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**SELECT CASES ON THE LAW OF TORTS**  
**VOLUME I**



**SELECT CASES**  
**ON THE**  
**LAW OF TORTS**

**WITH**  
**NOTES, AND A SUMMARY OF PRINCIPLES**

**BY**  
**JOHN HENRY WIGMORE**  
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**OF EVIDENCE," "A POCKET CODE OF THE**  
**RULES OF EVIDENCE," ETC.**

**IN TWO VOLUMES**

**VOL. I**

**BOSTON**  
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W. H. WIGMORE

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THESE WORDS ARE INSCRIBED IN HOMAGE

*To the Memory of*

JAMES BARR AMES

WHO FIRST INSPIRED FOR SO MANY OF US

A NEVER-ENDING INTEREST

IN THIS LAW OF TORTS

AND ENRICHED HIS STUDENTS WITH THE PERPETUAL INFLUENCE

OF HIS INCOMPARABLE QUALITIES

AS A TEACHER, A SCIENTIST, AND A MAN

**232925**

## PREFACE

THE field of Torts (as none will doubt) stands in special need of a more exact and scientific treatment. The future should see an improvement in method. But it must begin with the present generation of students. By way of Preface, then, let a few Wishes here be recorded for their reflection. If the suggestions should seem radical, they can at least not be thought crude; for they proceed from a twenty years' study of the subject.

I. The first Wish is that we might proscribe, expel, and banish the obnoxious term "Torts," as the title of the subject. Never did a Name so obstruct a true understanding of the Thing. To such a plight has it brought us that a favorite mode of defining a Tort is to declare merely that it is not a Contract. As if a man were to define Chemistry by pointing out that it is not Physics nor Mathematics! No half-way measures will do; the name must go.

Names enough could be found. Let us agree for the moment on "General Rights."

II. A second Wish would be that we might take courage to break away from the traditional analysis of General Rights. Tradition tries (but it is futile) to group under each separate kind of harm or damage (Battery, Nuisance, Libel, etc.) all the rules of law applicable to that harm or damage. Thus the body of the law is divided (as it were) into perpendicular sections. But its true cleavage is into cross-sections, — the Damage element, the Causation element, and the Excuse element. This is equally simple, and much more scientific and practical. Take for example the doctrine of Acting at Peril (or Negligence per se). It is commonly regarded as applying to trespasses to the person, to land, and to chattels. But as it may also be applied to defamation, to nuisance, and to infringement of copyright and patent, why not study all the instances in common? So too with Contributory Fault as an excuse; since it may be invoked not only for trespasses, but for injuries to domestic relations, to fair trade, and elsewhere, why not study all its bearings together? In natural science it is a truism that no law can be deduced from phenomena until all available instances have been collated and compared. Why does not this hold good for legal phenomena?

III. A third Wish would be that History, in the study of the law, may be given a treatment not purely logical, but also biological. The

logical (or internal) history of a rule is found by tracing in each successive decision or statute the steps which have brought the rule down into its form of today. The biological (or external) growth is seen by comparing the outward circumstances, beliefs, and motives amid which it began, and then those amid which it has persisted or changed. The former aspect is necessary, and has dominated; but the other needs emphasis now. "Other tools," said Mr. Justice Holmes, in *The Common Law*, "are needed besides logic; for the life of the law has not been logic; it has been experience. The felt necessities of the time, — the prevalent moral and political theories, — intuitions of public policy, — even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

As a simple example, take the law of Death by Wrongful Act. A hundred years ago the "appeal" of homicide had become impracticable, yet a genuine civil action was neither recognized nor much needed. But the rapid extension of life-menacing machinery in the early 1800's soon created both the need and the action. A more complex example is seen in the rules of Privilege for the criticism of political officials. They have all taken shape in the last hundred and fifty years, amidst new conditions of politics, journalism, and the platform; Burke, in his "Alarm Bell" speech, and Lord Mansfield, in his *John Wilkes* opinion, on the one hand, and (let us say) Mr. Justice Burch, in his masterly modern opinion in *Coleman v. McLennan*, on the other hand, typify the two stages of thought. The internal history of these rules (which may be traced through *Baker v. Bolton*, *Carr v. Hood*, and the other cases) is one thing; but we must also seek to discover the surrounding conditions and motives which bred the changes. It is this aspect of History which now needs emphasis in our method.

IV. Last, and most of all, the Wish would be to see this subject studied with an unremitting outlook for its Philosophy. Every institute and principle of law has a philosophy, — as every object in the sunlight has its attendant inseparable shadow. In the quest for the rule we must insist on including its reasons, and on lifting them out into the open. That human death may or may not be the subject of an action, — that truth is or is not a defence for the libeller, — that a judge is privileged absolutely or only qualifiedly, — that a secondary boycott is or is not justifiable, — all these rules and principles rest on reasons of some sort. They may be reasons of ethics, or of politics, or of economics, or perhaps of public health, or of a dozen other sorts. They may be found in experience or in dogma. But they are given to us independently of the rule of law itself. The rule of law is to be tested by the philosophy of the subject. In these days, when a re-statement of the entire body of our law is impending, we must be students of reasons as well as of rules. And the conservative needs this quite as much as the reformer. He who is not ready to give reasons

for the faith that is in him can not expect to hold his own against the demagogue and the crude innovator.

Perhaps this appeal for philosophy will be thought nothing novel. But what is novel in the present volume is the attempt (in the topics of Part III, where the need is greatest) to set forth the philosophy from non-legal sources. Already, to be sure, there exists in the judicial opinions plenty of legal philosophizing. That feature is one of the jewels of our legal system. But we have hitherto been blind (in our study-books, at least) to the mass of material lying outside of those technical sources. This book makes the attempt to extend our vision.

And why not? A rule of law — and especially any rule of General Rights — is a rule of life. It is founded on the dogmas and experiences of life; and life's dogmas and experiences are recorded in a vastly wider library than the covers of law-books comprise. Take, for instance, the law of arrest on suspicion. There, in the law-books, is the rule; but is all the philosophy of it there? Are not the histories full of the political convulsions that have attended that procedure? Is not the rule itself little more than the title-page to many long chapters of intense controversy and keen philosophizing? And today, in estimating the respect due to the rule, can it be studied without consulting those chapters of lay literature? Take again the very pressing problem of the boycott and the strike. Can their rules of law ever be consistently formulated without a philosophy which takes into account, not merely the ethics of human struggle, but also the postulates of economic science as to industrial competition? And there are scores of like instances.

The upshot is that the Philosophy of the principles of General Rights is to be found quite as much without as within the pages of the law reports. Not that we can hope to lift into the pages of a Case-Book adequate materials for that philosophy. We can provide no more than enough to suggest and remind and stimulate. But can we not do at least that much? This book is dedicated to the attempt.

Perhaps, then, it may not seem odd to find here, assorted 'twixt the annals of Doe v. Roe, some pages of De Tocqueville's "Democracy" and Spencer's "Justice," of Milton's "Areopagitica" and Benjamin Franklin's "Letters," of Balzac and Thackeray, of Francis Lieber and Dr. Johnson. Their service is performed if they help to convince the student of law that he must extend his outlook, — that he must not be content with the philosophy purveyed by the judges, — and that the chronicles of all literature and science must be consulted for the philosophy of these Rights. For no body of law ramifies so widely and deeply into the notable themes of all history, all politics, all economics, all ethics, and all literature of life.

J. H. W.

*Northwestern University Law School*

CHICAGO, September 1, 1911.



SIR EDWARD COKE. *Preface to the Ninth Part of the Reports.* (1613. p. xiv.) A substantial and a compendious Report of a Case rightly adjudged doth produce three notable Effects. First, it openeth the Understanding of the Reader and Hearer; secondly, it breaketh through Difficulties; and thirdly, it bringeth home, to the Hand of the Studious, Variety of Pleasure and Profit. I say, It doth set open the Window of the Laws, to let in the gladsome Light, whereby the right Reason of the Rule (the Beauty of the Law) may be clearly discerned. It breaketh the thick and hard Shell, whereby with Pleasure and Ease the Sweetness of the Kernel may be sensibly tasted, and adorneth with Variety of Fruits, both pleasant and profitable, the Storehouses of those by whom they were never planted nor watered. Whereunto (in those Cases that be tortuosi and of great Difficulty, adjudged upon Demurrer or resolved in open Court) no one man alone, with all his true and uttermost Labours, nor all the Actors in them, themselves by themselves out of a Court of Justice, nor in Court without solemn Argument (where, I am persuaded, Almighty God openeth and enlargeth the Understanding of the desirous of Justice and Right) could ever have attained unto. For it is one amongst others of the great Honours of the Common Laws, that Cases of great Difficulty are never adjudged or resolved in tenebris or sub silentio suppressis rationibus; but in open Court, and there upon solemn and elaborate Arguments, first at the Bar by the Counsel learned of either Party (and if the Case depend in the Court of Common Pleas, then by Serjeants at Law only); and after at the Bench by the Judges, where they argue (the puisne Judge beginning and so ascending) seriatim upon certain Days openly and purposely prefixed, declaring at large the Authorities, Reasons, and Causes of their Judgements and Resolutions in every such particular case (habet enim nescio quid energiae viva vox): a Reverend and Honourable Proceeding in Law, a grateful Satisfaction to the Parties, and a Great Instruction and Direction to the attentive and studious Hearers.

JAMES KENT. *Commentaries on American Law.* (1826-30. I, 496.) I have now finished a succinct detail of the principal reporters; and when the student has been thoroughly initiated in the elements of legal science, I would strongly recommend them to his notice. . . . Some of them, however, are to be deeply explored and studied, and particularly those cases and decisions which have spread their influence far and wide, and established principles which lie at the foundations of English jurisprudence. Such cases have stood the scrutiny of contemporary judges, and been illustrated by succeeding artists, and are destined to guide and control the most distant posterity. . . . They are worthy of being studied even by scholars of taste and general literature, as being authentic memorials of the business and manners of the age in which they were composed. Law reports are dramatic in their plan and structure. They abound in pathetic incident, and displays of deep feeling. They are faithful records of those "little competitions, factions, and debates of mankind" that fill up the principal drama of human life; and which are engendered by the love of power, the appetite for wealth, the allurements of pleasure, the delusions of self-interest, the melancholy perversion of talent, and the machinations of fraud. They give us the skillful debates at the Bar, and the elaborate opinions on the Bench, delivered with the authority of oracular wisdom. They become deeply interesting, because they contain true portraits of the talents and learning of the sages of the law.



## LIST OF LAW REVIEWS CITED

- A. L. R. = American Law Review.  
A. L. Reg. = American Law Register and Review (now, University of Pennsylvania Law Review).  
C. L. R. = Columbia Law Review.  
H. L. R. = Harvard Law Review.  
I. L. R. = Illinois Law Review.  
L. Q. R. = Law Quarterly Review.  
M. L. R. = Michigan Law Review.  
Y. L. J. = Yale Law Journal.

## LIST OF WORKS CITED ON JURISPRUDENCE AND PHILOSOPHY OF LAW

- Sheldon Amos*. "Systematic View of the Science of Jurisprudence" (1872).  
*John Austin*. "Jurisprudence, or the Philosophy of Positive Law" (1873, 4th ed. Eng.).  
*Jeremy Bentham*. "Theory of Legislation" (ed. 1871).  
*Thomas E. Holland*. "Elements of Jurisprudence" (9th ed. 1900).  
*Oliver Wendell Holmes, Jr.* "The Common Law" (1881).  
*Francis Lieber*. "Manual of Political Ethics" (1875, Misc. Writings, vol. I).  
*William Paley*. "Principles of Political and Moral Philosophy" (16th ed. 1806, 2 vols.).  
*Charles S. M. Phillipps*. "Jurisprudence" (1863).  
*John W. Salmond*. "Jurisprudence" (2d ed. 1907).  
*Herbert Spencer*. "Justice" (1891).  
*Henry Sidgwick*. "Elements of Politics" (1891).  
*Henry T. Terry*. "Some Leading Principles of Anglo-American Law" (1884).  
*A. J. Willard*. "Principles of the Law; Personal Rights" (1880).  
*W. W. Willoughby*. "Social Justice" (1900).  
*Theodore D. Woolsey*. "Political Science" (1878).

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# CASES ON TORTS

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## INTRODUCTION: SCOPE OF THE LAW OF TORTS

1. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England*. (1765. Book I, Chap. I, pp. 122-128, in part; Book III, Chap. VIII, pp. 115-236, in part.) The primary and principal object of the law are rights and wrongs. In the prosecution, therefore, of these commentaries, I shall follow this very simple and obvious division, and shall, in the first place, consider the rights that are commanded, and secondly the wrongs that are forbidden, by the laws of England.

Rights are, however, liable to another subdivision; being either, first, those which concern and are annexed to the persons of men, and are then called "jura personarum," or the rights of persons; or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are styled "jura rerum," or the rights of things. Wrongs also are divisible into, first, private wrongs, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, public wrongs, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors. . . .

We are now first to consider the rights of persons, with the means of acquiring and losing them. . . .

The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. . . . And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property; . . .

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual. . . .

2. A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these



therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty. . . .

3. Besides these limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it; and

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right. . . .

II. Next to personal security, the law of England regards, asserts, and preserves, the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. . . .

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. . . .

[Chapter VIII. Of Wrongs, and their Remedies, respecting the Rights of Persons.] Herein I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury: . . .

Now, since all wrongs may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, breach of contract, &c.: to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury;<sup>1</sup> though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself) are a diversity of suits and actions, which are defined by the Mirror<sup>2</sup> to be "the lawful demand of one's right:" or, as Bracton and Fleta express it, in the words of Justinian,<sup>3</sup> "*jus prosequendi in judicio quod alicui debetur.*" . . . But I must first beg leave to premise, that all civil injuries are of two kinds, the one without force or violence, as slander or breach of contract; the other coupled with force and violence, as batteries or false imprisonment. . . . And this distinction of private wrongs, into injuries with and without force, we shall find to run through all the variety of which we are now to treat. In considering of which, I shall follow the same method that was pursued with regard to the distribution of rights: for as these are nothing else but an infringement or breach of those rights, which we have before laid down and explained, it will follow that this negative system, of

<sup>1</sup> See book II, ch. 29.

<sup>2</sup> Ch. 2, § 1.

<sup>3</sup> Inst. 4. 6. pr.

wrongs, must correspond and tally with the former positive system, of rights. As therefore we divide <sup>1</sup> all rights into those of persons and those of things, so we make the same general distribution of injuries into such as affect the rights of persons, and such as affect the rights of property.

The rights of persons, we may remember, were distributed into absolute and relative: absolute, which were such as appertained and belonged to private men, considered merely as individuals, or single persons; and relative, which were incident to them as members of society, and connected to each other by various ties and relations. And the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty, and the right of private property, so that the wrongs or injuries affecting them must consequently be of a correspondent nature.

I. As to injuries which affect the personal security of individuals they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

1. With regard to the first subdivision, or injuries affecting the life of man, they do not fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next book of our Commentaries. . . .

2, 3. The next two species of injuries, affecting the limbs or bodies of individuals, I shall consider in one and the same view. And these may be committed, (1) By threats and menaces of bodily hurt, through fear of which a man's business is interrupted. . . . (2) By assault; which is an attempt or offer to beat another, without touching him: as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him, but misses him. . . . (3) By battery; which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. . . . (4) By wounding; which consists in giving another some dangerous hurt, and is only an aggravated species of battery. (5) By mayhem; which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight. . . .

4. Injuries affecting a man's health, are where by any unwholesome practices of another a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions, or wine; <sup>2</sup> by the exercise of a noisome trade, which infects the air in his neighbourhood. <sup>3</sup> . . .

5. Lastly; injuries affecting a man's reputation or good name are, first, by malicious, scandalous, and slanderous words, tending to his damage and derogation. As if a man maliciously and falsely utter any slander or false tale of another; which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man hath poisoned another, or is perjured; <sup>4</sup> or which may exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. <sup>5</sup> . . .

A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous <sup>6</sup> light, and thereby diminishes his reputation. . . .

<sup>1</sup> See book I, ch. 1.

<sup>2</sup> 1 Roll. Abr. 90.

<sup>3</sup> 9 Rep. 32; Hutt. 135.

<sup>4</sup> Finch, L. 185.

<sup>5</sup> Finch, L. 186.

<sup>6</sup> 2 Show. 314; 11 Mod. 99.

A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him. . . .

II. We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous public crime, but has also given a private reparation to the party; as well by removing the actual confinement for the present, as, after it is over, by subjecting the wrongdoer to a civil action, on account of the damage sustained by the loss of time and liberty.

To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person: and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks or even by forcibly detaining one in the public streets.<sup>1</sup> . . . The satisfactory remedy for this injury of false imprisonment is by an action of trespass *vi et armis*, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.

III. With regard to the third absolute right of individuals, or that of private property, though the enjoyment of it, when acquired, is strictly a personal right; yet as its nature and original, and the means of its acquisition or loss, fell more directly under our second general division, of the rights of things; and as, of course, the wrongs that affect these rights must be referred to the corresponding division in the present book of our Commentaries; I conceive it will be more commodious and easy to consider together, rather than in a separate view, the injuries that may be offered to the enjoyment, as well as to the rights, of property.\* And therefore I shall here conclude the head of injuries affecting the absolute rights of individuals.

We are next to contemplate those which affect their relative rights; or such as are incident to persons considered as members of society, and connected to each other by various ties and relations; and, in particular, such injuries as may be done to persons under the four following relations: husband and wife, parent and child, guardian and ward, master and servant.

I. Injuries that may be offered to a person, considered as a husband, are principally three: abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. . . .

II. Injuries that may be offered to a person considered in the relation of a parent were likewise of two kinds: 1. Abduction, or taking his children away; and, 2. Marrying his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage. . . .

III. Of a similar nature to the last is the relation of guardian and ward, and the like actions *mutatis mutandis*, as are given to fathers, the guardian has also for recovery of damages, when his ward is stolen or ravished away from him. . . .

IV. To the relation between master and servant, and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other is beating or confining him in such a manner that he is not able to perform his work. . . .

<sup>1</sup> 2 Inst. 589.

[Chapter IX. Of Injuries to Personal Property.] In the preceding chapter we considered the wrongs or injuries that affected the rights of persons, either considered as individuals, or as related to each other; and are at present to enter upon the discussion of such injuries as affect the rights of property, together with the remedies which the law has given to repair or redress them.

And here again we must follow our former division<sup>1</sup> of property into personal and real: personal, which consists in goods, money and all other movable chattels, and things thereunto incident; a property which may attend a man's person wherever he goes, and from thence receives its denomination: and real property, which consists of such things as are permanent, fixed, and immovable; as lands, tenements, and hereditaments of all kinds, which are not annexed to the person, nor cannot be moved from the place in which they subsist.

First then we are to consider the injuries that may be offered to the rights of personal property; and, of these, first the rights of personal property in possession, and then those that are in action only.<sup>2</sup>

I. The rights of personal property in possession, are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches; the unjust and unlawful taking them away; and the unjust detaining them, though the original taking might be lawful. . . . II. Hitherto of injuries affecting the right of things personal, in possession. We are next to consider those which regard things in action only; or such rights as are founded on, and arise from, contracts; the nature and several divisions of which were explained in the preceding volume. . . .

[Chapter X. Of Injuries to Real Property.] I come now to consider such injuries as affect that species of property which the laws of England have denominated real; as being of a more substantial and permanent nature, than those transitory rights of which personal chattels are the object.

Real injuries then, or injuries affecting real rights are principally six: 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.

Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the wrongdoer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy, in order to gain possession, and damages for the injury sustained. And such ouster, or dispossession, may either be of the freehold, or of chattels real. Ouster of the freehold is effected by one of the following methods: 1. Abatement; 2. Intrusion; 3. Disseisin; 4. Discontinuance; 5. Deforcement. . . .

[Chapter XII. Of Trespass.] In the two preceding chapters we have considered such injuries to real property, as consisted in an ouster, or amotion of the possession. Those which remain to be discussed are such as may be offered to a man's real property without any amotion from it.

The second species therefore of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is that of trespass. Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relates to a man's person or his property. . . .

But in the limited and confined sense in which we are at present to consider it, it signifies no more than an entry on another man's ground without

<sup>1</sup> See book II, ch. 2.

<sup>2</sup> Book II, ch. 25.

a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or a transgression. The Roman laws seem to have made a direct prohibition necessary, in order to constitute this injury; "*qui alienum fundum ingreditur, potest a domino, si is praeviderit, prohiberi ne ingrediatur.*"<sup>1</sup> But the law of England, justly considering that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases), as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the quantum of that satisfaction, by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained.

Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close: the words of the writ of trespass commanding the defendant to shew cause *quare clausum querentis fregit*. . . .

[Chapter XIII. Of Nuisance.] A third species of real injuries to a man's lands and tenements, is by nuisance. Nuisance, *nocumentum*, or annoyance, signifies any thing that worketh hurt, inconvenience, or damage. And nuisances are of two kinds: public or common nuisances, which affect the public, and are annoyance to all the king's subjects: for which reason we must refer them to the class of public wrongs, or crimes and misdemeanors: and private nuisances, which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another.<sup>2</sup> . . .

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2. JOHN H. WIGMORE. *The Tripartite Division of Torts*. (Harvard Law Review, 1894, VIII, 200.) Private law deals with the relations between members of the community regarded as being ultimately enforceable by the political power. Such a single relation may be termed a Nexus; it has a double aspect, for it is a Right at one end, and a Duty or Obligation at the other; every such relation or Nexus necessarily having both these aspects.

In classifying them, we may of course rest the division on the nature of either the Rights involved or the Duties involved. For the first and broadest division it seems best to take the latter point of view, and to distinguish according as the Duty has inhered in the Obligor (1) without reference to his wish or assent, or (2) in consequence of some volition or intention of his to be clothed with it. The former we may term Irrecusable, — having reference to the immateriality of the attitude of the obligor in respect to consent or refusal; the latter, Recusable, — for the same reason. The latter sort includes Contracts (in the narrow sense), and some few varieties not here important. The former includes Torts (so called), Enrichment (a part of Quasi-Contracts as nowadays treated), and a few minor ones. The permanent justification for this division, it may be said, will be found in the deep-rooted instinct of the Anglo-American legal spirit, which is strikingly backward in imposing or enlarging an irrecusable nexus,

<sup>1</sup> Inst. 2. 1, 12.

<sup>2</sup> Finch, L. 188.



but gives the freest scope for the voluntary assumption (*Recusable*) of nexus of any content.<sup>1</sup>

Dividing further the former sort, we find (a) many imposed *universally*, i. e. on all other members of the community in favor of myself; and (b) a few imposed on *particular classes of persons* by reason of special circumstances. Of the latter sort the duty of a child to support a parent, as recognized in Continental and other law, is an example; but the most important group is found in parts at least of the subject known in Roman law as *quasi-contractus*, in modern French and German jurisprudence as *enrichissement indu* and *Bereicherung*, and with us to-day as Quasi-Contract. As the feature which distinguishes this sort (b) from the former (a) is that the nexus is imposed in the one case on all persons whatever, but in the other on those particular persons only of whom special facts are true, the natural terms of distinction are, for the one, Universal Irrecusable Nexus; for the other, Particular Irrecusable Nexus.

The subject of Tort, then, deals with the large group of relations here termed Universal Irrecusable Nexus.

The next question is, What is the content of the rights and duties included under this head? Here, of course, we get nothing from mere analysis; we must look to judicial practice and legislation, as embodying the established results of the community's sense of systematic justice. We have seen, however, that the starting-point of the analysis is the tendency of Anglo-American peoples to be chary about imposing irrecusable duties, especially when universal. The general character, then, of these nexus will be that of relations fundamentally necessary to civilized social intercourse, — the minimum number of universal nexus without which (having reference to the points of view of both obligee and obligor) the community cannot get along. This in fact fairly expresses the general character of Tort-rights. Furthermore, and as a result of the same spirit, these Universal Irrecusable Nexus are almost all negative, not affirmative; i. e. the line is drawn at requiring others not to be the means of harm to me; our law has not yet gone so far, in Universal duties, as to impose any affirmative duty, as between one man and another, to take action to confer a good.

But, going further than these general features, we easily see, on examination, certain generic component elements in every relation of the sort we are considering. *First*, there are the specified *kinds of harm* which the obligor has a claim to be free from; this is the basis of the obligee's interest, the thing for the sake of which the nexus is instituted. *Second*, there must be something to *connect the obligor with this harm*, — that is, we must specify what is the sort of causality-connection, or the like, between the obligor and the harm in question for which he will be held responsible. This is necessary, because the very nature of the nexus presupposes that the obligor is to have some connection with the harm, and it is part of our business to specify when that connection shall be deemed to exist. *Third*, since human experience has always found it necessary to sanction in law the principle of give-and-take, and to compel us sometimes to put up with harm whose source is perfectly clear, there are numerous classes of *excusing circumstances* to be specified in which the nexus fails, and is without application,

<sup>1</sup> Compare Holmes, *The Common Law*, 77: "The liabilities . . . arising from a tort are independent of any previous consent of the wrongdoer to bear the loss occasioned by his act. . . . He does a harm which he has never consented to bear, and if the law makes him pay for it, the reason for so doing must be found in some general view of the conduct which every one may fairly expect and demand from every other, whether that other has agreed to it or not."

— that is, although harm is done, and although there is no question as to a particular person's responsibility for it. These circumstances form limitations to the nexus as a whole.

There are, therefore, three distinct elements in every Tort, which may be conveniently termed the Primary, Secondary, and Tertiary limitations. The first class deals with the sort of harm to be recognized as the basis of the right; this may be called the *Damage* element. The second class deals with the circumstances fixing the connection of the obligor with this forbidden harm; this we may call the *Responsibility* element. The third class deals with the circumstances in which (assuming both the *Damage* and the *Responsibility* elements to be satisfied) the harm may be inflicted with impunity; this we may term the *Excuse* or *Justification* element. This analysis results in a tripartite division of the Tort-nexus.<sup>1</sup>

We may now examine this division in detail with reference to the various topics dealt with in our law. . . .

I. *The Damage Element.* — The question is here, What sorts of harm is it that the law recognizes as the subject of a claim for its protection? We have here nothing to do with the question, Who is responsible? or, Is X responsible? nor with the question, Is X, though responsible, here excusable? We may and do determine the limitations of the *Damage* element without regard to these questions. Of course, after determining that the one exists, we may then determine that the other does not; and cases are frequent in which two or even all of the questions are disputable, and must be settled before a final determination can be reached as to the existence of a claim, *i. e.* a nexus. But, whenever there is a decision upon the Secondary or the Tertiary limitations, it necessarily involves, by assumption or otherwise, the sufficient existence of the other element or elements; nor can a claim be sanctioned by a favorable decision as to the *Damage* element without an assumption as to the existence of the other two.

Under the *Damage* element, of course, are to be considered physical injuries, — what sort of physical or corporal harm may be the subject of a claim. Mere touching of the person may be, while mere touching of personal property once was not. Physical illness of course is. Whether nervous derangement may be, when not brought about through corporal violence, and whether mere fright, with or without corporal violence, may be, is still the subject of discussion. Forms of annoyance, such as disagreeable odors, sights, and sounds, are usually

<sup>1</sup> Mr. Justice Holmes (in an article of creative theory, combining profound insight with shrewd good sense, entitled "Privilege, Malice, and Intent," *Harvard Law Review*, 1894, VII, May) seems to show a belief in the propriety of this tripartite division; his language as follows, the passages being somewhat curtailed:

(1) "I should sum up the first part of the theory in a few words, as follows. Actions of tort are brought for temporal damage. The law recognizes temporal damage as an evil which its object is to prevent or to redress, so far as is consistent with paramount considerations to be mentioned." (2) "When it is shown that the defendant's act has had temporal damage to the plaintiff for its consequence, the next question is whether that consequence was one which the defendant might have foreseen." (3) "The first [next] question which presents itself is why the defendant is not liable without going further. The answer is suggested by the commonplace, that the intentional infliction of temporal damage, as the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause. . . . There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of."

said to be the subject of recovery only in connection with the ownership of real property. There must in all such cases be a degree of inconvenience worth taking systematic notice of. The content of the right to land is also here concerned, including the right against mere intrusion upon the air space, against the cutting off of surface or subterranean water, etc. The nature of the harm known as conversion must also be treated here. The social relations must be enumerated with which interference is forbidden, and the words known as libel and the words deemed slanderous *per se* are to be discussed. The facts vesting the rights of patent and copyright, and the matters as to which we have a "right to privacy," and several other modes of harm, involve also some statement of the Damage element.

II. *The Responsibility Element.* — Assuming that the kinds of harm to be avoided or to be protected against have been determined, we have next to consider the Responsibility element, by defining what connection must exist between the obligor and the harm done, in order to bring him within the scope of the nexus. The question is, in a concrete case of the specified harm, what person, if any, shall be looked to as bound to bear legal responsibility for it.

This is not the place to attempt to define the order and nature of the topics that belong under this head. The doctrine of "acting at peril," the phrasing and application of the tests of "proximate cause," "reasonable and probable consequences," — these, with their attendant refinements and exceptions, form the substance of the general topic. But the important circumstance to call attention to is that this topic has an application in the domain of each one of the common so-called Torts, — conversion, defamation, loss of service, etc., — no less than in case and trespass. It has been customary to treat the subject of Negligence as if it were a specific injury by itself, instead of merely a question of Responsibility liable to arise in connection with various kinds of harm; but this obscures the true situation. Speaking roughly, a man may be made responsible for a given harm by initiatory action of one of three sorts: by acting (1) designedly, with reference to the harm; (2) negligently, with reference to it; (3) at peril, in putting his hand to some nearly related deed or some unlawful act. A part of the law is occupied with determining whether or not this last and strictest standard shall be applied; and when it is, no resort is needed to the second standard, negligence. Thus it happens that, as almost all direct dealing with personal property is done at peril, the question of negligence (or of knowledge) seldom arises in that connection. Yet it may arise; and thus, even though the treatment of the Responsibility element — mainly negligence and acting at peril — under the head of conversion is trifling in comparison with its place in injuries covered by trespass and trespass on the case, still it has its rightful place there as elsewhere. . . .

III. *The Excuse or Justification Element.* — Assuming that the various sorts of harm have been specified, and that the conditions and tests of Responsibility for them have been determined, the general limitations of Excuse under which the nexus exists still call for treatment. Perhaps the simplest illustration, if any is needed, is the excuse of self-defence. Here it is conceded that a harm has been done, otherwise the subject of recovery, and that a definite person is responsible for it; nevertheless no legal claim exists, because social experience prescribes limits to the nexus, and one of those limits is found in the circumstances briefly expressed in the term "self-defence." Here, again, it is impossible now to attempt an analysis of the various kinds of limitations. Only two or three suggestions can be made.



1. As a rule certain principles of pleading are based on the distinction between this element and the first and second, throwing on the defendant the business of making out the existence and the application of these limitations. For instance, justifications for a battery and privileges for defamation are left to the defendant to urge. . . .

2. Another application of the above distinction, similar but of larger moment, has been made by Mr. Justice Holmes in the article already referred to. He points out that the question of Malice, in connection with boycotts and similar interference with social relations, is not usually one of Responsibility, but of Excuse. We have the case of an inquiry conceded to be a harm and of a party conceded to be the source of it, *i. e.* we have the Damage and the responsibility elements satisfied; the problem is how to mark off the line of policy so as to determine where this harm may justifiably be inflicted with impunity.

One or two final implications of the recognition of this tripartite division of Tort may now be pointed out.

1. It calls to our attention the necessity, every day drawing nearer, of adjusting the treatment of our substantive law to the abolition, already largely accomplished, of the forms of action and classes of writs in Tort. As regards the distinction between Case and Trespass, there are of course two or three important marks left by it on the substantive law; *e. g.* the principle (justifiable, probably, on the highest grounds) that, of injuries to the person and to property, a mere touching is actionable if produced directly by the defendant, but not actionable if produced indirectly. . . . But the time must come when the sorts of actionable injuries will be classed according to an analysis of the essential qualities of the injuries, not the kind of writ employed by the clerks of the Chancery nor the analogies peculiar to a primitive legal condition; a time when further development can take place along these natural lines of classification and in view of the policy that may be appropriate to each situation. The recognition of the common Damage element in all Torts, and its separate treatment, will do much towards this end, — in fact, necessarily involves it as an ultimate consequence. By this it is not meant to advocate a slighting of the forms of action and their historical development, either in treatises or in education. For the present generation at least this would be impossible, as well as unpractical in the highest degree. But there is no reason why we may not, so far as may be, recognize legal realities and put ourselves in the path of more scientific treatment.

2. A more important consequence of the recognition of the tripartite division is the helpful results to be reached by studying the different solutions of the same problems and the applications of the same principles in different torts. . . . Of course more writers than one have recognized the propriety of treating "Justifications" under one head; but they have regarded them as more or less appurtenant to specific injuries, instead of looking for whatever common element there might be and analyzing them with reference to each other as well as to the different injuries associated with them. The article by Mr. Justice Holmes suggests the practical usefulness of work in this direction.

It has not been possible in the allotted space to explain difficult points, or to anticipate questions and criticisms naturally raised by the subject. What has been written will serve, perhaps, as a suggestion for those who have come to believe that there is still room for a theory of the law of Torts which shall, in a greater degree than now, be built up inductively from the cases themselves and yet bear a scientific form.

## BOOK I: THE DAMAGE ELEMENT

### INTRODUCTION: FORMS OF ACTION; TRESPASS AND CASE

#### Topic 1. Historic Significance of Forms of Action in General

3. SIR FREDERICK POLLOCK and FREDERIC WILLIAM MAITLAND. *The History of English Law before the time of Edward I.* (1895. Vol. I, pp. 115, 129, 174, 181; Vol. II, pp. 557-559, in part.) The reign of Henry II is of supreme importance in the history of our common law, and its importance is due to the action of the central power, to great reforms ordained by the king.<sup>1</sup> . . . If we try to sum up in a few words those results of Henry's reign which are to be the most permanent and the most fruitful, we may say that the whole of English law is centralized and unified, by the institution of a permanent court of professional judges, by the frequent mission of itinerant judges throughout the land, by the introduction of the "inquest" or "recognition" and the "original writ" as normal parts of the machinery of justice. We must speak briefly on each of these matters. . . . The king's courts have been fast becoming the only judicial tribunals of any great importance. Throughout the reign the bulk of their plea rolls increased at a rapid rate. Every term the bench at Westminster entertained a vast multitude of causes. The litigants who came before it were often men of lowly rank who were quarrelling about exceedingly small parcels of land. Though we hear some bad stories of corrupt and partial judges,<sup>2</sup> it is plain that this powerful, central tribunal must have been well trusted by the nation at large. Rich and poor alike would go to it if they could. The local courts were being starved, and this result we can not ascribe altogether to the ambition or greed of the lawyers at Westminster. Of his own free will the small freeholder passed by his lord's court and the county court on his way to the great hall. He could there obtain a stronger and better commodity than any that was to be had elsewhere, a justice which, as men reckoned in those days, was swift and which certainly was masterful. . . . This principle is at work — it is the king's business to provide a competent remedy for every wrong.<sup>3</sup> . . .

Closely connected with the introduction of trial by inquest is the growth of that system of original writs which is soon to become that ground-plan of all civil justice. For a long time past the kings have at the instance of complainants issued writs, which either bade their adversaries appear in the royal court

<sup>1</sup> As to Henry's reforms we have little to add to what has been said by Dr. Stubbs in the *Introduction to the Gesta Henrici*, vol. II, the *Select Charters*, and the *Constitutional History*.

<sup>2</sup> *Mat. Par.* V, 213, 223, 240: charges against Henry of Bath; V, 628, against Henry de la Mare.

<sup>3</sup> Bracton, f. 414 b: "pertinet enim ad regem ad quamlibet iniuriam compescendam remedium competens adhibere."

to answer the complaint, or else committed their causes to the care of the sheriff or of the feudal lord and commanded that right should be done to them in the county court or the seignorial court. Such writs were wont to specify with some particularity the subject-matter of the complaint. The sheriff, for example, was not merely told to entertain a suit which the abbot of Abingdon was bringing against the men of Stanton; he was told to do full right to the abbot in the matter of a sluice which, so the abbot alleged, had been broken by the men of Stanton. As the king's interference becomes more frequent and more normal, the work of penning such writs will naturally fall into the hands of subordinate officials, who will follow precedents and keep blank forms. . . . The number of writs which were issued as of course for the purpose of enabling those who thought themselves wronged to bring their cases before the law courts, increased rapidly during the reign of Henry III. A "register of original writs" which comes from the end of that period will be much longer than one that comes from the beginning.<sup>1</sup> Apparently there were some writs which could be had for nothing; for others a mark or a half-mark would be charged, while, at least during Henry's early years, there were others which were only to be had at high prices. We may find creditors promising the king a quarter or a third of the debts that they hope to recover by means of his writs.<sup>2</sup> Some distinction seems to have been taken between necessities and luxuries. A royal writ was a necessary for one who was claiming freehold; it was a luxury for the creditor exacting a debt, for the local courts were open to him and he could proceed there without writ. Elaborate glosses overlaid the king's promise that he would sell justice to none, for a line between the price of justice and those mere court fees, which are demanded even in our own day, is not very easily drawn.<sup>3</sup> That the poor should have their writs for nothing, was an accepted maxim.<sup>4</sup> The almost mechanical work of penning these ordinary writs was confided to clerks who stood low in the official hierarchy, to cursitors (*cursarii*); it consisted chiefly of filling with names and sums of money the blanks that were left in the forms that they found in their registers; but some clerk of a higher grade seems to have been responsible for every writ.<sup>5</sup> . . . A classification of writs will be the outcome; some will be granted more or less as a matter of course, will be "*brevia de cursu*," writs of course; those which are directed to a feudal lord will be distinguished from those which are directed to a sheriff; those which bid the sheriff to justice, from those which bid him summon the defendant to the king's own court; those which relate to the ownership of land, from those which relate to debts. But the introduction of the possessory assizes gives to this system of writs a peculiar definiteness and rigidity. The new actions have a new procedure appropriate to them and are governed by carefully worded formulas. Thus the first writ issued in an assize of novel disseisin commands the sheriff to empanel an inquest in order that one precise question may be answered: — Did B unjustly and without a judgment disseise A of his free tenement in X since the king's last journey into Normandy? In countless points an action thus begun will differ from a proprietary action for land begun by a writ of right; both of them will differ from an action of debt, and even between the several possessory assizes many distinctions must

<sup>1</sup> Harvard Law Review, III, 175.

<sup>2</sup> *Excerpta e Rotulis Finium*, I, 29, 49, 62, 68; Harvard Law Review, III, 12.

<sup>3</sup> Fleta, p. 77.

<sup>4</sup> Fleta, p. 77; *Excerpta e Rotulis Finium*, II, 101.

<sup>5</sup> Fleta, p. 77-78.

be drawn, in particular as to the number of "essoins," excuses for non-appearance, that the litigants may proffer. Thus before the end of Henry's reign we must already begin to think of royal justice — and this is becoming by far the most important kind of justice — as consisting of many various commodities each of which is kept in a different receptacle. Between these the would-be litigant must make his choice; he must choose an appropriate writ and with it an appropriate form of action. These wares are exposed for sale; perhaps some of them may already be had at fixed prices, for others a bargain must be struck. As yet the king is no mere vender, he is a manufacturer and can make goods to order; the day has not yet come when the invention of new writs will be hampered by the claims of a parliament; but still in Glanvill's day the "officina iustitiae" has already a considerable store of ready-made wares, and English law is already taking the form of a commentary upon writs. . . .

The time has long gone by when English lawyers were tempted to speak as though their scheme of "forms of action" had been invented in one piece by some all-wise legislator. It grew up little by little. The age of rapid growth is that which lies between 1154 and 1272.<sup>1</sup> During that age the chancery was doling out actions one by one. There is no solemn "Actionem dabo" proclaimed to the world, but it becomes understood that a new writ is to be had, or that an old writ, which hitherto might be had as a favour, is now "a writ of course."<sup>2</sup> It was an empirical process, for the supply came in response to a demand; it was not dictated by an abstract jurisprudence; it was conditioned and perturbed by fiscal and political motives; it advanced along the old Roman road which leads from experiment to experiment. . . .

Our forms of action are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials. They are institutes of the law; they are — we say it without scruple — living things. Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigour, usefulness and popularity, and then sinks perhaps into a decrepit and friendless old age. A few are still-born, some are sterile, others live to see their children and children's children in high places. The struggle for life is keen among them and only the fittest survive.

The metaphor which likens the chancery to a shop is trite; we will liken it to an armoury. It contains every weapon of medieval warfare, from the two-handed sword to the poniard. The man who has a quarrel with his neighbour comes thither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat, and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must observe the rules for sword-play; he must not try to use his cross-bow as a mace. To drop metaphor, our plaintiff is not merely choosing a writ, he is choosing an action, and every action has its own rules.<sup>3</sup>

The great difference between our medieval procedure and that modern procedure which has been substituted for it by statutes of the present century lies here: — To-day we can say much of actions in general, and we can say little of any procedure that is peculiar to actions of particular kinds. On the other hand, in the middle ages one could say next to nothing about actions in general,

<sup>1</sup> See above, vol. I, pp. 129, 174.

<sup>2</sup> For an instance, see above, vol. II, p. 64.

<sup>3</sup> Britton, I, p. 152: "Voloms . . . qe chescun bref eyt sa propre nature et qe nul ne soyt plede par autre."

while one could discourse at great length about the mode in which an action of this or that sort was to be pursued and defended.<sup>1</sup>

It must not escape us that a law about "actions in general" involves the exercise by our judges of wide discretionary powers. If the rules of procedure take nowadays a far more general shape than that which they took in the past centuries, this is because we have been persuaded that no rules of procedure can be special enough to do good justice in all particular cases. Instead of having one code for actions of trespass and another for actions of debt, we have a code for actions; but then at every turn some discretionary power over each particular case is committed to "the court or a judge." . . .

Let us not be impatient with our forefathers. Discretion is not of necessity "the law of tyrants," and yet we may say with the great Romanist of our own day that formalism is the twin-born sister of liberty.<sup>2</sup> As time goes on there is always a larger room for discretion in the law of procedure; but discretionary powers can only be safely entrusted to judges whose impartiality is above suspicion and whose every act is exposed to public and professional criticism. One of the best qualities of our medieval law was that in theory it left little or nothing, at all events within the sphere of procedure, to the discretion of the justices. They themselves desired that this should be so and took care that it was or seemed to be so. They would be responsible for nothing beyond an application of iron rules. Had they aimed at a different end, they would have "received" the plausibly reasonable system of procedure which the civilians and canonists were constructing, and then the whole stream of our legal history would have been turned into a new channel. For good and ill they made their choice. The ill is but too easily seen by any one who glances at the disorderly mass of crabbed pedantry that Coke poured forth as "Institutes" of English law; the good may escape us. But when we boast of "the rule of law" in England, or give willing ear to the German historian who tells us that our English state is a *Rechtsstaat*, we shall do well to remember that the rule of law was the rule of writs. When Ihering assures the unamiable English traveler who fights a "battle for right" over his hotel bill, that his is the spirit that built up the Roman law,<sup>3</sup> he speaks of nothing new. In the thirteenth century our justices kept to the old Roman road of strict adherence to "word and form." From the alien *Corpus Iuris* they turned aside, just because the spirit that animated them was (though they knew it not) "*der Geist des römischen Rechts*."<sup>4</sup>

The last years of Henry III's day we may regard as the golden age of forms. We mean that this was the time in which the number of forms which were living and thriving was at its maximum. Very few of the writs that had as yet been invented had become obsolete, and, on the other hand, the common law's power of producing new forms was almost exhausted. Bracton can still say, "*Tot erunt formulae brevium quot sunt genera actionum*."<sup>5</sup> A little later we

<sup>1</sup> During cents. xvii, xviii, much was done by fiction towards introducing a uniform procedure in the only actions that were commonly used; but the first great statutory change was made by the Uniformity of Process Act, 2 & 3 Will. IV, c. 39.

<sup>2</sup> Ihering, *Geist des römischen Rechts*, II (2) § 45: "Die Form ist die geschworene Feindin der Willkür, die Zwillingschwester der Freiheit."

<sup>3</sup> Ihering, *Der Kampf um's Recht* (10th ed.), 45, 69.

<sup>4</sup> As to what happened in France when the reverence for "word and form" disappeared, see Brunner, *Wort und Form*, *Forschungen*, pp. 272-273.

<sup>5</sup> Bracton, f. 413 b.



shall have to take the tale of writs as the fixed quantity and our maxim will be, "Tot erunt genera actionum quot sunt formulae brevium." Only some slight power of varying the ancient formulas will be conceded to the chancellor; all that goes beyond this must be done by statutes, and, when Edward I is dead, statutes will do little for our ordinary private law. The subsequent development of forms will consist almost entirely of modifications of a single action, namely, Trespass, until at length it and its progeny — Ejectment, Case, Assumpsit, Trover, — will have ousted nearly all the older actions. This process, if regarded from one point of view, represents a vigorous, though contorted, growth of our substantive law; but it is the decline and fall of the formulary system, for writs are being made to do work for which they were not originally intended, and that work they can only do by means of fiction.<sup>1</sup>

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4. A. WOOD RENTON, editor. *Encyclopædia of the Laws of England*. (1897. Vol. I, p. 110.) *Actions*. — At an early stage of the history of the law of England — as also of the law of Rome, France, and other continental nations — an attempt was made to group all legal proceedings under certain defined heads. And in each case the classification was unfortunately based, not so much on the right which the plaintiff desired to assert or enforce, as on the nature of the wrong done by the defendant, or the remedy which it was sought to apply to the case. It was, in short, a classification of the usual subjects of litigation; and to each class was allotted its appropriate formula of complaint or claim. In England such a formula was an essential part of the "original writ" (breve originale), with which the litigation commenced. The plaintiff's rights were regarded as synonymous, or as coextensive, with his cause of action; and even his cause of action was limited to cases in which an appropriate formula was known to the officers of the Court. Writs had been provided — when or by whom we know not — for the most obvious kinds of wrong; but when, in the progress of society, novel causes of complaint arose, it was found that they were not covered by any of the writs in vogue. And the clerks of the Chancery (whose duty it was to prepare the original writ for the suitor) had apparently no power to devise a new formula to meet the case. They had before them an authoritative list of all the recognized forms of action; and this they regarded as an exhaustive catalogue of the injuries for which the law of England provided redress. If there was no formula to fit the case, the person injured had no remedy.

To meet this difficulty, the Statute of Westminster the Second (13 Edw. I, c. 24) was passed, which provided, "That as often as it shall happen in the Chancery, that in one case a writ is found, and in a like case (in consimili casu) falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the Chancery shall agree in making a writ, or adjourn the complaint to the next parliament." The clerks of the Chancery made liberal use of the power thus conferred on them. But it will be observed that they still had no power to deal with cases entirely unprecedented; they could only frame new writs analogous to those previously existing (compare the Roman *actio utilis*). Parliament, indeed, from time to time added new writs; but it still remained the law of England, down to 1875, that a plaintiff could only sue in one or other of certain defined and recognised forms of action; his writ must either be according to one of the ancient original forms, or "in consimili casu" therewith, or

<sup>1</sup> [Compare F. W. Maitland's "Equity, also The Forms of Action at Common Law" (1909), pp. 295–386.]

justified by some statute. If the plaintiff selected the wrong form of action, judgement went against him, and he had to pay the defendant's costs, although he was clearly entitled to recover on a different writ (see *White v. Great Western Ry. Co.*, 1857, 2 C. B. N. s. 7). There were three different classes of actions—real, personal, and mixed. There were three real actions (dower, writ of right of dower, and quare impedit), and prior to 3 & 4 Will. IV, c. 27, there were many more. There was one mixed action, ejectment (see *Recovery of Land*). There were seven principal forms of personal actions: debt, covenant, assumpsit, detinue, trespass, trespass on the case, and replevin, each of which is dealt with hereafter under a separate heading. And in some cases it was only by a costly process of elimination that a plaintiff could ascertain which was his proper remedy; for the Court never decided that no action lay on the facts stated to it, but only that no action lay in the particular form which the plaintiff had been advised to select.

But all difficulty of this kind was removed by the Judicature Act, 1875. Forms of action are now in fact abolished. The plaintiff states the material facts upon which he relies, and claims the relief which he desires; there is no longer any necessity for him to specify the form of action in which he would formerly have had to seek that relief; for that is a conclusion of law, and he may safely leave the Court to draw the proper inference from the facts which he proves at the trial (*Hammer v. Flight*, 1876, 24 W. R. 346; 35 L. T. 127).

## Topic 2. Trespass and Case; their Distinction and General Scope

5. STATUTA REGIS EDWARDI [PRIMI] EDITA APUD WESTMONASTERIUM IN PARLIAMENTO SUO. (Statutes at Large, Pickering's ed., 1762, Vol. I, pp. 163, 196, 197.) Whereas of late our Lord the King, in the Quinzim of Saint John Baptist, the Sixth Year of his Reign, calling together the Prelates, Earls, Barons, and his Council at Gloucester, and considering that divers of this Realm were disherited, by Reason that in many cases, where Remedy should have been had, there was none provided by him nor his Predecessors, ordained certain Statutes right necessary and profitable for his Realm, whereby the People of England and Ireland, being Subjects unto his Power, have obtained more speedy Justice in their Oppressions, than they had before; and certain Cases, wherein the Law failed, did remain undetermined, and some remained to be enacted, that were for the Reformation of the Oppressions of the People: Our Lord the King in his Parliament, after the Feast of Easter, holden the Thirteenth Year of his Reign at Westminster, caused many Oppressions of the People, and Defaults of the Laws, for the accomplishment of the said Statutes of Gloucester, to be rehearsed, and thereupon did provide certain Acts, as shall appear here following. . . .

Cap. XXIV. . . . In Cases whereas a Writ is granted out of the Chancery for the Fact of another, the Plaintiffs from henceforth shall not depart from the King's Court without Remedy, because the Land is transferred from one to another. (2) And in the Register of the Chancery there is no special Writ found in this Case, as of a House, a Wall, a Market, but the Writ is granted against him that levied the Nuisance. (3) And if the House, Wall, or such like be aliened to another, the Writ shall not be denied; but from henceforth, where in one Case a Writ is granted, in like Case, when like Remedy falleth, the Writ shall be made as hath been used before: . . .

II. In like manner . . . whensoever from henceforth it shall fortune in the Chancery, that in one Case a Writ is found, and in like Case falling under

like Law and requiring like Remedy, is found none, the Clerks of the Chancery shall agree in making the Writ; (4) or the Plaintiffs may adjourn it until the next Parliament, and let the Cases be written in which they cannot agree, and let them refer themselves until the next Parliament, by Consent of Men learned in the Law, a Writ shall be made, lest it might happen after that the Court should long time fail to minister Justice unto Complainants.

6. REGISTRUM BREVIUM (1595). *Breve de transgressione in banco* (fol. 93). Rex, vicecomiti Lincolni salutem. Si A. fecerit te securum de clamore suo proseguendo, tunc pone per vadium & saluos plegios B., quod sit coram iustitiariis nostris apud Westmonasterium in octauis sancti Michaelis; (Vel sic, quod sit coram nobis in octauis sancti Michaelis vbicunque tunc fuerimus in Anglia;) Ostensus quare vi & armis in ipsum A. apud N. insultum fecit, & ipsum verberauit, vulnerauit & male tractauit: ita quod de vita eius desperabatur, & alia enormia ei intulit, ad graue damnum ipsius A, & contra pacem nostram. Et habeas ibi nomina plegiorum & hoc breue. T. &c.

7. REGISTRUM BREVIUM (1595). *Breve de sewera fracta* (fol. 106 b). Ostensus quare vi & armis ripas cuiusdam seweræ apud R. fregit, ita quod aqua, de eadem sewera per huiusmodi rupturam decurrens, terras & prata ipsius A. eidem seweræ adiacentia inundauit, per quod idem A. proficuum terrarum & pratorum suorum prædictorum totaliter amisit, & alia enormia &c. ad damnum ipsius A. centum librarum, & contra pacem nostram &c.

8. R. ROSS PERRY. *Common Law Pleading; its History and Principles*. (1897. Appendix I, p. 435.) Declaration in an Action of Trespass for Assault and Battery, date, 1677. *Hawe versus Planner*. *Trin. 17 Car. II. Regis. Roll. 925*. Berkshire, to wit, Be it remembered that heretofore, to wit, in the term of St. Hilary last past, before our lord the king at Westminster, came Henry Hawe by James Rouse his attorney, and brought here into the court of our said lord the king, then there, his certain bill against John Planner, of the parish of Wokingham, in the county aforesaid, yeoman, in the custody of the marshal, &c., of a plea of trespass, and there are pledges of prosecution, to wit, John Doe and Richard Roe, which said bill follows in these words; that is to say, Berkshire, to wit, Henry Hawe complains of John Planner, of the parish of Wokingham in the county aforesaid, yeoman, being in the custody of the marshal of the Marshalsea of our lord the king before the king himself, for that he on the 4th day of September, in the 16th year of the reign of our lord Charles the Second, now King of England, &c. with force and arms, &c. made an assault upon him the said Henry Hawe, at Wokingham aforesaid, in the county aforesaid, and him the said Henry then and there beat, wounded, and ill treated, so that his life was greatly despaired of, and other wrongs to him then and there did, against the peace of our said lord the now king, and to the damage of him the said Henry of 100*l.* and therefore he brings suit, &c.

9. SABIN D. PUTERBAUGH. *Common Law Pleading and Practice*. (1896. 70 ed., p. 633, No. 327.) Declaration in an Action on the Case for Corporal Injury:

In the . . . . . Court.

. . . . . Term, 18—.

State of Illinois, }  
County of . . . . ., } sct. A. B., plaintiff, by E. F., his attorney, complains  
of the . . . . . railroad company, defendant, of a plea of trespass on the case:  
For that whereas the plaintiff, on, etc. in, etc., was riding in a certain carriage,



then and there drawn by a certain horse, upon and along a certain public highway there (to wit, a certain public highway leading from . . . . . to . . . . .,) at a certain crossing of the said public highway and a certain railroad of the defendant, in the county of . . . . . aforesaid; and the defendant was then and there possessed of a certain locomotive engine and train of cars then attached thereto, which said locomotive engine and train were then and there under the care and management of divers then servants of the defendant, who were then and there driving the same upon and along the said railroad, near and towards the crossing aforesaid: And while the plaintiff, with all due care and diligence, was then and there riding in the said carriage across the said railroad, at the said crossing, upon the said public highway there, the defendant then and there, by its said servants, so carelessly and improperly drove and managed the said locomotive engine and train, that by and through the negligence and improper conduct of the defendant, by its said servants, in that behalf, the said locomotive engine and train then and there ran and struck with great force and violence upon and against the said carriage, and thereby the plaintiff was then and there thrown with great force and violence from and out of the said carriage to and upon the ground there, and was thereby then and there greatly bruised, hurt and wounded, and divers bones of his body were then and there broken, and he became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, hitherto, during all which time he, the plaintiff, suffered great pain, and was hindered and prevented from attending to and transacting his affairs and business; and by means of the premises the plaintiff was forced to, and did then and there lay out divers sums of money, amounting to . . . . . dollars, in and about endeavoring to be cured of his said wounds, hurts and bruises, occasioned as aforesaid; and also by the running and striking of the said train upon and against the said carriage as aforesaid, at the time and place in that behalf aforesaid, the said carriage, then of the value of . . . . . dollars, and whereof the plaintiff was then and there lawfully possessed, was crushed and destroyed; and then and there became and was rendered of no use or value to the plaintiff. . . .

Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of . . . . . dollars, and therefore he brings his suit, etc.

## 10. SCOTT *v.* SHEPHERD

COMMON PLEAS. 1773

2 *Wm. Bl.* 892

TRESPASS and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes that he lost sight of it, whereby, &c. On not guilty pleaded, the cause came on to be tried before Nares, J., last summer assizes at Bridgwater, when the jury found a verdict for the plaintiff with £100 damages, subject to the opinion of the Court on this case. On the evening of the fair day at Milbourne Port, 28th October, 1770, the defendant threw a lighted squib, made of gunpowder, &c., from the street into the market-house, which is a covered building supported by arches, and inclosed at one end, but open at the other

and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and threw it across the said market-house where it fell upon another standing there of one Ryal, who sold the same sort of wares; who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and in so throwing it struck the plaintiff, then in the said market-house, in the face therewith, and the combustible matter then bursting put out one of the plaintiff's eyes. *Qu.* If this action be maintainable?

This case was argued last term by *Glyn* for the plaintiff, and *Burland* for the defendant; and this term, the Court being divided in their judgment, delivered their opinions *seriatim*.

NARES, J., was of opinion that trespass would lie well in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has, by statute W. III, been since made a nuisance. Being, therefore, unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate: 21 Hen. VII, 28, is express that *malus animus* is not necessary to constitute a trespass. So, too, 1 Stra. 596; Hob. 134; T. Jones, 205; 6 Edw. IV, 7, 8; Fitzh. Trespass, 110. The principle I go upon is what is laid down in *Reynolds v. Clarke*, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequence of it. . . . But he who does the first wrong is answerable for all the consequential damages. . . .

BLACKSTONE, J., was of opinion that an action of trespass did not lie for Scott against Shepherd, upon this case. He took the settled distinction to be, that where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case: *Reynolds v. Clarke*, Lord Raym. 1401, Stra. 634; *Haward v. Bankes*, Burr. 1114; *Harker v. Birbeck*, Burr. 1159. The lawfulness or unlawfulness of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain, but as it was a lawful act (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule; for it is held by the court in the same case, that if I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over it, and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it

I hit another man, he may bring trespass, because it is an immediate wrong. . . . So that lawful or unlawful is quite out of the case; the solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other. And trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was immediate or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal or Scott. The tortious act was complete when the squib lay at rest upon Yates's stall. . . . If a man tosses a football into the street, and, after being kicked about by one hundred people, it at last breaks a tradesman's window, shall he have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction. . . . I am of opinion that in this action judgment ought to be for the defendant.

GOULD, J., was of the same opinion with Nares, J., that this action was well maintainable. The whole difficulty lies in the form of the action, and not in the substance of the remedy. The line is very nice between case and trespass upon these occasions. I am persuaded there are many instances wherein both or either will lie. I agree with Brother Nares, that wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequence be in nature of trespass. . . . I shall not go over again the ground which Brother Nares has relied on and explained, but concur in his opinion, that this action is supported by the evidence.

DEGREY, C. J. This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my Brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespassers by accident; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c. They may also not lie for the consequences even of illegal acts, as that of casting a log into the highway, &c. But the true question is, whether the injury is the direct and immediate act of the defendant; and I am of opinion that in this case it is. It has been urged that the intervention of a free agent will make a difference, but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers Gould and Nares, that the present action is maintainable.

*Postea to the plaintiff.*

11. COVELL *v.* LAMING

NISI PRIUS. 1808

1 *Camp.* 497

TRESPASS for running defendant's ship against plaintiff's in the river Thames. Plea, not guilty.

It appeared, that when the accident happened, the defendant was himself on board of his ship, and stood at the helm; but there was evidence to shew, that he wished to steer clear of the plaintiff, and that if he was to blame for what had happened, it was only through ignorance and unskilfulness.

The Attorney General contended, that the action could not be supported, unless the jury should believe that the defendant intended to run his vessel against the plaintiff's, and wilfully did the act complained of. . . . Thus it is wilfulness alone that can determine the nature of the act. The case of *Leame v. Bray*,<sup>1</sup> seemed to establish the distinction, that where the injury is immediate from a forcible act of the defendant, the remedy is trespass, and that case is never proper except where the injury is consequential; but the doctrine there laid down, had been since much doubted by the Court of Common Pleas.<sup>2</sup>

LORD ELLENBOROUGH, C. J. I know there is a difference of opinion upon this subject. I have had much communication concerning it with those whom I respect very highly; but I confess, I have not been able to perceive the grounds of their difficulties. My own opinion has always been uniform. Whether the injury complained of arises directly, or follows consequentially, from the act of the defendant — I consider as the only just and intelligible criterion of trespass and case. If, in the dark, I ignorantly ride against another man on horseback, this is undoubtedly trespass, although I was not aware of his presence till we came into contact. It makes no difference that here the parties were sailing on ship board. The defendant was at the helm, and guided the motions of his vessel. The winds and the waves were only instrumental in carrying her along in the direction which he communicated. The force, therefore, proceeded from him, and the injury which the plaintiff sustained, was the immediate effect of that force.

The defendant had a verdict.

*Garrow, Park and Marryat*, for the plaintiff.

*The Attorney General and Pitcairn*, for the defendant.

12. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England*. (1765. Book III, p. 122.) This action of trespass, or transgression, on the case, is an universal remedy given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length

<sup>1</sup> 3 East, 593.

<sup>2</sup> *Rogers v. Imbleton*, 2 N. R. 119.

in the original writ.<sup>1</sup> For though in general there are methods prescribed, and forms of actions previously settled, for redressing those wrongs, which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods or the like; yet where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. 2, c. 24, to bring a special action in his own case, by a writ formed according to the peculiar circumstances of his own particular grievance.<sup>2</sup> For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action;<sup>3</sup> and therefore, wherever a new injury is done, a new method of remedy must be pursued.<sup>4</sup> And it is a settled distinction,<sup>5</sup> that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*; but where there is no act done, but only a culpable omission; or where the act is not immediately injurious, but only by consequence and collaterally; there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act.

13. JOSEPH CHITTY. *Treatise on Pleading*. (1808. 11th Amer. ed., 1851, Vol. I, p. 96.) To this statute (of Westminster 2d) the copious production of new forms of writs, and the great encouragement and frequency of actions on the case so infinitely various is to be attributed.

Notwithstanding these provisions, it was once thought that the circumstance of an action being of the first impression, and unprecedented, constituted a conclusive objection against it; and it is observable, that the Statute Westminster 2d, does not recognize or confer any right to frame writs in cases entirely new; it merely gives or enforces the power to frame new writs by analogy to and upon the principle of such as had previously existed, (i. e. in *consimili casu*). It has however, been observed, that it by no means follows, that because in cases unprovided for by the Register, the statute directs an action upon the case to be framed, that the action upon the case or a remedy for every new injury in general did not subsist at common law. There is also the authority of Lord Kenyon for the doctrine, that whenever the common law recognizes or creates a legal right, it will also confer a remedy by action;<sup>6</sup> and Lord Chief Justice Pratt, in answer to the objection of novelty, said, that he wished never to hear it urged again, for torts are infinitely various, not limited or confined, and there is nothing in nature that may not be an instrument of mischief, and the special action on the case was introduced, because the law will not suffer an injury without affording a remedy, and there must be new facts in every special action on the case. In the case of *Pasley v. Freeman*, Mr. J. Ashurst observed, that where cases are new in their principle, it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized by law to such new case, it will be just as competent to courts of justice to apply the acknowledged principle to any case which may arise two centuries hence as it was two centuries ago.

<sup>1</sup> For example, Registr. Brev. 105.

<sup>2</sup> See p. 52.

<sup>3</sup> 1 Salk. 20; 6 Mod. 54.

<sup>4</sup> Cro. Jac. 478.

<sup>5</sup> 11 Mod. 130; Lord Raym. 1402; Stra. 635.

<sup>6</sup> Vide *Yates v. Joice*, 11 Johns. 140.

14. FIRST REPORT OF HER MAJESTY'S COMMISSIONERS FOR INQUIRING INTO THE PROCESS, PRACTICE, AND SYSTEM OF PLEADING IN THE SUPERIOR COURTS OF COMMON LAW. (JOHN JERVIS, SAMUEL MARTIN, ALEXANDER EDMUND COCKBURN, WILLIAM HENRY WALTON, GEORGE WILLIAM BRAMWELL, JAMES SHAW WILLES.) (1851. pp. 31, 34, 72, 74.) It is admitted that serious inconvenience arises from the stringency of the existing rules respecting forms of action, both with respect to the misjoinder of forms of action, and their misapplication to the particular case. . . .

A few instances, not unfrequently occurring in practice, will be sufficient to explain the nature of the inconvenience complained of. . . .

Trespass lies for direct injuries to person or property:

Case is far more extensive than any other form of action, and is applicable as a remedy for what are called consequent injuries, that is, injuries supposed to arise indirectly and consequentially from the act complained of, — as slander, whereby the plaintiff's character is injured; negligent driving, whereby the plaintiff is run over and hurt; and the like. A familiar illustration of the difference between trespass and case may be stated: — Suppose a person throws a log of wood on a highway, and, by the act of throwing, another person is injured, the remedy in such case is trespass. But if the log reaches the ground, and remains there, and a person falls over it, and is injured, the remedy is case, as the injury is not immediately consequent on the act. So, if the defendant drive his carriage against that of another, the remedy may be trespass; but if the defendant's servant be driving, the remedy is case. One form of the action on the case is trover, which is a remedy for the wrongful conversion of goods. Case is said to be the remedy for all actionable matters of complaint to which the other forms of action do not apply. . . .

We pass on to the important question of whether forms of action should still be retained. It may be difficult to define what is meant by a form of action. Practically, however, it may be said to be the peculiar technical mode of framing the writ and pleadings appropriate to the particular injury which the action is intended to redress. By the established practice of pleading, peculiar forms of expression characteristic of each action have been appropriated thereto, many of which are of a purely formal nature, and are wholly independent of the merits of the cause of action. Thus, as an instance, in those cases which, as we have already pointed out, trespass is the appropriate remedy, the plaintiff's declaration must state that the act complained of was done with force and arms, and against the peace, although the trespass may have been unaccompanied by violence; these allegations being unnecessary in case. Yet the distinction between the injuries to which these forms of action are respectively appropriate is, as we have already shown, often of a very shadowy nature, and the ground of complaint must in each case be set forth with sufficient distinctness and particularity, independently of these technical forms. . . .

The necessity of adhering to these forms sometimes subjects declarations to objections on special demurrer, and has led to plaintiffs being defeated after establishing a good cause of action, on the ground that the form of action has been mistaken. It remains to be considered whether any countervailing advantage results from maintaining these forms. We think not. It appears to us that if the facts which constitute the cause of action be sufficiently set forth in the declaration, all the legitimate purposes of pleading are thereby accomplished, and that to incumber the pleading with formal requirements which



afford no additional information, but which open a door to technical and captious objections, is not only useless but mischievous. We feel ourselves, however, bound to state, that much difference of opinion exists in the legal profession on this head. . . .

It is manifest, therefore, that as the question, whether there is a cause of action or not, must depend upon the facts and not upon the form adopted, the decision of a cause on the merits is not helped by means of these forms of action. . . .

It is obvious, therefore, that, if our other recommendations be adopted, forms of action will exist in name only, and, as their general effect appears to us to be mischievous, we recommend their abolition. We recommend not only that merely formal expressions shall be unnecessary, but that they shall be disused. This will have several good results; it will get rid of formal and captious objections; it will shorten pleadings, free them of their verbiage, and make them more intelligible by being more like the language of every-day use. . . .

In order to illustrate the effect of our recommendation upon the form of pleadings, we give in the Appendix a set of forms, free from fictitious and unnecessary statements. . . .

*Recommendations made in the foregoing report. . . .*

31. That every declaration and subsequent pleading which shall clearly and distinctly state all such matters of fact as are necessary to sustain the action, defence, or reply, as the case may be, shall be sufficient, and it shall not be necessary that such matters should be stated in any technical or formal language or manner, or that any technical or formal statements should be used. . . .

59. That the technical forms of action be done away with. . . .

*Appendix. Forms to serve as examples:*

26. That the defendant broke and entered certain land of the plaintiff called the Big Field, and depastured the same with cattle.

27. That the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police office. . . .

31. That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill.

15. FIRST REPORT OF THE COMMISSIONERS OF THE STATE OF NEW YORK ON PRACTICE AND PLEADINGS (ARPHAXAD LOOMIS, DAVID GRAHAM, DAVID DUDLEY FIELD), 1848. *Part II, Civil Actions; Title I, Of their Form.* (Code of Procedure, pp. 81, 87.) Within some one of these forms of action, every injury to personal rights, which is the subject of legal redress, must be brought; and the failure to select the one which is strictly appropriate, is as fatal to the rights of the party, as his failure to sustain the merits upon which his claim to redress is founded. There is no branch of legal science upon which so much curious, and we may be permitted to add, unnecessary learning has been expended, as in the attempt to define the precise boundaries which distinguish these various forms of action; and the absurdities by which their early history and their present retention are attended, are full of instruction as to the necessity for a deliberate inquiry into the propriety of their further continuance. They are referred back, by

some of the elementary writers, to the sanction of the king's original writ, which formerly was, and even now, by fiction of law, is an essential preliminary form to the institution of a suit in the common law courts; and which, from the fact, that, from the most ancient times, it defined and determined the form of action, rendered the forms of writs and actions correlative terms, and led to the result that the former were regarded as evidence of the right. . . .

From the period of which we have been speaking — a period comparatively benighted and ignorant, in all that is valuable in science — to the present, these forms have been adhered to with a sort of bigoted devotion. While the principles of legal science have expanded and adapted themselves to the exigencies of each successive age, through which they have passed, we find ourselves met with the standing argument against improvement, that the time-honored institutions of ages must be held sacred, and that these forms, which may have been well suited to the age in which they originated, must be left untouched. Is there, in truth, any soundness in such a doctrine? Can it be possible, that the progress which has characterized almost every age since that period, and which is the distinguishing feature of the present day, must stop in its application to the machinery by which rights are to be vindicated and wrongs redressed?

While we are disposed to respect the opinions of those who differ from us, we cannot admit that these questions are difficult of solution. It seems to us clear, that neither the forms of remedies, nor the mode in which they are stated, require the complexity, in which both are now enveloped. The embarrassments, to which they have given rise, have resulted from no difficulty in determining the real rights of parties, but simply in the means of enforcing them; and in this respect, we feel no hesitation in recommending, that the retention of forms, which serve no valuable purpose, should no longer constitute a portion of the remedial law of this State. Let our Courts be hereafter confined in their adjudications to questions of substantial right, and not to the nice balancing of the question, whether the party has conformed himself to the arbitrary and absurd nomenclature, imposed upon him by rules, the reason of which, if they ever possessed that quality, has long since ceased to exist, and the continuance of which is a reproach to the age in which we live. . . . [We therefore recommend this provision:]

62. The distinction between actions at law, suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this State, hereafter, but one form of action, for the enforcement or protection of private wrongs, which shall be denominated a civil action.

16. CODES AND STATUTES OF CALIFORNIA, 1873. *Code of Civil Procedure*. (Pomeroy's ed., 1901.) Sect. 307. There is in this State but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs.

17. REVISED STATUTES OF THE STATE OF ILLINOIS, 1874. COMPILED AND EDITED BY HARVEY B. HURD, COMMISSIONER OF REVISION. *Practice*. (Chap. 110, § 22.) The distinctions between the action of "trespass" and "trespass on the case" are hereby abolished; and in all cases where trespass or trespass on the case has been heretofore the appropriate form of action, either of said forms may be used, as the party bringing the action may elect.



18. PUBLIC STATUTES OF MASSACHUSETTS, 1882. *Forms of Declaration in Tort.* (Chap. 167, §§ 1, 94.) Section 1. There shall be only three divisions of personal actions:

First, Actions of contract, which shall include those heretofore known as actions of assumpsit, covenant, and debt, except for penalties.

Second, Actions of tort, which shall include those heretofore known as actions of trespass, trespass on the case, trover, and all actions for penalties.

Third, Actions of replevin.

Sect. 2. The form of declaring in personal actions shall be according to the following particulars:

First, The action shall be named in conformity with the division specified in the preceding section.

Second, No averment need be made which the law does not require to be proved.

Third, The substantive facts necessary to constitute the cause of action may be stated with substantial certainty, and without unnecessary verbiage. . . .

Sect. 94. The forms contained in the schedule annexed to this chapter may be used in the several Courts, subject to be changed and modified from time to time by the Supreme Judicial Court, by general rules made for the purpose. . . .

Negligence of Town. "And the plaintiff says there is in the town of . . . . . a public highway leading from . . . . . to . . . . ., which said defendants are bound to keep in repair; that the same was negligently suffered by defendants to be out of repair, whereby the plaintiff, traveling thereon and using due care, was hurt; and that due notice of the time, place, and cause of injury was given." . . .

Trespass to Person. "And the plaintiff says the defendant made an assault upon him, and struck him on his head, and kept him imprisoned for the space of one day."

Trespass to Land. "And the plaintiff says the defendant forcibly entered the plaintiff's close, (describing it,) and ploughed up the soil, etc., and took and carried away fifty bushels of the plaintiff's corn there being, and converted the same to his own use."

### Topic 3. Nominal Damage and Substantial Damage

19. L. C. J. HOLT, in *Ashby v. White*. (1703. 2 Ld. Raym. 938, 950.) The single question in this case is, whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in Parliament, be refused and hindered to give it by the officer, if an action on the case will lie against such officer.

I am of opinion that judgment ought to be given in this case for the plaintiff. My brothers differ from me in opinion, and they all differ from one another in the reasons of their opinion; but notwithstanding their opinion, I think the plaintiff ought to recover, and that this action is well maintainable, and ought to lie. . . .

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. . . . And I am of opinion, that

this action on the case is a proper action. My brother Powell indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there. And in these cases the action is brought *vi et armis*. But for invasion of another's franchise, trespass *vi et armis* does not lie, but an action of trespass on the case; as where a man has *retorna brevium*, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompence. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action.

## 20. WEBB *v.* PORTLAND MANUFACTURING COMPANY

CIRCUIT COURT OF THE UNITED STATES. 1838

3 *Sumner*, 189; *Fed. Cas. No.* 17322

**BILL IN EQUITY** for an injunction by the plaintiff to prevent the defendant from diverting a water-course from the plaintiff's mill, and for further relief.

The facts admitted on all sides were that at the Saccarappi Falls, on the river Presempscut, there are two successive falls, upon which there are erected certain mills and mill dams, the latter being called the upper and the lower mill dams, and the distance between them is about forty or fifty rods; and the water therein constituted the mill pond of the lower dam. The plaintiff is the owner of certain mills and mill privileges, in severalty, upon the lower dam, and the defendants are entitled to certain other mills and mill privileges on the same dam, also in severalty. As to a portion of one of the mills, there was a controversy between the parties in regard to title; but that controversy in no essential degree affected the question presented to the Court. The defendants are the owners of a cotton factory mill near the left bank of the river, and opened a canal for the supply of the water necessary to work that mill, into the pond immediately below the upper dam; and the water thus withdrawn was returned again into the river immediately below the lower dam. The defendants insisted upon their

right so to divert and withdraw the water, by means of their canal, upon the ground, that it was a small part only (about one fourth) of the water, to which, as mill owners on the lower dam, they were entitled; and that there was no damage whatsoever done to the plaintiff's mill by this diversion of the water.

Upon the coming in of the answer a preliminary question was suggested by the Court at the hearing, which was argued by *C. S. Davis* for the plaintiff, and by *P. Mellen* and *Longfellow* for the defendants.

STORY, J. The question, which has been argued upon the suggestion of the Court, is of vital importance in the cause; and, if decided in favor of the plaintiff, it supersedes many of the inquiries, to which our attention must otherwise be directed. It is on this account, that we thought it proper to be argued, separately from the general merits of the cause.

The argument for the defendants then presents two distinct questions. The first is, whether, to maintain the present suit, it is essential for the plaintiff to establish any actual damage. . . .

As to the first question, I can very well understand, that no action lies in a case where there is *damnum absque injuria*, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that *injuria sine damno* is not actionable.<sup>1</sup> On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. A fortiori, this doctrine applies, where there is not only a violation of a right of the plaintiff; but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain, that it may be lost or destroyed, without any possible remedial redress. In my judgment the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than, whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication

<sup>1</sup> See *The Mayor of Lynn, &c. v. Mayor of London*, 4 T. R. 130, 141, 143, 144; *Comyns Dig. Action on the Case*, B. 1 and 2.

of his right, if no other damages are fit and proper to remunerate him.

So long ago as the great case of *Ashby v. White* (2 Lord Raym. R. 938; s. c. 6 Mod. R. 45; Holt's R. 524), the objection was put forth by some of the judges, and was answered by Lord Holt, with his usual ability and clear learning; and his judgment was supported by the House of Lords, and that of his brethren overturned. . . .

The principles, laid down by Lord Holt, are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a juridical view, incontrovertible. And they have been fully recognized in many other cases. . . . I am aware, that some of the old cases inculcate a different doctrine, and perhaps are not reconcilable with that of Lord Holt. There are also some modern cases, which at first view seem to the contrary. But they are distinguishable from that now in judgment; and, if they were not, "*Ego assentior Scaevolae.*" . . .

Upon the whole, without going farther into an examination of the authorities on this subject, my judgment is, that, whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages. And, a fortiori, that this doctrine applies, whenever the act done is of such a nature, as that by its repetition or continuance it may become the foundation or evidence of an adverse right.<sup>1</sup> . . .

Now, if this be the law on this subject, upon what ground can the defendants insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said, that there is no perceptible damage done to the plaintiffs. That suggestion has been already in part answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiffs to the full, natural flow of the stream; and may become the foundation of an adverse right in the defendants. In such a case, actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugitive, temporary trespass, by diverting or withdrawing the water a short period, without damage, and without any pretence of right. In such a case the wrong, if there be no sensible damage and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion upon such a case), be without redress at law; and certainly it would found no ground for the interposition of a Court of Equity by way of injunction.

<sup>1</sup> See also *Mason v. Hill*, 3 Barn. & Adolph. R. 304; s. c. 5 Barn. & Adolph. R. 1.

21. PAUL *v.* SLASON

SUPREME COURT OF VERMONT. 1850

22 *Vt.* 231

TRESPASS for taking two cords of wood, two baskets, two pitchforks, two horses, one harness, and one wagon. Plea, the general issue, with notice, that the defendant Charles H. Slason attached the property by virtue of a writ, which he was legally deputed to serve, in favor of one Langdon against the plaintiff, and that the other defendants aided him in so doing, at his request. Trial by jury, September Term, 1848, *Hall*, J., presiding. On trial it appeared, that on the twenty-sixth day of September, 1844, the defendant Francis Slason commenced a suit in the name of Benjamin F. Langdon against the plaintiff, and that the defendant Charles H. Slason, who was legally deputed to serve the writ, which was returnable to the County Court, attached the property in question, except one pitchfork, and that the defendant Pelkey assisted in removing the property. It also appeared, that on the same day Charles H. Slason and Pelkey made use of the horse, wagon, and harness, part of the property attached, in removing grain and other property, which was attached at the same time, on the same writ, and upon the same farm, and continued to use them for this purpose through the day; and that on the next day Charles H. Slason was seen driving the same horse and wagon, with the harness, in the highway in the vicinity, — but upon what business did not appear. It also appeared, that the defendants took a pitchfork belonging to the plaintiff, and used it during the day on which the attachment was made, in removing the grain, &c. . . . The defendants then offered in evidence the return of the sheriff upon the original writ in favor of Langdon against the plaintiff, showing an appraisal of the horse and some other property attached, and that the plaintiff has furnished security to the sheriff and received possession of the property. . . . The plaintiff requested the Court to charge the jury, . . . That if the jury found, that the defendants took the plaintiff's pitchfork and used it during the day, without right, he was entitled to recover its value, unless it were returned, — and that, if returned, he was entitled to recover nominal damages. . . . In regard to the pitchfork the Court charged the jury, that if they believed, from the evidence, that the defendants took and carried it away, they should give the plaintiff its value; that if it was used and left upon the premises, so that the defendant received it again, and it was injured by the use, the plaintiff would be entitled to recover the amount of the injury; but that if they found, that it was merely used for a portion of a day in removing the plaintiff's property, there attached, and was left where it was found, so that the plaintiff had it again, and that it was not injured by the use, they were not bound to give the plaintiff damages for

such use. The jury returned the verdict for the defendants. Exceptions by plaintiff. . . .

POLAND, J. 1. The first question, arising in this case, is in relation to the charge of the County Court to the jury as to the use of the horse, wagon, and harness by the defendants, in removing the other property of the plaintiff, which was attached at the same time. . . .

3. Another question is also raised upon the charge to the jury in relation to the use of the pitchfork by the defendants. Under the charge the jury must have found, that the pitchfork was used by the defendants only in moving the plaintiff's property, that it was left where they found it, that the plaintiff received it again, and that it was in no way or manner injured. They were told by the Court, that if they found all these facts proved, they were not obliged to give the plaintiff any damages for the fork.

It is true, that, by the theory of the law, whenever an invasion of a right is established, though no actual damage be shown, the law infers a damage to the owner of the property and gives nominal damages. This goes upon the ground, either that some damage is the probable result of the defendant's act, or that his act would have effect to injure the other's right, and would be evidence in future in favor of the wrongdoer. This last applies more particularly to unlawful entries upon real property, and to disturbance of incorporeal rights, when the unlawful act might have an effect upon the right of the party and be evidence in favor of the wrongdoer, if his right ever came in question. In these cases an action may be supported, though there be no actual damage done, — because otherwise the party might lose his right. So, too, whenever any one wantonly invades another's rights for the purpose of injury, an action will lie, though no actual damage be done; the law presumes damage, on account of the unlawful intent. But it is believed, that no case can be found, where damages have been given for a trespass to personal property, when no unlawful intent, or disturbance of a right, or possession, is shown, and when not only all probable, but all possible, damage is expressly disproved.

The English Courts have recently gone far towards breaking up the whole system of giving verdicts when no actual injury has been done, unless there be some right in question, which it was important to the plaintiff to establish. . . . Mr. Broome, in his recent work on Legal Maxims, lays down the law in the following language:

"Farther, there are some injuries of so small and little consideration in the law, that no action will lie for them; for instance, in respect to the payment of tithes, the principle which may be extracted from the cases appears to be, that for small quantities of corn, involuntarily left in the process of raking, tithes shall not be payable, unless there be any particular fraud, or intention to deprive the person of his full right."

If any farther authority is deemed necessary, in support of the ruling of the County Court on this point, we have only to refer to that ancient

and well-established maxim, "de minimis non curat lex," — which seems peculiarly applicable in this case, and would alone have been ample authority upon this part of the case; for we fully agree with Mr. Sedgwick, that the law should hold out no inducement to useless or vindictive litigation. Sedgwick on Dam. 62. This disposes of all the questions raised upon the charge.<sup>1</sup>

<sup>1</sup> [For the application of the present principle to specific kinds of tort, see as follows:

Trespass to *the person*, No. 26, *post*.

Trespass to *real property*, Nos. 261, 262, *post*.

Trespass to *personal property*, No. 290, *post*.

NOTES:

"Actual damage required." (C. L. R., VIII, 139.)

"Interference with rights, not causing actual damage." (H. L. R., IV, 293; IX, 435; XII, 284; XIII, 142.)

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS PRINCIPLE:

*John W. Salmond*, "Jurisprudence," 2d ed., § 130.

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. XIII, § 406, p. 392, c. XV, § 526, p. 540.]



**TITLE A: PERSONAL HARMS****SUB-TITLE (I): CORPORAL HARMS****Topic 1. Corporal Harm in General. (Trespass by Battery. Case.)**

22. **REGISTRUM BREVIUM** (1595). *Breve de transgressionem in banco* (fol. 93). Rex, vicecomiti Lincolnensi salutem. Si A. fecerit te securum de clamore suo prosequendo; tunc pone per vadium & saluos plegios B, quod sit coram iustitiariis nostris apud Westmonasterium in octauis sancti Michaelis; (vel sic; quod sit coram nobis in octauis sancti Michaelis ubicunque tunc fuerimus in Anglia:) Ostensurus quare vi & armis in ipsum A. apud N. insultum fecit, & ipsum verberauit, vulnerauit & male tractauit: ita quod de vita eius desperabatur, & alia enormia ei intulit, ad graue damnum ipsius A, & contra pacem nostram. Et habeas ibi nomina plegiorum & hoc breue. T. &c.

23. **ANON.** *The Attorney's Practice in the Court of Common Pleas.* (1746; 2d ed., Vol. I, p. 121.) Declaration in battery. Middlesex, to wit, J. M., late of, etc. was attached to answer J. H. of a plea, wherefore with force and arms he assaulted the said J. H. at Westminster in the county of Middlesex, and beat, wounded and illtreated him, so that his life was despaired of, and other injuries did to him, to the great damage of the said J. H. and against the peace of our lord the present king, etc. And whereupon the said J. H. by J. C. his attorney, complains, that the said J. M. on the . . . . . day of . . . . . in the . . . . . year of his present majesty's reign, with force of arms, to wit, with swords, staves, and knives, assaulted the said J. H. at Westminster in the county of Middlesex, and beat, wounded, and treated him ill, so that his life was despaired of; and other enormities, etc. to the great damage, etc. and against the peace, etc. wherefore he says that he is injured, and hath damage to the value of 50*l.* And thereupon he brings suit, etc.

**24. HOPPER v. REEVE**

COMMON PLEAS. 1817

7 *Taunt.* 698

THE plaintiff declared that the defendant, with force and arms, at Portsmouth, drove a certain gig against a certain carriage in which the plaintiff's wife was then riding, and overturned it, and greatly hurt the plaintiff's wife. After verdict for the plaintiff taken at the Winchester Lent assizes, 1817, before *Abbott, J.*, Pell, Serjt., in Easter term, 1817, moved in arrest of judgment, upon the ground that this ought not to have been an action of trespass, but an action on the case, for that the declaration did not state that the carriage in which the plaintiff's wife was riding, was the carriage of the plaintiff, nor averred any injury to the carriage, but was solely brought for an injury to the wife. Though that injury received by the plaintiff's wife arose out of an act of the defendant, yet it was in consequence of the defendant having run against the carriage of some other person (for such it must be in-



tended to be, not being stated to be the carriage of the plaintiff), and no act could be more consequential in its nature than this injury to the plaintiff's wife. The case of *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403, went beyond the law, but not so far as this.

The Court granted a rule nisi. . . .

*Pell*, in support of his rule. The objection is, that the grievance complained of warrants case but not trespass, for the hurt to the woman was consequential on an act of hurt to another person's carriage, *Pitts v. Gaince and Foresight*, 1 Ld. Raym. 558. The plaintiff might have declared on his possession of this carriage, and in that case, he might have declared in trespass. *Reynolds v. Clarke*, Str. 635; 2 Ld. Raym. 1402. The driving against the carriage, was, so far as appears on this record, no trespass to the plaintiff. The distinction is, that where the injury is immediate, the remedy is trespass, where it is consequential, there the proper remedy is case. It appears that this plaintiff had no interest in the carriage, and the damage was therefore consequential; — *Leame v. Bray*, 3 East, 593.

GIBBS, C. J. I do not think I could point out any defects in the legal argument of either of the counsel. But the facts are not brought within the law stated by the defendant's counsel; for I am of opinion that he who throws over a chair or a carriage in which another person is sitting, commits a direct trespass against the person of him who is sitting in that carriage or chair, and that the action of trespass may be well maintained for it.

*Rule discharged.*

## 25. WIFFIN *v.* KINCARD

COMMON PLEAS. 1807

2 Bos. & P. N. R. 471

THIS was an action for assault, battery, and false imprisonment.

At the trial before Sir *J. Mansfield*, Ch. J., at the Sittings after last Easter term, it appeared that a number of persons being assembled in consequence of an alarm occasioned by a mad ox, the defendant, who was a constable, was sent for; that the plaintiff had posted himself upon some rails before a gentleman's house, which place he refused to quit, though frequently desired; that the defendant, in order to draw his attention, touched him with his constable's staff, but without hurting him, and desired him to get down; and the plaintiff still refusing, the defendant, at the desire of several persons, took him by the collar and carried him to the watch-house, from which he was discharged as soon as he could be brought before a justice. The jury found a verdict for one shilling damages, and the Chief Justice certified under the 43 Eliz. c. 6, that the damages amounted to one shilling only.

*Best*, Serjt., now moved for a rule to shew cause why the prothonotary should not be directed to tax full costs to the plaintiff, notwithstanding the certificate; and contended that, as actions for assault and battery were excepted out of the statute of Elizabeth, it was not competent to

the Judge to certify under that statute if any battery were proved; that in the present case a battery was proved, first by the striking with the constable's staff, for that the intention with which a blow is given makes no difference in a civil action for the battery, and, secondly, by taking the plaintiff by the collar in order to carry him to prison. He referred to the case of *Emmet v. Lyne*, 1 New Rep. 255, where the whole question was, Whether a battery was proved or not? it being taken for granted that if proved the Judge could not certify.

The Court were clearly of opinion that the touch given by the constable's staff, in order to engage the plaintiff's attention, did not amount to a battery. But there was some doubt whether the taking by the collar did not; Sir J. MANSFIELD, Ch. J., saying that taking the plaintiff by the collar without any improper violence, though an imprisonment, was no battery, which is a beating; and CHAMBRE, J., saying that imposition of hands in order to imprison is a battery.

The Court agreed, however, that whether the evidence amounted to proof of a battery or not, it would not prevent the Judge from certifying with respect to the imprisonment under the 43 of Elizabeth; that the plaintiff was not entitled to full costs for the assault and battery, unless the Judge certified under 22 & 23 Car. 2, c. 9, and here no such certificate had been granted. . . .

*Best*, Serjt., took nothing by his motion.<sup>1</sup>

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26. REGISTRUM BREVIUM (1595). *Breve de veneno in cibos posito* (fol. 102 a). Si I. & I. vxor eius fecerint te &c. tunc pone &c. I. quod sit &c. ostensurus quare cum idem I. in seruitio ipsorum I. & I. apud T. extitit, ex praecogitata malicia venenum in cibos ipsius I. occulte & proditioaliter posuit, per quod eadem I. tam graui infirmitate postmodum detinebatur, quod de vita eius desperabatur, & alia enormia &c. ad graue damnum ipsorum I. & I. vt dicit. Et habeas ibi &c.

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<sup>1</sup> [Compare the following:

HOLT, C. J., upon evidence in trespass for assault and battery, declared, — First, That the least touching of another in anger is a battery. Secondly, If two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery. Thirdly, If any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt will be a battery. (1704. *Cole v. Turner*, 6 Mod. 149.)

COWEN, J., in *Seneca Road Co. v. Auburn & Rochester R. Co.* (1843. 5 Hill, N. Y. 170, at 175.) It is said, however *de minimis non curat lex*. This maxim is never applied to the positive and wrongful invasion of another's property. To warrant an action in such case, says a learned writer, "some temporal damage, be it more or less, must actually have resulted, or must be likely to ensue. The degree is wholly immaterial; nor does the law, upon every occasion, require distinct proof that an inconvenience has been sustained. For example, if the hand of A. touch the person of B., who shall declare that pain has or has not ensued? The only mode to render B. secure is to infer that an inconvenience has actually resulted." (Hamm. N. P. 39, Am. ed. of 1823.) . . . The rule is necessary for the general protection of property; and a greater evil could scarcely befall a country than the rule being frittered away or relaxed in the least, under the idea that though an exclusive right be violated, the injury is trifling, or indeed nothing at all.]

27. SIR ANTHONY FITZHERBERT. *New Natura Brevium* (1534, fol. 234 B). [The writ *De Leproso Amovendo* lies] where a man is a lezar or a leper, and is dwelling in any town and he will come into the church or amongst his neighbors where they are assembled, to talk with them, to their annoyance or disturbance. Then he or they may sue forth that writ for to remove him from their company. . . . But it seemeth that if a man be a leper or lezar and will keep himself within his house and will not converse with his neighbors, that then he shall not be moved out of his house. . . . [The writ to the sheriff reads,] Because we have received information that I. of N. is a leper . . . and refuses to remove himself . . . to the great damage of the men aforesaid, and manifest peril by reason of the contagion of the disease aforesaid, we being willing to take precaution against such danger, . . . if you find him to be a leper, . . . then without delay, in the best manner you can, cause him to be carried away and removed from the communication of the said men to a solitary place, to dwell there, as the custom is, lest by such his common conversation, damage or peril should in any wise happen to the said men.

28. HILL *v.* METROPOLITAN ASYLUM DISTRICT  
QUEEN'S BENCH DIVISION, SUPREME COURT OF JUDICATURE OF  
ENGLAND, 1878. HOUSE OF LORDS, 1881

*L. R. 4 Q. B. D. 433, 6 App. Cas. 193*

THE action was tried at the Middlesex Michaelmas Sittings, 1878, before *Pollock*, B., and a special jury. The plaintiffs were Sir Rowland Hill, William Lund, and Alfred Downing Fripp, owners of land (by separate rights) adjacent to the hospital built and maintained at Hampstead by the defendants, the managers of the Metropolitan Asylum District, incorporated under the Metropolitan Poor Act, 1867 (30 Vict. c. 6). The plaintiffs claimed damages in respect of an alleged nuisance caused by the hospital, and an injunction against the defendants using the hospital for smallpox or scarlet fever or other infectious or contagious diseases.

1878. Dec. 18. The case came on for further consideration.

*Herschell*, Q. C., *Bompas*, Q. C., and *Finlay*, for the plaintiffs.

Sir *John Holker*, Q. C., A. G., *Willis*, Q. C., *C. H. Anderson*, and *Proudfoot*, for the defendants.

The learned judge took time to consider his judgment, which sets out the facts and the arguments. *Cur. adv. vult.*

Jan. 28, 1879. *POLLOCK*, B. This action was brought to recover damages in respect of and to obtain an injunction against the recurrence of what the plaintiffs alleged to be a nuisance, affecting their rights by the erection and maintenance of an asylum, consisting of several buildings which were erected and maintained for the reception and treatment of paupers suffering from smallpox. . . .

The plaintiffs proved that between December, 1870, and July, 1872, 7352 patients were admitted into the asylum, of whom 1379 died, and that there were for a considerable period as many as 560 patients under treatment. They also adduced evidence to shew that during this period

the proportion of smallpox cases in the neighbourhood of the hospital was far larger than in other parts of the parish, and they called a number of medical witnesses, who stated that, in their opinion, the existence of the asylum, as carried on by the defendants, was a source of danger to the neighbourhood and to the plaintiffs in particular, owing to the probable spread of the disease by infection, to the effect of the dead-house, and also to the bringing to and from the asylum of the patients in ambulances, and the visiting of the patients by their relations in cases where death was apprehended. With regard to the plaintiff Sir Rowland Hill, some evidence was also given that patients within the grounds of the asylum were allowed to walk near to the fence which separated the asylum grounds from those belonging to Sir Rowland Hill so as to interfere with the safety of the latter. With regard to the plaintiff Fripp, he deposed to having perceived when in his own house a bad smell from the dead-house, whereby his family and others were compelled to leave, and that on a particular day in February, 1871, this smell was specially noticed by himself and his wife, and shortly after she sickened and was attacked by smallpox. He also stated, however, that about the same period Mrs. Fripp had examined an empty ambulance standing in the high road wherein a patient suffering from smallpox had been conveyed.

The defendants called a great number of witnesses, consisting of those who had the superintendence and personal management of the asylum, and also medical men, who stated that in their opinion no danger or disturbance of the plaintiffs' rights was occasioned by the asylum, and that it was built and carried on with all possible care and skill so as to avoid any evil consequences.

At the end of the case on both sides I left to the jury five questions, which were answered as follows:

1st. Was the hospital a nuisance occasioning damage to the plaintiffs, or either and which of them, per se?

2nd. Or by reason of the patients coming to, or going from, the hospital?

(A.) 1st and 2nd. It was a nuisance to each of the plaintiffs, per se, and by reason of the patients coming to, or going from the hospital.

3rd. Assuming that the defendants were by law entitled to erect and carry on a hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?

(A.) No. . . .

It was argued (on broader and more intelligible grounds) that the defendants were not liable, because in all that they did they acted bona fide in the execution of a duty, cast upon the Local Government Board and themselves by a statute which required certain things to be done for the public welfare. . . .

I am unable, upon what seems to me to be a fair construction of the statute and a proper appreciation of its meaning, to arrive at this conclusion. . . .

I therefore grant an injunction to restrain the defendants, their servants, or agents, from carrying on the asylum so as to be a nuisance to all or any of the plaintiffs, and I suspend the issue of it for three months with liberty to either side to apply. *Judgment for the plaintiffs.*

LORD BLACKBURN [on appeal, in the House of Lords].

My Lords, in this case the respondents, who were the plaintiffs below, claimed in their writ damages for a nuisance arising from the use, by the defendants, of their hospital at Hampstead for smallpox and other infectious and contagious diseases, and for causing the assemblage, in the neighbourhood of the plaintiffs' property, of large numbers of persons suffering from smallpox or other infectious and contagious diseases, or having been recently in contact with persons so suffering, and from offensive smells and noises arising from the said hospital; and they asked for an injunction to restrain the defendants from using the said hospital as a hospital for patients suffering from smallpox or other infectious and contagious diseases. . . .

When the disease is infectious, there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything that can be avoided which shall tend to spread the infection; and if either do so, as by bringing the infected person into a public thoroughfare, it is an indictable offence; though it will be a defence to an indictment if it can be shewn that there was a sufficient cause to excuse what is *prima facie* wrong. *Rex v. Burnett*, 4 Mau. & S. 272. . . . Where those who have the custody of the person sick of an infectious disorder have not the means of isolating him from the other inmates (which is very commonly the case with the poor), and consequently those other inmates and the neighbours are exposed to the risk of infection, I think that the inability to isolate him would form a sufficient excuse to be a defence to any indictment; and I think also, though I am not aware of any authority on the subject, that the neighbours could not maintain any action for damage which they would in such a case sustain from the proximity of the infected person, it being a necessary incident to the use of property for habitations in town, that contagious sickness may befall their neighbours. If those who have the charge of the infected person have the means of isolating him on the spot, they certainly do well to use them, and if it cannot be done on the spot, and they can, either by their own means, or by the aid of charitable persons who have erected an hospital, find a place where he can be isolated so as to avoid the risk of infection, they will do well to use these means. I do not mean to express any opinion as to whether, at Common Law, they would or would not be responsible for *not* doing so. But there is no authority, and I think no principle, for saying that they are justified in removing him to a place where the neighbours would be exposed to contagion, though it may be fewer in number than the neighbours of the spot where the infection broke out; nor saying that if that was done, and the contagion was such as to amount to a real nuisance, those neighbours might not

maintain an action, and obtain an injunction to protect themselves against the importation of foreign infection. For though, as I have already said, I think it an incident to the use of a habitation in a town that the occupier must bear the necessary risks of the inmates of a neighbouring habitation falling ill of a contagious disease, I do not think it an incident that he is to submit to his neighbours wilfully, though for very laudable motives, and not maliciously, bringing in contagion where it did not previously exist, if the effect is not merely to alarm him, but to injure him.

This, I think, is borne out by the decisions on the subject of inoculation. . . . In *Rex v. Burnett* [supra], in 1815, it was decided that, though inoculation for the smallpox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease. And I also think that, by necessary inference, it follows that to gather together in one spot patients suffering from infectious disease is lawful, but it must be under such guards as not to endanger the public health by communicating this infectious disease; and, as it seems to me, so as not to produce injury to the rights of the owners of adjoining property by producing a nuisance to it.

If this be a correct view of the law, it is obvious that, however desirable it might be to erect and maintain asylums for the reception of the sick poor, sick of infectious disorders, it could not be done by any parochial authorities unless the authority of Parliament was obtained for raising funds for the purpose, and authorizing a public body to obtain a site for the asylum. . . .

There are no express words in this Act, and I think the weight of argument is rather against than in favour of such an implication. . . . It will follow that the Appeal No. 2 should be dismissed with costs.<sup>1</sup>

<sup>1</sup> [PROBLEMS :

The defendant gave to a woman some figs containing cantharides, a powerful drug, which the defendant thought would operate as a love-powder. The woman became ill. Was it a battery? (1873, *Com. v. Stratton*, 114 Mass. 303; compare similar facts in *R. v. Button*, 1838, 8 C. & P. 660; *R. v. Dilworth*, 1843, 2 Moo. & R. 534; *R. v. Walkden*, 1845, 1 Cox Cr. 282; *R. v. Hanson*, 1850, 2 C. & K. 912.)

The plaintiff was in the defendant's retail store. The defendant's clerk touched her on the shoulder, and asked her to go into another room, which she did; he there accused her of having stolen a pepper-caster from the counter. Was this a battery? (1897, *McDonald v. Franchere*, 102 Ia. 496, 71 N. W. 427.)

The defendant's granary was set on fire and his property stolen; he suspected the plaintiff, a boy thirteen years old, and found him present at a second fire which broke out; the defendant "placed his hand on the plaintiff's shoulder and asked him if he felt better after he had set the fire"; the plaintiff testified that the defendant kicked and choked him. Assuming the truth of the defendant's story, was a battery committed? (1894, *Crawford v. Bergen*, 91 Ia. 675, 60 N. W. 205.)

Is any legal damage shown in a proceeding by neighbors to enjoin the extension of a cemetery by the defendant town; the facts being that the germs of contagious diseases flourish in the liquid of decomposing bodies; that if moisture seeps into the enclosing earth it will carry the germs for considerable dis-



**Topic 2. Physical Pain and Suffering. Physical Incapacity**

**29. PENNSYLVANIA RAILROAD *v.* ALLEN**

**SUPREME COURT OF PENNSYLVANIA. 1866**

**53 Pa. 276**

**ERROR to the Court of Common Pleas of Erie County.**

This was an action on the case for personal injuries, by William N. Allen against the Pennsylvania Railroad Company, commenced May 30, 1865. The plaintiff, whilst a passenger in the defendants' car, was injured by a collision on the railroad, and disabled from attending to business.

The only question was as to the charge of the Court on the subject of damages, in which JOHNSON, P. J., said:

"The pain and personal affliction incident to the injury are also to be compensated in damages.

"While the cases maintain the right of the plaintiff to damages for the pain and bodily suffering endured, they insist on the enforcement of the rule that nothing but their pecuniary value shall be allowed, and require the court to lay down the standard by which they are to be estimated. Yet the books have furnished us no gauge or mathematical process to aid us in the performance of this duty. But the law is that the plaintiff is only entitled to recover the pecuniary value of the injuries sustained, and so we lay it down to you. In its application to the question of damages for the physical pain suffered by the plain-

tances; that, if it seeps as far as a well, it may communicate the disease to persons using the well-water; and that there are wells in the premises adjoining the proposed extension of the cemetery? (1899, *Lowe v. Prospect Hill Cemetery Ass'n*, 58 Nebr. 94, 78 N. W. 488.)

The plaintiff lived in a house five hundred feet from a building owned by the defendant city and located in a small public park. An epidemic of smallpox broke out in the State College in the city. The defendant isolated twelve smallpox patients in this building, acting under general statutory authority to isolate cases of contagious disease. May the plaintiff restrain the defendant from so doing? (1909, *Manhattan v. Hessin*, — Kan. —, 105 Pac. 44.)

**CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:**

*A. J. Willard*, "Principles of the Law: Personal Rights," c. XXIV, Assault, pp. 199-203.

*Herbert Spencer*, "Justice," c. IX, The Right to Physical Integrity.

*Henry Sidgwick*, "Elements of Politics," c. IV, § 2, and § 4, par. I.

*John Austin*, "Jurisprudence, or the Philosophy of Positive Law," 4th ed., vol. II, p. 815 (Lecture XLVII).

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law, c. XI, § 339, p. 335.

*Thomas E. Holland*, "Elements of Jurisprudence," 9th ed., c. XI, par. I, p. 160.

*Theodore D. Woolsey*, "Political Science," § 21.

*Charles S. M. Phillipps*, "Jurisprudence," b. I, c. I, § 1, p. 80, c. II, § 57, p. 113.

*John W. Salmond*, "Jurisprudence," § 73.]

tiff, you must exercise your own discretion, governed by your own sense of justice and right, taking care not to indulge in your imagination or sympathies, so as to be led into an assessment of damages that would be unjust or oppressive to the defendant."

The jury rendered a verdict of \$10,000, for which, after the overruling of a motion for a new trial, judgment was entered June 19, 1866.

The errors assigned were:

1. The Court erred in instructing the jury that the pain and personal affliction incident to the injury were to be compensated in damages.

2. The Court erred in instructing the jury as follows: "But the law is that the plaintiff is only entitled to recover the pecuniary value of the injuries sustained, and so we lay it down to you. In its application," etc.

3. The Court submitted no rule to the jury by which damages were to be estimated for pain and mental suffering, but left the question of damages for pain and suffering to the unlimited discretion of the jury.

*J. R. Thompson* and *J. C. & F. F. Marshall*, for plaintiffs. . . .

*J. Sill, Spencer & Marvin* and *J. H. Walker*, for defendant. . . .

The opinion of the Court was delivered, January 7, 1867, by

STRONG, J. The argument addressed to us on behalf of the plaintiffs in error is one which has often been urged, but always unsuccessfully. It is said the plaintiff below is entitled to no more than compensation measured by the pecuniary value of the injury he had sustained; that pain and personal suffering have no pecuniary value; that there is no standard by which they can be estimated; and that if a jury are allowed to take them into consideration in assessing damages, they must guess both at the intensity of the pain and at the sum which would be a compensation for it.

Hence, it is urged that inquiries into these subjects are too refined for a jury, or for any human tribunal, and that compensation ought to be allowed for nothing that cannot be measured by some defined rule. It must be admitted, that it is easier to answer this by authorities than it is by reasoning. The theory of a jury trial undoubtedly is, that it accomplishes certain results by certain rules. Ordinarily, it measures damages according to some known and recognised standard. That standard is, in most cases, a common and acknowledged measure adopted as a lesson of human experience. But where there is, and can be, no such experience, or none that can be known, damages might as well be determined by the casting of dice as by the verdict of a jury. It is conceded, they must be estimated in money. But what is the pecuniary worth of a pain? If it must be determined, it is either nothing, or it is variable according to the conjecture of those who are required to estimate it; and they must guess not only its intensity, but its value in dollars and cents. It would seem that judicial tribunals ought not to be under the necessity of deciding anything so indeterminable. Damages,



if recoverable at all, ought to be such as can be measured by some comprehensible rule — some rule that can be applied to human affairs.

Notwithstanding all this, however, it is undoubtedly true, that in some actions for personal injuries, juries in estimating the damages are to take into consideration the personal suffering caused by the wrong. So are the decisions. In cases of libel or slander, of wilful torts to the person, and in cases of negligence other than those that are breaches of contract, in cases of negligence which causes a personal injury, it has often been held that a jury may take into consideration the bodily and mental pain attendant on the injury. It must be admitted that it is no more possible to determine the pecuniary value of pain, in this class of cases, than in such a one as we now have before us. But such actions are not remedies sought for broken contracts. The wrongs complained of bear a nearer resemblance to a public offence. In assessing damages in such actions, juries are always allowed a larger license than in actions on contracts, and with some reason. In this State, at least, it seems to be the doctrine, that the circumstances attending such injuries may warrant an assessment of damages beyond those that are merely compensatory. It might well be, therefore, that a different rule should be applied to them from that which should be applied in suits on broken contracts.

Yet it is not to be denied that the authorities recognize no such difference. In this State the question has never directly arisen; but I know of no decision anywhere, that a passenger personally injured by the neglect of a carrier to transport him safely, has been denied compensation for the pain caused by the injury. Such compensation is denied to one who sues for an injury to his relative rights; but the immediate sufferer has been held entitled to it whenever the question has been raised. And that such is the law is shown by the precedents. Chitty, in vol. 2d of his work on Pleading, page 647, gives the form of a declaration by a passenger against the owners of a stage-coach for overloading and improperly driving it, whereby the coach was overturned and the plaintiff's leg was broken. In each of the counts, the great pain of the plaintiff is laid as a substantial injury. And so far as any decisions of the English Courts are to be found upon this subject, they recognize the right of a plaintiff to damages for such a cause. . . . I do not find that it has been even doubted in any court. Juries are required to estimate in the best way they can, what is a just recompense for pain suffered. . . . It follows, that the first assignment of error in this record cannot be sustained.

The second relates to the instruction given respecting the mode of assessment. Was that erroneous? The jury were told that the plaintiff was only entitled to recover the pecuniary value of the injuries sustained, and that in the application of this rule to the question, what damages should be given for physical pain suffered, they must exercise their own discretion, governed by their sense of justice and right, taking care not to indulge in their imagination or sympathies, so as to be led

into an unjust or oppressive assessment. It is difficult to see how more precise instructions could have been given. The assessment was not left to the ungoverned and unlimited discretion of the jury. It may be and it probably is the fact that the damages found were excessive and quite unreasonable. There must always be danger of such assessments, if a jury is at liberty to fix a valuation upon something that cannot be valued. But this is irremediable by us. The only palliation that remains in such a case (it is not a cure), is the free exercise of the power which the Court of Common Pleas has to grant new trials.

*The judgment is affirmed.*

### 30. BALLOU v. FARNUM

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1865

11 AL. 73

TORT against the trustees named in a mortgage executed by the Norfolk County Railroad Company upon their railroad and franchise, seeking to recover for a personal injury sustained by the plaintiff by being run against by a car of the defendants. The declaration alleged that by this act of the defendants he was hurt and put to great expense; and, being before able to earn large sums by his business, was rendered unable to labor in and conduct his business, and deprived of the earnings which he would otherwise have made. No objection was made to the form of the declaration.

At the second trial in this Court, before *Gray, J.*, after the decision reported in 9 Allen, 47, the plaintiff was allowed, in order to show his bodily and mental capacity before the accident, and the extent of his injury, to introduce evidence that before the accident he owned and carried on a large mill for the manufacture of fancy cassimeres; used to select the patterns and colors which required constant attention and thought; bought part of the stock, hired the workmen, and agreed with them for their wages; superintended the putting in of machinery; conducted an extensive correspondence, and twice a year took an account of stock; and that since the accident he had been able to do very little that required mental application or physical labor.

The plaintiff then proposed to ask witnesses of suitable knowledge and experience whether the work at his mill was as well done after the accident as before; whether after the accident the business was conducted at a profit or a loss; what were the value and the usual compensation, at the time of the accident and since, of such services as the plaintiff performed before the accident, and of such as he could perform after it; and what compensation a person of the skill and capacity of the plaintiff would command in the market at the time of the accident and since. But all this testimony was objected to by the defendants, and excluded.

The defendants requested the presiding judge to instruct the jury that the plaintiff, if his business capacity was superior to that of men in general, was not on that account entitled to greater damages. The judge declined so to instruct the jury, and instructed them that if the defendants were liable in this action the plaintiff was entitled to recover, as part of his damages, compensation for his loss of physical and mental capacity, so far proved to have been caused solely by the defendants' negligence; that there was no rule of law that one man was or was not exactly like another; that it was a question of fact for the jury what injury the plaintiff has suffered by the defendants' negligence, not what any other man had suffered; that the evidence of his occupation and capacity was admissible only in order to enable the jury to judge of the injury to his capacity; that this was an action for an injury to the man, and not for interfering with his business, and the damages must be limited to the personal injury to him occasioned by the defendants' negligence.

The jury returned a verdict for the plaintiff, with \$9,687.50 damages; and the case was reported for the determination of the whole Court, upon the competency of the above evidence, and the correctness of the above instructions.

*F. H. Dewey* and *E. B. Stoddard*, for the defendants. The law makes no distinction between men, and damages sustained by them are not to be measured by the wealth, occupation, or capacity of the person injured. Evidence of the plaintiff's wealth, in owning a large mill, was improperly admitted. . . .

*G. F. Hoar* (*P. E. Aldrich* with him) for the plaintiff.

COLT, J. The plaintiff in this action is entitled to recover as damages compensation for all such personal injury to him as was the necessary and proximate consequence of the alleged wrongful act of the defendants, and for such other injury as was the direct and natural, though not the necessary consequence thereof, and which is specially alleged in his declaration. It is averred that, being a manufacturer, before the accident able to earn large sums of money, he was by the injury rendered unable to labor in and conduct his business. No objection was taken to the form of the allegation, and it is to be regarded as a sufficient statement that the injury has produced a diminution of capacity, either mental or physical or both. For the purpose of proving the extent of the injury, the plaintiff was permitted to introduce evidence to show his previous occupation as a manufacturer, the nature of the duties he was accustomed to perform, and that since the accident he was able to do very little that required mental application or physical labor; and it is now insisted that this evidence was improperly admitted. It is said that if the jury were permitted to take into consideration as an element of damage the loss of intellectual power and capacity of the plaintiff for business, the inquiry must of necessity include an estimate of the future profits of the business in which the plaintiff was or might thereafter be

engaged; that such an estimate can furnish no safe basis for fixing the compensation, and must at best be conjectural and uncertain.

In general the profits of a future business are indeed too remote and uncertain to be relied on as an element in the estimate of damages. . . . If this evidence had been offered by the plaintiff with a view of increasing the damages on account of his wealth or peculiar skill as a manufacturer, or the large profits he would be able to realize in his future business, and it had been admitted for that purpose, the argument of the defendant would be entitled to further consideration. But it was offered only to show the extent of the personal injury by reason of the loss of mental vigor and endurance thereby occasioned. The diminution, whatever it was, could only be shown by evidence of strength before and weakness afterwards as manifested in the ordinary pursuits of the plaintiff. The presiding judge admitted it only for this restricted purpose, and carefully instructed the jury that it was admissible only in order to enable them to judge of the injury to his capacity, and that the action was for an injury to the man, and not for interfering with his business.

In all actions of this description, and particularly in those in which damages for mental suffering or loss of mental capacity are sought to be recovered, the difficulty of furnishing by evidence the means of measuring the extent of the injury, so that the jury may be able to award with any certainty a pecuniary equivalent therefor, is at once apparent; and in this difficulty the defendants find argument for the support of their objection. But the answer is, that the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree. In a variety of actions founded on personal torts, and in many where no positive bodily harm has been inflicted, the plaintiff is permitted to recover for injury to the feelings and affections, for mental anxiety, personal insult, and that wounded sensibility which follows the invasion of a large class of personal rights. The impossibility, in all such cases, of precisely appreciating in money mental suffering of this description is certainly as great as is suggested where the question is what shall be allowed for a permanent injury to mental capacity. The compensation for personal injury occasioned by the negligence or misconduct of others, which the law promises, is indemnity, so far as it may be afforded in money, for the loss and damage which the man has suffered as a man. Some of its elements may be bodily pain, mutilation, loss of time and outlay of money; but of more important consideration oftentimes is the mental suffering and loss of capacity which ensues. Of these several items of injury, if compensation is to be confined to those capable of accurate estimate, it will include but a small part, and must exclude all those injuries commonly regarded as purely physical; for the difficulty in ascertaining a pecuniary equivalent for the last named is precisely the same and quite as great as any that have been suggested. In fact, it will be found impossible to fix a limit to injuries of a physical nature so as to exclude from consideration their effect on the mental organization of

the sufferer. The intimate union of the mental and physical, the mutual dependence of each organization — if indeed, for any practical purpose in this regard, they can be considered as distinct — the direct and mysterious sympathy that exists whenever the sound and health condition of either is disturbed, render useless any attempt to separate them for the purpose indicated. It is obvious, upon a moment's reflection, that the powers and usefulness of the limbs and senses in ministering to the necessities and pleasures of the individual are to a great extent to be measured by the knowledge, experience and taste which he possesses, and which are purely qualities of the mind. Take the case of an injury to the right arm of a skilful painter or musician, for example. To show the extent of his injury, the plaintiff produces evidence of the use he was able to make of the arm before and after the accident. From such evidence alone the jury judge of the plaintiff's loss. Such proof is constantly resorted to without objection in these cases. And still the chief value of the limb to its possessor consists in its skilful use, as controlled and directed by the cultivated taste and education of the plaintiff; and the chief loss to him is the loss of the power to make these purely intellectual endowments available for his pleasure or benefit. Or suppose the injury be to one of the five senses. Can any rule be adopted which shall limit the damages to that portion of the injury suffered which may be called only bodily?

There is a class of injuries, especially those which affect the brain and nervous system, to which this case seems to have belonged, where, by common observation, the most satisfactory symptom and proof of the physical injury is to be found in the weakness and derangement of the intellectual faculties. Upon the whole, then, upon principle we can see no error in the admission of the evidence, with the accompanying instructions. . . .

The cases in New York not only sustain the grounds upon which we place this decision, but some of them go further than the true rule of damages in such cases would seem to require. *Lincoln v. Schenectady, &c. Railroad*, 24 Wend. 434; *Ransom v. New York & Erie Railroad*, 15 N. Y. 415; *Tilley v. Hudson River Railroad*, 24 N. Y. 471.

*Judgment on the verdict.*<sup>1</sup>

30 a. FETTER v. BEAL

KING'S BENCH. 1697

1 *Ld. Raym.* 339

[Printed post, as No. 537.]

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<sup>1</sup> [For the application here of the principle of certainty of damage by loss of commercial profits, see Title C, Sub-title (II), Topic 1, post, Nos. 149-152.]

31. FRY *v.* DUBUQUE & SOUTHWESTERN RAILWAY  
COMPANY

SUPREME COURT OF IOWA. 1877

45 Ia. 416

APPEAL from Jones District Court. Wednesday, March 21. It is claimed by the plaintiff that the defendant permitted snow and ice to accumulate on the steps and platform at its station house in Monticello, whereby the same became dangerous, and that the plaintiff slipped and fell therefrom, whereby she was greatly injured. There was a jury trial. Verdict and judgment for the plaintiff. Defendant appeals.

*Clark & Moulton* and *N. M. Hubbard*, for appellant.

*J. Q. Wing* and *E. Keeler*, for appellee.

SEEVERS, J. The evidence satisfies us that the injury received by the plaintiff was not of a permanent character, nor was it at all times painful. At the trial the plaintiff testified: "I still have to bathe my limb in cold water sometimes and wrap it up; after walking it gets painful." The limb had been previously injured, and the attending physician testified: "I think her limb was in a fair way to recover permanently after the first injury, and I would not say there is no chance for a permanent recovery now." Such being the evidence as to the character of the injury and the probabilities as to future suffering, the Court gave the jury the following instruction:

"9. If you find from the evidence, as hereinbefore stated, the plaintiff is entitled to recover, then you will take into consideration the nature and character of the wound or injury, the present situation and condition of her limb, the pain she has suffered, or which from the evidence she will suffer, and you will give her such damages as will fairly compensate her for all past, present or future physical suffering or anguish which is, has been or may be caused by said injury."

If the injury is of a permanent character, it is conceded there may be a recovery for future physical suffering, and such was the ruling of this Court in *Collins v. Council Bluffs*, 32 Iowa, 324. But it is claimed such is not the rule if the injury is not of that character. We, however, think otherwise, and hold that if the injury is not of a permanent character, but the reasonable certainty is, as shown by the evidence, there will be future pain and suffering there may be a recovery therefor. There was evidence tending to show there might be such suffering, sufficient to authorize the court to submit such question to the jury. We, however, are of the opinion the instruction is too broad. . . . Under the law, the jurors had no right to allow damages for mere possibilities, and such under the instruction they could without doubt have allowed.

*Reversed.*



32. ATLANTA STREET RAILROAD COMPANY *v.* JACOBS

COURT OF APPEALS OF GEORGIA. 1891.

88 *Ga.* 647, 15 *S. E.* 825

MRS. JACOBS sued for damages from personal injuries, alleging that she had a separate estate. The other material allegations of her declaration are quoted in the opinion. Before the trial defendant moved to dismiss the case because plaintiff's husband was not joined in the suit, it appearing from the declaration that she was a married woman. This motion was overruled, and this ruling is one of the errors assigned. The jury found for plaintiff \$3,000. Defendant's motion for new trial was overruled, and it excepted.

The evidence for plaintiff was to this effect: she was quite stout, weighing 165 or 170 pounds. She had twelve children, ten of them at home. Her oldest child was thirty-two, and her oldest child at home was twenty-eight. Otherwise her own age did not appear. Before she was hurt she had been accustomed to doing most of the sewing for the family, using a sewing-machine, and did all of the cooking. Since she was hurt she has had to employ a servant, not being able to do the cooking, and she cannot use a sewing-machine. Her husband is living, and there are three children living with them, over twenty years of age. She boarded a car of defendant, paid her fare, and when she got to the place at which she wished to stop, rang the bell. The driver stopped long enough to let her get to the rear platform and get down upon the step, but as she was about to step to the ground, and before he had stopped long enough for her to get off, he started the car and she fell. Both her knees were hurt; her right knee has never got well, and probably never will. She suffered much, and still suffers from the injury. She can get about in the house by holding to the walls and chairs, but cannot get around in the yard without a crutch, etc. The evidence for defendant was, that when plaintiff rang the bell the driver stopped the car, and plaintiff went out the rear door and fell; and that the car was not started nor moved at all until the driver went to her and helped her up.

In addition to the grounds that the verdict was contrary to law, evidence, etc., the motion for new trial alleges that the verdict was grossly excessive, and assigns error on the following parts of the charge of the Court: . . .

"A physical injury which destroys or impairs the power of a human being to labor is an actionable injury, and this is true though the person injured should be a married woman. A physical injury which impairs the capacity of a married woman to labor is classified by the law with pain and suffering. It is not to be measured by pecuniary earnings, for such earnings, as a general rule, belong to the husband, and the right of action for their loss is in him, but the wife herself has such an interest in her working capacity as that she can recover something,

in a proper case, for its impairment, and what she is allowed ought to be more or less according to the nature of the injury and the length of time during which the pain and deprivation is likely to continue. Under such circumstances there is no known rule of law by which witnesses can give you in dollars and cents the amount of injury, but this is left, as I have remarked, to the enlightened conscience of impartial jurors."

*John L. Hopkins & Son*, for plaintiff in error.

In this case the plaintiff could only recover for pain, and in the preceding section the Court had charged fully upon this branch of the case. The destruction of the power of labor was not a separate item for which a recovery could be had; it was but one element of pain. By giving this section in the charge, the Court in effect allowed a double recovery for the same thing, and the jury promptly took advantage of the opportunity, as shown by the amount of the verdict. The impairing of plaintiff's working capacity was not an element of damages. If proper at all, it should have been submitted under the head of pain.

*Hoke & Burton Smith and W. H. Rhett*, contra.

BLECKLEY, C. J. 1. The contention of the learned counsel for the railroad company is that it was error to submit the impairment of the power of a married woman to labor as a distinct element of damage, and allow her to recover for it. He insists that this damage was not sued for, and that in another part of the charge of the Court the entire subject of pain was dealt with; hence the jury were allowed to give for impairment of her power to labor what they pleased, even though it were greatly more than her husband would be entitled to recover were he the plaintiff in the action. It is true that it is not expressly alleged in the declaration that the capacity of Mrs. Jacobs, the plaintiff in the court below, to labor was impaired, but a definite injury to her person is alleged and described, which incapacitated her to walk without the aid of crutches. An injury which disables one from walking without crutches necessarily impairs to some extent ability to labor. It follows that such impairment is embraced by necessary implication in what the declaration alleges. The injury sued for being one which incapacitated the plaintiff to walk without crutches, and consequently one which impaired her ability to labor, compensation for this impairment of her physical perfection was a part of the redress for which the action was brought, and to which the plaintiff, when she verified by evidence the case set out in her declaration, was entitled. According to the declaration, the plaintiff "was thrown violently to the ground, striking her knees on the stone pavement of the street. The fall caused great pain and suffering and injury. She will always suffer from said injury, and her capacity for enjoyment has been greatly lessened. Her knees were very much bruised, and the bones much injured. She has been compelled ever since to remain under the treatment of surgeons. She has been confined to her bed six weeks, and has been unable to walk at all since the occurrence except on crutches. The injury to her knee is permanent, and she will be compelled to use



crutches all her life. She has been put to great expense and suffering on account of said injuries, and has been entirely unable to care for herself." She claims damages in the sum of \$1,500.

2. Grant that the entire subject of pain was dealt with in a previous part of the charge of the Court, the jury could not have understood, from the instructions added on the subject of impaired power to labor, that they were to give double damages for pain and suffering. On the contrary, they must have understood that the general instructions related to pain other than that discussed in the special instruction. It seems to us that the loss or material impairment of any power or faculty is matter for compensation, irrespective of any fruits, pecuniary or otherwise, which the exercise of the power or faculty might produce; and irrespective, also, of any conscious pain or suffering which the loss or impairment might occasion. Every person is entitled to retain and enjoy each and every power of body and mind, with which he or she has been endowed, and no one, without being answerable in damages, can wrongfully deprive another, by a physical injury, of any such power or faculty, or materially impair the same. That such deprivation or impairment can be classed with pain and suffering was ruled by this Court in *Powell v. Railroad Co.*, 77 Ga. 200, 3 S. E. Rep. 757; and, inasmuch as enforced idleness or diminished efficiency in offices of labor is calculated to give rise to mental distress, it is not error to describe the thing by its effects, and call it pain and suffering. But it need not be so called necessarily, and consequently it was not misleading for the Court to treat of it separately as a subject-matter for compensation in damages, although the plaintiff was a married woman. Touching this element of her case, the measure of damages would be neither more nor less than that which the law recognizes for pain and suffering. There is no standard but the enlightened conscience of impartial jurors. The other points made by the record were not argued by counsel, and, if they embrace any error, we have been unable to discover it.

*Judgment affirmed.*<sup>1</sup>

### Topic 3. Illness caused without Bodily Impact<sup>2</sup>

#### 33. ALLSOP v. ALLSOP

EXCHEQUER OF PLEAS. 1860

5 H. & N. 534

DECLARATION. That, before the committing of the grievance, the said Hannah was the wife of the plaintiff William Allsop; and the de-

<sup>1</sup> [NOTES:

"Recovery by wife of damages for impaired earning power." (H. L. R. IX, 473; XIV, 61.)

"Decreased earning capacity as element of damages." (H. L. R., XV, 76.)]

<sup>2</sup> [For the application here of the principle of remoteness of consequence, see Book II, Title C, Sub-title (II), post.]

fendant, on divers occasions, falsely and maliciously spoke and published of the plaintiff Hannah the words following (to the effect that he had had carnal connection with her whilst she was the wife of the plaintiff William Allsop); Whereby the plaintiff Hannah lost the society of her friends and neighbours, and they refused to and did not associate with her as they otherwise would have done, and she was much injured in her credit and reputation, and brought into public scandal and disgrace: and, by reason of the committing of the grievances, the said Hannah became and was ill and unwell for a long time and unable to attend to her necessary affairs and business, and the plaintiff William Allsop was put to and incurred much expense in and about the endeavouring to cure her of the illness which she laboured under as aforesaid by reason of the committing of the said grievances; and the said William Allsop lost the society and association of his said wife for a long time in his domestic affairs, which he otherwise would have had. Demurrer and joinder.

*Quain*, in support of the demurrer. The words in this declaration are not actionable without special damage, and no sufficient special damage is alleged. . . .

*Prentice*, contra. Admitting that the declaration does not show a cause of action in respect of the loss of society by the plaintiff Hannah, there is an allegation that "by reason of the committing of the grievances the said Hannah became and was ill and unwell for a long time and unable to attend to her necessary affairs and business." The question is whether such illness is not a sufficient special damage to constitute a cause of action. [POLLOCK, C. B. The law deals with damage which might reasonably result, not with that which may depend on the idiosyncrasy of the party. Suppose the allegation was that the plaintiff, being a person liable to the gout, was thrown into a violent fit of anger, and was seized with a fit of the gout.] It is submitted that it would be sufficient; since the defendant was guilty of a wrongful act. . . .

POLLOCK, C. B. We are all of opinion that the defendant is entitled to judgment. There is no precedent for any such special damages as that laid in this declaration being made a ground of action, so as to render words actionable which otherwise would not be so. We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what a dangerous use might be made of it. In actions for making false charges before magistrates, for giving false characters, and for torts of all kinds, illness might be said to have arisen from the wrong sustained by the plaintiff. The case of *Ford v. Monroe*, 20 Wendell, 210, is the only authority that has any tendency to throw light on the argument; but we ought not to act upon the authority of that case, opposed as it is to the universal practice of the law in this country. The courts here have always taken care that parties shall not be responsible for fanciful or remote damages, or in fact any that do not fairly and naturally result from the wrongful act itself. . . .

In one sense nothing is more natural than that such [suffering] should be the case. So there are many other consequences which may follow in libel and slander in respect of which there is no remedy. This particular damage depends on the temperament of the party affected, and it may be laid down that illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground of action. . . .

BRAMWELL, B. I am of the same opinion. The question seems to me one of some difficulty, because a wrong is done to the female plaintiff who becomes ill and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck by what has been said as to the novelty of this declaration, that no such special damage ever was heard of as a ground of action. If it were so I am at a loss to see why mental suffering should not be so likewise. It is often adverted to in aggravation of damages, as well as pain of body. But if so, all slanderous words would be actionable. Therefore, unless there is a distinction between the suffering of mind and the suffering of body, this special damage does not afford any ground of action. There is certainly no precedent for such an action, probably because the law holds that bodily illness is not the natural nor the ordinary consequence of the speaking of slanderous words. Therefore on the ground that the damage here alleged is not the natural consequence of the words spoken by the defendant, I think that this action will not lie. . . .

*Judgment for the defendant.*

### 34. WRIGHT v. SOUTHERN EXPRESS COMPANY

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF TENNESSEE.  
1897

80 Fed. 85

ACTION by Florence H. Wright against the Southern Express Company.

This is an action for damages for personal injuries alleged to have been sustained in a struggle between the plaintiff and the defendant's agent over a parrot in its cage, constructed of wooden strips tacked together with nails, such as is commonly used in shipping birds. It had come from Nicaragua, consigned by a brother to his sister Mrs. Williams. The plaintiff, being a sister of the consigner and consignee, had heard, according to her story, that the bird was to be sold for charges, delivery to the consignee having been delayed by her absence. The plaintiff, appearing at the express office, proposed to buy the bird. Parleying ensued, which resulted in her paying the amount of the charges, executing a receipt on the delivery book, and the consequent delivery to her then and there. She laid her hands upon the cage to send it away by her servant, accompanying her, when the agent was warned by a bystander

that the plaintiff was taking the bird as her own through a pretended purchase from him, contrary to his understanding of the transaction, according to his contention, and contrary to the bystander's notion of the agent's right to thus dispose of the bird. Anticipating trouble for himself and his company, the agent forbade the plaintiff to take away the bird, laid his hands upon the cage to prevent her from delivering it to her servant, and thereupon the struggle for its possession ensued. Upon the facts proved, the Court peremptorily instructed the jury that the plaintiff was a trespasser and a wrongdoer, or else should have yielded a ready assent to the rescission of the supposed purchase from the agent for the correction of the mutual misunderstanding between them, and left the bird in the express office; that the agent had a right to retain it in the office, and to use such force as was necessary to accomplish that purpose; but that the defendant company would be liable for any unnecessary or excessive violence in defending his possession. Having received such other instructions as the case required, the jury returned a verdict for the plaintiff, assessing the damages at \$3,500. There had been a previous trial of the case, Mr. District Judge *Clark* presiding, and also a verdict for the plaintiff for \$2,500. The instructions in that case proceeded upon a somewhat different theory of trying the case, not being confined, as in this trial, to the question of excessive violence. That verdict was set aside, and a new trial granted, mainly upon the ground that the evidence did not make it reasonably certain that the plaintiff had been injured by the struggle in the express office. . . .

The testimony as to the injury of the plaintiff consisted of her own description of her physical and mental sufferings, and that of medical men who had attended her or examined her, some of them for the purpose of giving their evidence, and some for purposes of treatment. Witnesses testified as to her condition of health, her habits and conduct of life, before and since the occurrences at the express office. This testimony was met by the defendant company with the testimony of medical men speaking to a hypothetical case, or men who had examined her while under treatment, and especially the physician who treated her at home after the altercation at the express office, and such other witnesses as could speak of the plaintiff's physical condition, habits of life, and conduct. Among other incidents of her life, it appeared that she had some years before been thrown from a carriage, and received serious injury affecting her spine, for which she had in the intervening time been often treated. Her own proof, and that of her medical men, was that she had recovered from this injury, she producing, among other testimony, that of a New York physician who had certified to her good health in aid of her application to become a member of the Episcopalian Order of Deaconesses. Around this old-time accident, and the conflict over the bird at the express office, the testimony of the plaintiff was gathered to show that she had entirely recovered from the previous injury, and that all her pain

and sufferings were attributable to the violence of the struggle with the defendant company's agent; and on the part of the defendant to show that she had never been a well woman, had never recovered from the former injury, was not at all injured by the quarrel over the bird and cage, and that she was a physically frail woman, with mental disorders that made her irascible, quarrelsome, and unreasonable in her conduct towards other people.

There was a motion by the defendant company to direct a verdict, both at the end of the plaintiff's testimony and at the end of all the proof, which motion the Court refused to grant, but submitted the case to the jury as hereinbefore indicated.

*J. H. Watkins and E. E. Wright, for plaintiff.*

*Geo. Gillham and F. G. Dubignon, for defendant.*

HAMMOND, J. (after stating the facts). . . . My experience in the trial of this class of cases has grown to be quite a large one, through a somewhat long judicial service, and properly I may say that I quite thoroughly agree with some of the views expressed in a recent article in the North American Review of February, 1897, as to the alarming increase of favoritism in the jury box towards the plaintiff in litigation of this character. It is not necessary to analyze or descant upon the causes that may exist for this favoritism. That it does exist is beyond question, and the preservation of the right of trial by jury itself is, in my judgment, involved in the duty of the Courts to protect the litigants and the jury against the indulgence of an overweening partiality for verdicts giving damages for personal injuries that are not clearly and satisfactorily established by the proof. The trial judge is apt, with the approval of revising courts, to resort to the usurpation of the functions of the jury, and direct a verdict when he should not, thereby depriving the citizen of his right to trial by jury, in order to escape the consequences of such favoritism in the jury box. Hence he should freely exercise the only power there is or can be under our constitutional guaranties to set aside the verdict in this class of cases, whenever he has reason to believe that the verdict has been influenced by that kind of partiality to which the writer in the North American Review adverts. I should not feel authorized to cite mere lay writing in aid of judicial judgment, were it not for the fact that there is there cited abundant support in expression of opinion from the bench itself. In almost every charge I have given for many years I have adverted to the existence of this favoritism, and sought to guard the jury against it, as I did in this case, but have often felt, when the verdicts are rendered, that there is some foundation for the constantly recurring criticism which we see everywhere arising out of this fact, that the juries cannot be implicitly trusted to do even-handed justice in personal injury cases. I am glad to say that sometimes they do act with the utmost impartiality, but often they clearly do not. I have seen them act unjustly towards the plaintiff, and have set aside their verdicts on that account. There are possibly extremes of criticism on the subject,

and the fault is not always with the jury perhaps, so that the difficulty is not entirely blamable to the system. But what I do mean to say on this occasion, as a justification to the action now taken, is that it is my judicial habit in this class of cases to exercise the right of inspection of the verdict much more readily and freely than in other classes of cases, where the occasion for its exercise does not so often arise. The trial judge alone can employ this remedy, and that condition demands at his hands the careful use of the power to meet any extraordinary requirement.

At first, within my judicial experience large verdicts for damages in personal injury cases were confined to those instances where the severity of the injury was manifest on the body itself; to cases where cripples had been made and maiming had been done. More recently there has been a very noticeable increase of cases where apparently there has been the slightest physical disturbance, and the facts disclosed only the slightest causes of injury, and yet there is set up the largest claim for damages, because of some alleged occult injury to the spinal cord or the brain or some other invisible organs or tissues of the body; it being claimed that there has been left as a permanent affliction some "traumatic neurosis," as in this case. I do not know whether it is authentic or not, but I have lately seen somewhere in my reading the statement of a case where a woman had recovered large damages against a railroad company because of a physical injury that made her barren, in the opinion of the expert doctors who were examined as witnesses in her behalf, but, pending long-delayed proceedings, she had given birth to children before the appeal was heard. There are many cases told of crutches thrown away after verdict. This class of personal injury litigation requires at the hands of the Court and jury, unquestionably, far more vigilance of treatment than those cases where the injury is obvious. They afford an almost unlimited scope for the exhibition of unreliable, if not false, testimony. They depend largely for success upon the bare opinions of medical men employed as expert witnesses by the party offering them.

The Courts and juridical writers have often commented upon the unsatisfactory character of all expert testimony, and many suggestions have been made for mitigating the evils attending it, such as the employment only of official experts, not at all selected by or in any way connected with the parties to the suit. Within a few weeks there has occurred a case in my own experience where the injury claimed was of this hidden nature. The plaintiff's own doctor testified with great fulness to the impoverishment of nerve nutrition, and a consequent permanent disability for physical exertion adequate to remunerative labor. Expert physicians were introduced to support this theory. The railroad doctors, on the other hand, with equal confidence, testified that there had been no serious impairment of the man's physical abilities. In numbers and professional character these doctors on either side were of equal weight. It was suggested by one of the counsel that the Court appoint a medical



expert independently selected, and it was agreed between the parties that the Court should choose two such examiners. The Court declined to make any selection, but allowed the parties themselves each to name a medical man. This was done, they made a wholly independent examination of the plaintiff, and both testified that there was no serious or permanent injury then existing. Notwithstanding this, and the corroboration of circumstances showing that the injury done to the body was apparently not serious, and the violence of the fall from the car was apparently not greater than usually attends a fall of five or six feet, the jury gave an enormous verdict for the plaintiff, which, upon a motion for a new trial, I set aside for precisely the same reasons that actuate me in this case, although the negligence of defendant company was clear, if not admitted.

I do not mean to impute to the medical profession any complaisance of professional opinion that does not equally belong to the legal profession and all other professional or quasi professional experts; but with all men, in all employments, benevolence and sympathy with those who seek a mere opinion upon subjects of expert knowledge dominate the judgment that is given. If a lawyer comes to a brother attorney, and wishes him to estimate the value of his professional services, he is almost certain to put the estimate at the most that is possible to meet the views of him who applies, because it is a kind of courtesy of benevolence to think as well of one's services as that one does himself. If a client comes to a lawyer and wishes professional advice, the lawyer is very apt to shape his opinion in accordance with the wishes of the applicant, and not only that, but he is willing to go into the courts to vindicate that opinion, and will vigorously adhere to it after it has been decided against him through all the courts, and by that of last resort. It is a human tendency, and is the weakness of all expert testimony. Doctors of medicine are as much liable to follow this tendency as other experts, if not more, and it is no imputation upon their fairness and their honesty and skill to challenge and scrutinize any opinions that they offer on either side of a controversy like this. . . .

At all events, verdicts for large damages in cases of that character should not be made final until there has been such assurance of justness as would be founded in an adequacy of proof, and not in the mere human sympathy of jurors, which is not always justified by the particular facts. Particularly there is nearly always indiscrimination in this regard where women and other helpless creatures are involved, as against strong and aggressive men, who are often expected to yield more than the law requires to sex or weakness in an adversary. Often the mere sentiment of gallantry to woman dominates the jurors and the judge when it should not. It is this doubtful character of the proof adduced in this case, as to the existence of the plaintiff's injuries, and the presence of the disturbing elements of possibly an undue sympathy on the part of the jurors, that causes me to hesitate about the fairness of this verdict, to doubt its

justness, and to feel that it is unreasonable that it should have been found upon the proof in this case. . . .

But, as before remarked, if this were all, I should most assuredly hesitate to disturb the verdict of the jury. Still, I think the apparent ease with which the jury reached the conclusion that there had been any excessive violence on the part of the agent of the defendant company may be considered as an illustration of the complaisance with which they have regarded the proof in favor of the serious nature and character of the injuries which she claims to have suffered, and, taking the two issues together, it shows that the jury might have been dominated by an undue sympathy for an afflicted woman, and too great a readiness to attribute her affliction to the occurrence at the express office. . . .

Every medical man who spoke in favor of the injury being caused by the struggle over the bird and cage, that did not injure the cage at all or only slightly, spoke with evident hesitation to attribute so formidable an injury to so slight an origin. . . . Taken altogether, these opinions of the medical men did not and do not impress me as being sufficiently well founded to justify this verdict. On another trial it may be that the facts and circumstances will show that the plaintiff has been injured by that which occurred at the express office, and I am well aware of the fact that I am assuming a grave responsibility in setting aside a verdict which is the second in the plaintiff's favor; that I am in some danger of trenching upon the right of the plaintiff to have the weight of this proof determined by the jury, and not by me; but the law commits this responsibility to the hands of the trial judge for the very purpose of protecting parties from what may seem to be unjust verdicts; and so I must accept that responsibility, give expression and effect to my decided conviction that the proof does not sustain the verdict, and that it is an injustice to the defendant company to permit it to stand as a reasonable verdict on such proof as we had at the trial. . . . It is better to submit the question to another jury.

*New trial granted.*

### 35. BRAUN *v.* CRAVEN

SUPREME COURT OF ILLINOIS. 1898

175 Ill. 401, 51 N. E. 657

APPEAL from Circuit Court, First District: *James Goggin*, Judge.

Action by Emma Braun against Thomas Craven. From a judgment of the appellate Court (73 Ill. App. 189) reversing a judgment for plaintiff, plaintiff appeals. Affirmed.

The appellant sued appellee in an action on the case, and filed her declaration, which contained four counts. The first count alleges that the plaintiff was living at the home of Julia Soper, in Evanston; that the defendant then and there entered the said house, and it then and there



became and was the duty of the said defendant to conduct and demean himself in an orderly and peaceable manner, and to announce or give notice and warning of his approach to and into said house, and to the presence of the plaintiff; yet the defendant, wholly disregarding his duty in that behalf, neglected and wholly failed to announce his entry to the said house to the plaintiff or any other occupant thereof, but wrongfully and wilfully then and there, entered therein unbidden, and then and there stealthily, and without warning or announcement, entered the presence of the plaintiff, greatly surprising and shocking her; that the defendant then and there demeaned himself in the presence of the plaintiff in a violent and boisterous manner, using towards her violent, abusive, and threatening language, greatly frightening, terrifying, and shocking her, whereby she sustained a severe and permanent shock to her nervous system and mind, and otherwise sustained great and permanent bodily harm and injury, and became and was sick, sore, and disordered, and so remained thence hitherto, during all which time she suffered, and still does and will ever suffer, great pain. The second and third counts are substantially like the first. The fourth count alleges the plaintiff was in a bedroom in a certain dwelling, which dwelling was the home and residence of the plaintiff, and then alleges the facts substantially as set forth in the first count. A general demurrer to the declaration was interposed and overruled, and a plea of general issue was filed.

The evidence showed that appellant lived with her sister, who was a tenant of appellee. Appellee went to the house to collect rent. His conduct, actions, and language while there are alleged to have been so negligent that they caused the injury to appellant, by fright and mental shock, which resulted in serious physical impairment. The actions and language of appellee which are the basis of this suit are given by appellant and her witnesses substantially as follows: When appellee entered the house, his tenant, the sister of appellant, was having her household goods removed therefrom. Appellant testified as to what took place, as follows:

"I was upstairs in my bedroom, sitting on the floor. Something made me look up, and Mr. Craven [appellee] waved his arms, and shouted. He seemed so big. I was flat on the floor. He said: 'What are you doing here? I forbid you moving. If you attempt to move I will have a constable here in five minutes. I refuse to take possession of these premises.' I was so frightened I was paralyzed with fear. I could not speak or move."

The brother of appellant testified:

"I remember the day that we moved from Benson avenue down to Clark and Halsted streets. I saw the defendant at our home on that day. When I first saw him, he was standing just inside the bedroom door, where my sister, Mrs. Braun, was, — on the second floor. That bedroom was the northwest room. I heard him before I saw him. I heard him say: 'Here! what are you doing? Don't you move. I refuse to take possession of these premises. I will

have an officer here in five minutes to stop these goods.' These words were spoken in a very loud and angry tone of voice. I was just out of sight, at the end of the hall, when he said, 'Here! what are you doing? Don't you move;' and then I came towards him to see what was the matter, not knowing what it was, and the rest of it I heard as he stood over her. She was sitting on the floor. As he was speaking these words he was swinging his arms, and gesticulating very wildly. On hearing these words uttered by the defendant, I hurried to the front end of the hall, and saw him standing in the door. I went clear up to him. He was standing very close to my sister — clear up to her, right by her side. She was sitting flat on the floor. He was close enough to have touched her with his hands if he had so desired to. I should say close up to her, — not six inches from her. Upon my going up there to where the defendant was, I said: 'Here, what is the trouble here? What do you want?' He turned to me, and said: 'I refuse to take possession of these premises. I will have an officer here in five minutes to stop these goods.' When he said these words, he was still close by my sister. I tried to stop him, and said, 'What is the matter?' and he turned around, and went downstairs as hard as he could go."

. . . Much additional evidence as to the effect of fright in causing injury was before the jury. A verdict was returned by the jury in favor of the plaintiff (appellant here) and her damage was assessed at \$9,000. A motion for a new trial and a motion in arrest of judgment were both overruled, and judgment was entered on the verdict. The defendant, the appellee here, sued out a writ of error from the Appellate Court for the First District to review that judgment; and by the latter court the judgment of the Superior Court of Cook County was reversed, without remanding the cause, the Appellate Court holding, under the pleading and facts appearing in the record, there was no right of recovery. From that judgment of reversal, the plaintiff in the trial Court, who was defendant in error in the Appellate Court, prosecutes this appeal.

*William Prentiss, Russell M. Wing, and James Heckman, for appellant.*

*Pliny B. Smith and Morton V. Gilbert, for appellee.*

PHILLIPS, J. (after stating the facts). The declaration in this case charges appellee with negligence in approaching the room where appellant was, and in so speaking and acting in her presence as to cause her injury. This constitutes the entire allegation on which a recovery is sought under the various counts of this declaration. In addition to the evidence above recited, it is disclosed that appellee claimed there was rent due him, and he entered the house for the purpose of collecting the same before the tenant's goods should be removed therefrom. Under this state of facts, it is necessary to determine whether the language of the appellee, his manner of entering the house, and his acts therein, are such as can be held to constitute negligence, and whether the injury sustained by appellant was such as might have been foreseen, or was such a natural and probable consequence, under the surrounding circumstances, as might reasonably have been anticipated as the probable results of such acts and language. The principle is, damages which are recov-

erable for negligence must be such as are the natural and reasonable results of defendant's acts; and the consequences must be such as, in the ordinary course of things, would flow from the acts, and could be reasonably anticipated as a result thereof. Proximate damages are such as are the ordinary and natural results of the omission or commission of acts of negligence, and such as are usual and might have been reasonably expected. Remote damages are such as are the unusual and unexpected result, not reasonably to be anticipated from an accidental or unusual combination of circumstances, — a result beyond and over which the negligent party has no control. The law regards only the direct and proximate results of negligent acts as creating a liability against a defendant. Here, appellee approached the house, and entered the same, the door being ajar. So far as the averments of this declaration are concerned, he lawfully entered the house for the purpose of collecting rent. He passed noiselessly (because of wearing overshoes) up the stairs and along the hall, approached the door of the only room he saw occupied, and used the language and made the gestures testified to by the plaintiff's witnesses without impact with plaintiff's person. He then turned and left the room, and went hurriedly to the office of the justice of the peace. These acts could not, in the ordinary course of things, have been reasonably anticipated to cause a diseased condition of appellant, — to create in her a seriously diseased condition. Appellee might have reasonably anticipated that his acts would cause excitement, or even fright; but fright and excitement so seldom result in a practically incurable disease that, from the ordinary experience of mankind, such a result could not have been expected. The evidence for plaintiff was that, by reason of the excitement and fright, a condition of chorea, or St. Vitus' dance, was produced. This is shown to be a diseased physical condition, resulting from mental suffering, superinduced by excitement and fright, unattended by injury to the person resulting from impact. Under the pleadings in this case, mere words and gestures are sought to be made actionable because of the nervous temperament of the plaintiff, without which such words and gestures would not be actionable. This would introduce and incorporate in the law a new element of damage, — a new cause of action, — by which a recovery might be had for an injury resulting to one of a peculiarly nervous temperament, while no injury would result to another in identically the same position. Of such a cause of action and liability for damage a dangerous use could be made. No such recovery is authorized under the common law, and no statute gives it. . . .

In *Allsop v. Allsop*, 5 Hurl. & N. 534, Pollock, C. B., said:

"We are all of the opinion that the defendant is entitled to judgment. There is no precedent for any such special damage as that laid in this declaration being made a ground of action, so as to render words actionable which otherwise would not be so. We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what

a dangerous use might be made of it. In actions for making false charges before magistrates, for giving false characters, and for torts of all kinds, illness might be said to have arisen by the wrong sustained by the plaintiff. . . . This particular damage depends on the temperament of the party affected, and it may be laid down that illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground of action."

. . . In *Ewing v. Railway Co.*, 147 Pa. St. 40, 23 Atl. 340, it was said:

"It is plain from the plaintiff's statement of her case that her only injury proceeded from fright, alarm, fear, and nervous excitement and distress. There was no allegation that she received any bodily injury. If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as accident cases will be greatly enlarged; for, in every case of a collision on a railroad, the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for 'fright' to which they have been subjected. This is a step beyond any decision of any legal tribunal of which we have knowledge. . . . We need not discuss the authorities cited by the appellant. They are nearly all cases in which the fright was the result of or accompanied by a personal injury, and have no application to the case in hand."

In *Mitchell v. Railway Co.*, 151 N. Y. 107, 45 N. E. 354, it was said:

"While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. . . . If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be open for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may therefore be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages are too remote to justify a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury."

In *Victorian Railway Com'rs v. Coultas*, 13 App. Cas. 222, it was said:

"The rule of English law as to the damages which are recoverable for negligence is stated by the Master of the Rolls in *The Notting Hill*, 9 Prob. Div. 105,

— a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendant's act, — such a consequence as in the ordinary course of things would flow from the act. . . . According to the evidence of the female plaintiff, her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a mental or nervous shock, cannot, under such circumstances, their lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gatekeeper. If it were held that they can, it appears to their lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which often exists, in case of alleged physical injuries, of determining whether they were caused by the negligent act, would be greatly increased, and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English courts in which, upon such facts as were proved in this case, damages were recovered. . . . It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their lordships decline to establish such precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that impact is necessary, that judgment should have been for the defendants."

. . . Appellant relies upon *Bell v. Railroad Co.*, 26 L. R. Ir. 432, and *Purcell v. Railway Co.*, 48 Minn. 134, 50 N. W. 1034. Both of these cases fully sustain the contention of appellant that where sudden terror occasions a nervous shock, resulting from a negligent act, without impact or physical contact, by which the mind is affected, which may press on the health and affect the physical organization, a cause of action for negligence results. These cases have the approval of Mr. Beven, in his work on Negligence (Vol. I, pp. 76-84), and of Mr. Sedgwick, in his work on Damages (8th ed., § 861). The *Purcell* case arose on a demurrer to the complaint, and it was conceded that the effect of a wrongful act or of negligence on the mind alone will not furnish ground of action. The entire discussion was confined to the question whether the defendant's negligence was the proximate cause of the injury, and whether, if the fright was a natural consequence thereof, and caused the nervous shock and consequent illness, the negligence was actionable. While it is the duty of a carrier to anticipate that an accident or appearance of great danger will produce fright and excitement, and that an accident will cause physical injury, it could not be anticipated that a disease of the mind would result; and, unless such anticipation could be had in the light of the attending surroundings, it would not constitute the proximate cause of the injury, under the great weight of authority. In the *Purcell* Case, fright may have been the natural consequence of the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright may have caused the nervous shock and consequent illness of



the plaintiff, as held by the Supreme Court of Minnesota; yet, if it could not have been reasonably anticipated as a result of the fright, it would not be the proximate cause of her injuries. The question of the reasonable anticipation of the injury as a result of the fright is entirely disregarded in that case, and causes it to be in conflict with the weight of authority, because it absolutely disregards this principle. In the Bell case, an instruction was approved which read as follows:

"That if great fright was, in their opinion, a reasonable and natural consequence of the circumstances in which the defendant had placed Mary Bell, and she was actually put in great fright by these circumstances, and if injury to her health was, in their opinion, a reasonable and natural consequence of such great fright, and was actually occasioned thereby, damages for such injury would not be too remote, and might be given for them if they found for the plaintiff."

It was objected that the instruction was erroneous unless the fright was accompanied by physical injury, but it was held the objection was not well founded; that a nervous shock was to be considered as a bodily injury, and, if such bodily injury might be a natural consequence of fright, it was an element of damages for which a recovery might be had; that as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage could not be too remote. This case, like the Purcell case, bases the right of recovery solely on the fact that negligence may cause physical injury, and hence the damage could not be too remote. The courts in the above cases seem to have lost sight of the only safeguard against imposition in cases arising from negligence, and that is the elementary rule that, before a plaintiff can recover, he must show a damage naturally and reasonably arising from the negligent act, and reasonably to be anticipated as a result. Two trains might be passing on a double-track road, one carrying passengers, and the other freight, and, at the moment when the engine of the freight train is immediately opposite a passenger car, it might become necessary to sound a whistle, whose effect might be to startle and greatly frighten a nervous person in the passenger car; and the fact that a whistle unexpectedly sounded would be calculated to startle and frighten a nervous person, and that such fright might produce a nervous shock that would cause physical injury, under the principle announced in the Purcell and Bell cases, *supra*, would authorize a recovery. That could only be done, under the authority of those cases, by absolutely ignoring the principle that the injury might be reasonably anticipated as the result of the act, and, where it cannot be so anticipated, the result is too remote. These cases are discussed by Beven and Sedgwick without laying sufficient stress on this principle.

In our opinion, these authorities, so much relied on by counsel for appellant, are not only against the great weight of authority, but are not sustainable on principle. Appellee, in this case, was on the premises to collect rent, as he lawfully might, without any knowledge of the nervous condition of appellant; and it cannot be said that his manner, lan-

guage, or gestures, or declared purpose of preventing the removal of the household effects of his tenants, were naturally and reasonably calculated to, or that it might be anticipated they would, produce the peculiar injury sustained by the appellant. It could not have been reasonably anticipated by the appellee that any injury therefrom could reasonably have resulted. The action is purely one of negligence; and, if appellee could be held liable under this evidence, then any person who might so speak or act as to cause a stranger of peculiar sensibility, passing by, to sustain a nervous shock productive of serious injury, might be held liable. Thus, one whose very existence was unknown to the party guilty of so speaking and acting would be given a right of recovery. Terror or fright, even if it results in a nervous shock which constitutes a physical injury, does not create a liability. On the ground of public policy alone, having reference to the dangerous use to be made of such cause of action, we hold that a liability cannot exist consequent on mere fright or terror which superinduces nervous shock. The Appellate Court held the language of the appellee, as disclosed by the evidence, was not such as could be held to constitute negligence, and that the injury sustained by appellant could not, according to common experience, be reasonably anticipated to result from such actions and language. We concur in that view, and the judgment of the Appellate Court for the First District is affirmed.

*Judgment affirmed.*

### 36. SPADE *v.* LYNN & BOSTON RAILROAD COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1897

168 *Mass.* 285, 47 *N. E.* 88

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. The declaration alleged that while, on February 16, 1895, the plaintiff was a passenger in the defendant's car, and in the exercise of due care, "one of the defendant's agents or servants, in attempting to remove from said car a certain person claimed and alleged by said defendant's agent to be noisy, turbulent, and unfit to remain as a passenger in said car, conducted himself with such carelessness, negligence, and with the use of such unnecessary force, that said agent and servant, acting thus negligently, created a disorder, disturbance, and quarrel in said car, and thereby frightened the plaintiff and subjected her to a severe nervous shock, by which nervous shock the plaintiff was physically prostrated and suffered, and has continued to suffer, great mental and physical pain and anguish, and has been put to great expense."

At the trial in the Superior Court, before *Mason*, C. J., there was evidence tending to show that the accident complained of occurred while the plaintiff was being conveyed to her home in Chelsea upon a

crowded car of the defendant company after 10.30 P. M., on February 16, 1895.

The plaintiff testified in substance that two men somewhat intoxicated were allowed, during a part of the trip from Boston to Chelsea, to stand near her in the car, one of them in a position where he was leaning or lurching toward her in such a way that she was obliged to move to avoid him; that a controversy occurred between one of the intoxicated persons and the conductor about the payment of a fare, and that the conductor said to the intoxicated person, after some other conversation, that if he did not keep quiet he would throw him off the car, even if he broke his head; that as she neared the place where she was to leave the car,

“the first thing I saw was the conductor . . . grab this man by the collar; the next thing I saw was . . . another man from the other end of the car, whom I did not know, come down; but the other man, as he pulled him, lurched over on me; then it seemed as though I turned to solid ice. My breath was cut right off. I could not have spoken; I tried to speak, but I chilled so I kept growing stiffer and stiffer, until I did not know, I do not know when they got me off the car.”

She further stated that nothing had occurred of any sort or description that gave any suggestion of a warning that the conductor was going to rush at the drunken man at this time; that he did it “just as quick as a man could jump;” and that the intoxicated person standing directly in front of her “lurched over so it kind of pushed me back against the car.”

The plaintiff further testified:

“Q. Your body was not injured in any way by contact with this man?  
A. Oh, no, I was not injured. There were not any marks on me, anything like that.”

“Q. You suffered no pain from this man touching you? A. No, not any injury from that.

“Q. What was the cause of this man’s touching you, the one that lurched forward? A. When the conductor jumped and grabbed this man that I told about, on the opposite side of the car, that made a commotion, and as he twitched him it pushed this other man over on to me.”

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

*S. L. Whipple* and *W. R. Sears*, for plaintiff.

*C. K. Cobb*, for defendant.

ALLEN, J. This case presents a question which has not heretofore been determined in this Commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: Whether, in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress, occasioned



by the negligence of another, which does not result in bodily injury, but that, when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury. In *Canning v. Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge, that he could not recover if he sustained no injury in his person, but merely incurred risk and peril which caused fright and mental suffering. In *Warren v. Railroad Co.*, 163 Mass. 484, 40 N. E. 895, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground; and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm consists mainly of nervous shock. It was not, therefore, a case of mere fright, and resulting nervous shock.

The case calls for a consideration of the real ground upon which the liability or non-liability of a defendant guilty of negligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety, does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and, to a greater or less extent, disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real.

Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others. It must also be admitted that a timid or sensitive person may suffer, not only in mind, but also in body, from such a cause. Great emotion may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence; and, if compensation in damages may be recovered for a physical injury so caused, it is hard, on principle, to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects.

It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different, and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life,

any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases may fail to meet what would be desirable if the single case were alone to be considered. Rules of law respecting the recovery of damages are framed with reference to the just rights of both parties, — not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And, in determining the rules of law by which the right to recover compensation for unintended injury from others is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveller is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travelling in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly, and extra care be observed. But as a general rule a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop v. Allsop*, 5 Hurl. & N. 534, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and applied. *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125; *White v. Dresser*, 135 Mass. 150; *Fillebrown v. Hoar*, 124 Mass. 580; *Derry v. Flitner*, 118 Mass. 131; *Railroad Co. v. Kellogg*, 94 U. S. 469, 475; *Wyman v. Leavitt*, 71 Me. 227; *Ellis v. Cleveland*, 55 Vt. 358; *Phillips v. Dickerson*, 85 Ill. 11; *Jones v. Fields*, 57 Iowa, 317, 10 N. W. 747; *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435; *Lynch v. Knight*, 9 H. L. Cas. 577, 591, 595, 598; *The Notting Hill*, 9 Prob. Div. 105; *Hobbs v. Railway Co.*, L. R. 10 Q. B. 11, 122.

The law of negligence, in its special application to cases of accidents, has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the

rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and, if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions: *Commissioners v. Coultas*, 13 App. Cas. 222; *Mitchell v. Railway Co.* (N. Y. App.; Dec. 1, 1896), 45 N. E. 354; *Ewing v. Railway Co.*, 147 Pa. St. 40, 23 Atl. 340; *Haile's Curator v. Railroad Co.*, 9 C. C. A. 134, 60 Fed. 557. In the following cases a different view was taken: *Bell v. Railroad Co.*, L. R. Ir. 26 Exch. 428; *Purcell v. Railroad Co.*, 48 Minn. 134, 50 N. W. 1034; *Fitzpatrick v. Railway Co.*, 12 U. C. Q. B. 645. See also *Beven Neg.* 77 et seq.

It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard v. Lennox and Fillebrown v. Hoar*, already cited; *Meagher v. Driscoll*, 99 Mass. 281. In the present case no such considerations entered into the rulings, or were presented by the facts. The entry therefore must be, *Exceptions sustained.*

### 37. GREEN v. SHOEMAKER & COMPANY

COURT OF APPEALS OF MARYLAND. 1909

111 Md. —, 73 Atl. 688

APPEAL from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Action by Rebecca A. Green against T. A. Schmaker & Co. Judgment for defendant, and plaintiff appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and PEARCE, BRISCOE, SCHUMUCKER, BURKE, THOMAS, and WORTHINGTON, JJ.

*Edward M. Hammond* and *Z. Howard Isaac*, for appellant.

*Wm. H. Harlan* and *John L. G. Lee*, for appellee.

PEARCE, J. This is an action by the appellant, a married woman, to recover damages for alleged injuries to her property and person, caused by the blasting of rocks by the defendants in the vicinity of her dwelling. She lived at Alberton, in Howard County, about two hundred yards

from the line of the Baltimore & Ohio Railroad, and the defendants were contractors, who were engaged in extensive work upon the line of said railroad during the year 1906, which required the blasting of large quantities of rock by explosives. The declaration contained four counts, and the first and second are substantially the same. They allege that at the time of the grievance complained of the plaintiff, as tenant, was in possession of three certain rooms in a house belonging to Mrs. Annie McIlvaney, in which said three rooms the plaintiff resided, and to the exclusive possession of which she was entitled; that the defendants from about April 14, 1906, to December, 1906, were engaged in blasting large quantities of rock near her said residence, and by means thereof caused large rocks and stones to be cast on the house in which she resided, and the lot of land appurtenant thereto, destroying doors, windows, sashes, and glass therein, breaking the roof and porches, and cracking the walls and ceilings of said house, and particularly of the three rooms occupied by the plaintiff, breaking the glass and china of the plaintiff and otherwise injuring her property, and wrongfully depriving her thus of the quiet and peaceable possession of said rooms as her dwelling. These two counts further alleged that, in consequence of said blasting, the plaintiff was struck and wounded by falling plaster and debris,

“and was caused immediately by said blasting to be violently shaken and jarred, whereby she was greatly injured physically . . . and her health has been greatly damaged and shattered, and her nervous system disordered, and she has suffered great physical pain in consequence, and has sustained severe and permanent physical injuries.”

The third and fourth counts are substantially the same. These counts, after alleging the plaintiff's title to, and occupation of, said three rooms, and the blasting operations of the defendants, with the resulting damage to said dwelling and rooms, as set forth in the first and second counts, further alleged that

“immediately, and in consequence thereof, all persons on or about said premises, and those living in said rooms, including the plaintiff, were kept in continual fear and jeopardy of their lives, rendering a proper attention by the plaintiff to her duties full of fear and danger, and, as a further consequence, the plaintiff was wrongfully deprived of the quiet and peaceable possession of said rooms as her abode, and was frequently compelled, by day and by night, to seek shelter in the cellar, and that as a further consequence the said dwelling and the said plaintiff's rooms therein were subjected to incessant and violent vibrations, . . . and the plaintiff and all other persons in said rooms were subjected to frequent and violent physical jars, and that plaintiff's health has been thereby greatly damaged and shattered, and her nervous system disordered, and she has by reason suffered great physical pain, and has sustained severe and permanent physical injuries.”

The defendants filed the general issue pleas. The plaintiff testified that previous to 1901 she rented and occupied the same rooms as tenant

of Mrs. McIlvaney, paying as rent \$3 a month; that in 1901 Mrs. McIlvaney's husband died, and she then went to work in a mill near by; that plaintiff then agreed with Mrs. McIlvaney to take care of her children and do her housework while she was at the mill, and that her rent for the same rooms at the same rate should be paid for by said services instead of in money as theretofore; that there was no community of interest or occupation of said house between Mrs. McIlvaney and the plaintiff; that she had exclusive possession and control of her three rooms, and Mrs. McIlvaney of the residue of said dwelling; that Mrs. McIlvaney furnished the meals, prepared the same, and they were eaten in her part of the house, and the plaintiff's arrangement for her family was the same; and that all their household arrangements were separate and distinct. She testified that the first blast was on April 14, 1906; that it knocked nearly half the plastering from the wall of the room she was in, and part of the ceiling. None of it then fell on her, though some fell on Mrs. McIlvaney's child. It seemed to lift the house up, and then let it fall. It broke every glass in the window except one. It threw the table upside down. It broke two dozen jars belonging to the plaintiff in the cellar of the house. On April 24 a stone burst through the roof and ceiling and came down through plaintiff's bed, mattress, and spring, and broke the slats and rollers. It weighed twenty-two pounds. That blast tore the window sash out, broke some in two, and threw them across the room. They did not sleep in that bed for six weeks after that. This blasting kept up till the fall of 1906. They often had to leave their meals and run to the cellar, and were in terror all night of being killed. She had to sit up in a chair at night the best part of six weeks while they were blasting across the river. She said:

"My nerves were completely broken down through fright, and I was not able to do my work. Before that time, I was in ordinary health, and never was nervous. Since then I have had no health at all. Dr. Miller attended me for this nervousness, and he came every day during the latter part of April, and after that every week or so until fall."

Dr. Miller testified that he was her family physician before and after this blasting; that after April 14 plaintiff developed nervous prostration which he attributed to the shock of the blasting. George Green, plaintiff's husband, testified that he worked for defendants at that time; that there was constant blasting going on, and that in consequence his wife had become a nervous wreck; that she was thirty years of age, and before this blasting had always attended to all her household duties, but since then has been unable to do so. . . . Mrs. Davis, Walter Oldfield, and Hamilton Oldfield testified to the terrific blasting and the damage of the property. Upon the close of the plaintiff's testimony, the defendants moved to strike out all the evidence of the plaintiff's witnesses "bearing on the nervous condition and nervous shock to the plaintiff, and any physical injury resulting from such nervous shock, such testimony hav-

ing been admitted subject to exception, because there is no evidence of any physical impact or corporal injury to the plaintiff." This motion was granted, and the first exception was taken to that ruling.

The defendants then prayed an instruction "that, under the pleadings and evidence in the case, there is no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendants;" and the second exception was taken to the granting of that instruction. The defendants having filed only the general issue plea to all the counts of the amended declaration, there is no question arising as to the form of the pleadings, and there are only two questions which it is necessary to consider: (1) Can the plaintiff upon the evidence which was admitted recover damages for the interference with her quiet possession and enjoyment of the rooms occupied and rented by her? (2) Does a cause of action lie for physical injury resulting from fright and nervousness caused by the wrongful acts of the defendants?

The evidence is undisputed that the rent for these rooms was always paid by the plaintiff, and not by her husband, and that the agreement of renting was made by Mrs. McIlvaney with the plaintiff alone. We are of opinion that under the evidence the plaintiff was not a mere lodger, the landlady retaining the legal possession of the whole house, but that she was a tenant entitled to the exclusive possession and control of the rooms she occupied. Blasting of rocks by the use of gunpowder or other explosives in the vicinity of another's dwelling-house is a nuisance, and the person doing the act, or causing it to be done, is liable for all injuries that result therefrom. . . . We think this action was properly brought by the plaintiff. Even if no other damage were shown than the breaking of the two dozen jars which were her personal property, she would be entitled to at least nominal damages which would carry costs. . . .

This brings us to the important question involved in the granting of the motion to strike out all the testimony bearing on the nervous shock to the plaintiff and physical injury resulting therefrom. There is a wide divergence of judicial opinion as to whether a cause of action will lie for actual physical injuries resulting from fright and nervous shock caused by the wrongful acts of another, and it may be considered as settled that mere fright, without any physical injury resulting therefrom, cannot form the basis of a cause of action. This is so, because mere fright is easily simulated, and because there is no practical standard for measuring the suffering occasioned thereby, or of testing the truth of the claims of the person as to the results of the fright. But when it is shown that a material physical injury has resulted from fright caused by a wrongful act, and especially, as in this case, from a constant repetition of wrongful acts, in their nature calculated to cause constant alarm and terror, it is difficult, if not impossible, to perceive any sound reason for denying a right of action in law for such physical injury. The grounds upon which these courts have proceeded which deny such right are twofold:



"(1) That physical injury produced by mere fright caused by a wrongful act is not the proximate result of the act; and (2) that, upon the ground of expediency, the right should be denied because of the danger of opening the door to fictitious litigation, and the impossibility of estimating damages."

*Huston v. Freemansburg*, 3 L. R. A. (N. S.) 50, Editor's note. As to the first of these grounds, this Court has laid down in clear language the true doctrine upon this question in *Balt. City Passenger Railway Co. v. Kemp*, 61 Md. 80. In that case the Court, speaking through Judge Alvey, said:

"It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains that only the natural and proximate results of a wrongful act are to be regarded. It is only where there may be a more direct and immediate sufficient cause of the effect complained of that the more remote cause will not be charged with the effect. If a given effect can be directly traced to a particular cause as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all conditions of things, produce like results? It is the common observation of all that the effects of personal physical injuries depend much upon the peculiar conditions and tendencies of the person injured, and what may produce but slight and comparatively uninjurious consequences in one case may produce consequences of the most serious and distressing character in another. . . . Hence the general rule is in actions of tort like the present that the wrongdoer is liable for all the direct injury resulting from his wrongful act, and that, too, although the extent or special nature of the resulting injury could not, with certainty, have been foreseen or contemplated as the probable result of the act done."

In the case now before us the evidence does not suggest any other cause of the effect complained of. It is a matter of common knowledge or observation that loud explosions, even if unattended by any immediate special dangers, are very trying to the nerves of those subjected to them. This is especially so when such explosions are constantly repeated, as in blasting, and are accompanied by the hurling about of rocks and stones displaced by the blast, to the danger of property and life. It is equally a matter of common knowledge that as a general rule the nerves of women are more sensitive to injury than those of men, are more easily disturbed, and that, when so disturbed, the injurious consequences are more serious and lasting. Here is a young woman, thirty years of age, in sound health and free from any nervous disorder or tendency. She is subjected to a long continued series of terrific blastings near her dwelling, shattering the roof, walls, and windows by day and by night, and, in the language of the declaration, "putting her in continual fear and jeopardy of her life." In the absence of any evidence of any other cause, why, then, may not her nervous prostration be traced by the jury under the principles stated by Judge Alvey to the one cause shown to exist, viz., the alarm and terror under which she was forced to live? In the case just cited there was a motion for a reargument based as the Court stated

upon authorities that were not brought to the attention of the Court upon the former hearing, but the motion was overruled; the Court saying: "Whether the direct causal connection exists is a question in all cases for the jury upon the facts in proof." In *Sloane v. Southern Cal. R. R.* 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193, a case similar to the present, in that there was no physical impact, the Court said:

"The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. . . . The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire nervous system are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct as by a blow or indirect through some action upon the mind."

If, in the case before us, the plaintiff had received an actual blow, however slight, either from a rock hurled by the blast, from the falling of a wall or ceiling, or even by a fall of herself, caused by the alarm of the concussions, no one would question her right to maintain this action, nor the right of the jury to consider the nervous prostration from which she is suffering in ascertaining the damages to be awarded. If, therefore, the jury had believed from the evidence which was stricken out that the nervous prostration of the plaintiff was the natural and proximate consequence of the alarm and terror to which she was subjected by the constant blasting, it would properly have formed an element for their consideration in reaching their verdict. For these reasons we do not think the question of proximate cause in this case justified the striking out of the testimony bearing upon the nervous shock and the resulting physical injury, nor in the withdrawal of the case from the jury.

We now come to the question of expediency. It appears from an examination of the cases in which the right of recovery has been denied where there has been no physical impact that this doctrine has been the controlling one with the Court. This is especially apparent in the Pennsylvania and Massachusetts decisions. In *Huston v. Freemansburg*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49, the Court dealt only with that question, and said:

"If we opened the door to this new invention, the result would be great danger, if not disaster, to the cause of practical justice."

In *Homans v. Boston Elevated R. W. Co.*, 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324, Chief Justice Holmes said, referring to the rule established in that Court:

"As has been explained repeatedly, it is an arbitrary exception, based upon a motion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. . . . We must recognize the logic in favor



of the plaintiff when a remedy is denied because the only immediate wrong is a shock to the nerves."

At the trial below the defendant by various requests tried to press the principle so far as to require the plaintiff to prove that the nervous shock was the immediate consequence of a slight blow received by being thrown forward against a seat, whereas the judge allowed her to recover for the nervous shock ending in paralysis, if it resulted from a jar to her nervous system which accompanied the slight blow to her person. In other words, the Court held that it was not necessary to show that the shock was the consequence of the blow; and Judge Holmes said: "We are of opinion the judge was correct, and that further refining would be wrong." This case well illustrates the difficulty felt by the Court in denying a recovery upon the ground of expediency without withholding from the plaintiff a legal right. The argument from mere expediency cannot commend itself to a court of justice resulting in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be urged as a real one. The apparent strength of the theory of expediency lies in the fact that nervous disturbances and injuries are sometimes more imaginary than real, and are sometimes feigned; but this reasoning loses sight of the equally obvious fact that a nervous injury arising from actual physical impact is as likely to be imagined as one resulting from fright without physical impact, and that the former is as capable of simulation as the latter.

It must be conceded that the numerical weight of authority supports the general rule that there can be no recovery for nervous affections unaccompanied by contemporaneous physical injury, but the sounder view in our opinion is that there are exceptions to this rule, and that where the wrongful act complained of is the proximate cause of the injury within the principles announced in *Kemp's Case*, *supra*, and where the injury ought in the light of all the circumstances to have been contemplated as a natural and probable consequence thereof, the case falls within the exception and should be left to the jury. In England, in *Victorian Railway Commissioners v. Coultas*, L. R. 13 App. Cases, 222, the Court held that damages arising from mere terror unaccompanied at the time by any physical injury could not be considered as a consequence of the wrongful act there complained of, although the Court refused to decide that in no case could recovery be had without proof of actual impact. In *Bell v. Great Northern R. R. Co.*, 26 L. R. Irish, 428, the Court refused to follow the case just mentioned, saying that where no intervening independent cause of the injury was suggested, and where the jury could find that the bodily injury complained of was a natural consequence of the fright, the chain of reasoning for recovery was complete. These cases are reviewed in 1 *Beven on Negligence* (2d ed.), pp. 76-83, and the doctrine of the former is criticised with much force and discrimination. . . . In *Denver R. R. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, the jury was instructed as follows:

"If great fright was a reasonable and natural consequence of the circumstances in which the collision aforesaid, with the ensuing wreckage, explosion, and conflagration, placed the plaintiff, and if she was actually put in fright by those circumstances, and injury to her health was a reasonable and natural consequence of such fright, and was actually and proximately occasioned thereby, then said injury is one for which damages are recoverable."

The reasoning upon which that conclusion was reached is in our opinion sound, and it is in accord with the views expressed in Sedgwick on Damages (8th ed.), § 861; Addison on Torts, 5; 3 Sutherland on Damages, 714, 715. . . .

It may be observed here that there is a class of cases in which Courts which generally sustain the contrary rule seem not to require contemporaneous physical injury in order to sustain a recovery for fright and its consequences. In *Spade v. Lynn R. R.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, where a recovery was denied, the Court said:

"We do not include cases of acts done with gross carelessness or recklessness showing utter indifference to such consequences when they must have been in the actor's mind."

In *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577, it is intimated that the rule does not reach those cases where there is an intention to cause mental distress, and in *Wilkinson v. Downton* (1897), 2 Q. B. 57, it was expressly so held where a practical joke resulted in fright producing a miscarriage. In the case before us the evidence is that the defendants were notified of the injury to the house, and they made some repairs, but that the blasting continued thereafter and during all the summer with the same results. This would seem to come fairly within the description of gross recklessness as to consequences, and thus to bring the case within that exception.

In view of all the circumstances of this case, we cannot apply to it the rigid rule applied in some courts, requiring actual contemporaneous physical impact producing physical injury, and we are of opinion that the case should have gone to the jury upon the principles announced in *Denver R. R. v. Roller*, *supra*. It will be for the Court in future cases of this character, as in all other cases where the questions of proximate cause and legally sufficient evidence arise, to permit no recovery except upon the application of the principles just mentioned, while denying none upon the ground of mere expediency, where these principles logically require the submission of the case to the jury.

*Judgment reversed, with costs to the appellant above and below, and new trial awarded.*

### 38. CHITTICK v. PHILADELPHIA RAPID TRANSIT COMPANY

SUPREME COURT OF PENNSYLVANIA. 1909

224 Pa. 13, 73 Atl. 4

ACTION by Annie E. Chittick and John F. Chittick against the Philadelphia Rapid Transit Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and ELKIN, FELL, POTTER, and STEWART, JJ.

*Thomas Leaming and Russell Duane*, for appellant.

*Robert B. Kelly*, for appellees.

ELKIN, J. During the construction of the elevated railroad in West Philadelphia, a steel brace, a necessary part of the superstructure, was being hoisted into position by the employees of the bridge company doing the work, when the trolley pole of a street railway car struck it with such force as to cause an electrical explosion by reason of the contact of the brace with the trolley wire. The negligence relied on to sustain a recovery is the failure of the motorman to stop his car after timely notice to do so in the face of an impending danger. The negligence of appellant in the respect charged is not denied, and if the injuries complained of resulted as a natural and probable consequence of the negligent act, which ought to have been foreseen and provided against, it would be a case for the jury. What occurred after the happening of the accident is of such an extraordinary character, and the cause of the injuries of such an unusual nature, that the facts must be briefly stated in order to have an intelligent understanding of the question raised by this appeal. When the trolley wire was forcibly brought into contact with the steel brace, there was a brilliant flash of electricity, variously described by the witnesses as a "ball of fire," a "brilliant flash," a "blinding light," and a "powerful electrical flash of an explosive nature." A woman, one of the appellees here, was seated near an open window of her dwelling-house two or three hundred feet distant from the point at which the electrical manifestation occurred, and was thrown, or in some manner fell, from her chair, to the floor. In the fall she received some bruises to her person, but these were of a temporary character and not serious. She was blinded temporarily by the brilliant electric flash, suffered pain in her eyes, followed by some impairment of vision and nervous weakness, and these are the injuries principally relied on to sustain this action for damages.

It must now be determined whether upon such a state of facts, appellant is answerable in law for injuries resulting from this unfortunate occurrence. The learned Court below, after patient and careful consideration, submitted the case to the jury, and upon more mature deliberation refused to enter judgment for defendant non obstante veredicto,

although in arriving at that conclusion doubt was expressed as to the liability of the defendant under the circumstances. Whatever doubt there may have been in the mind of the learned trial judge was resolved in favor of the plaintiffs, and the case is now here for final determination. At the beginning of our inquiry, it may be remarked that the relation of common carrier and passenger, or of master and servant, did not exist between the parties, all of whom were in the enjoyment of their respective properties with the right to use and operate them in every lawful manner. The duty of each to the other was not to so wantonly or recklessly or negligently use her or its property as to cause injury to the person or property of the other. Did the appellant meet this measure of duty, and did it do anything to make it liable for the injuries sustained? It was bound to know what the natural and probable consequences of its negligent act would be, and would be answerable in damages for all injuries which ought to have been anticipated and which could have been provided against if the duty rested upon it to foresee such consequences. This is the crux of the case, and there are numerous decisions of this Court bearing upon the question involved. In *Pittsburg Southern Railway Company v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580, it was held that the correct rule in determining proximate cause in this class of cases is that the injury must be such a natural and probable consequence of the alleged negligent act as might and ought to have been foreseen by the wrongdoer. This rule has been recognized and followed in many later cases. See *West Mahanoy Township v. Watson*, 112 Pa. 574, 3 Atl. 866; *Fox v. Borkey*, 126 Pa. 164, 17 Atl. 604; *Ewing v. Railway Company*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; *Linn v. Duquesne Borough*, 204 Pa. 551, 54 Atl. 341, 93 Am. St. Rep. 800; *Huston v. Freemansburg Borough*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. N. S. 49.

In some of our cases it has been pointed out that the trend of decision both in this country and in England is against the allowance for mental suffering, or nervous shock or fright, as elements of damages, and when the injuries relied on to sustain a recovery flow from such causes the action cannot be maintained. There can be no doubt about the application of this principle in the trial of this class of cases under the authority of our decisions, and it must be considered a settled rule of law in our State. The only question to be now determined is whether, under the facts of the case at bar, this principle should be applied. If the injuries sustained resulted from mental suffering, or from a severe nervous shock, or from fright, occasioned by the unusual occurrence, the rule certainly applies, and as we read the testimony no other conclusion can be reached. It is true that the injured appellee testified that she saw a ball of fire which seemed to pass through the window at which she was sitting, and as a result of that indescribable something which passed before her eyes she fell to the floor. This was an optical illusion. In point of fact there was no ball of fire, and it could not have passed through the window. It is

not seriously contended that there was a real ball of fire, or that any actual physical injury was inflicted upon appellee by reason of any material force or substance coming in contact with her body. The window at which she was sitting was not broken, nor was there any evidence of force or violence in or about the room or upon her person. The bruises she received resulted from her fall on the floor, and were not occasioned by any material or other force prior to the fall. The electrical manifestation described as a ball of fire was not a real material substance, but a flash of light reflected upon the retina of the eye, or it may have been produced by light and other rays set in motion by the flash and explosion resulting from the violent force with which the metal brace came in contact with the trolley wire. No current of electricity passed through the air, nor was any material substance set in motion, whereby injury to the person of appellee was done or could have resulted. To hold that this is anything but a case of nervous shock, or terrible fright, our eyes must be closed to the facts, and our minds to an intelligent understanding of them. If the injuries resulted from the nervous shock, and of this there can be no doubt, there can be no recovery in this action without overruling many decided cases. As we read the testimony, neither experience nor scientific research could have foreseen what happened in this case, and the consequences which followed the occurrence were of such an extraordinary character as could not have been anticipated by appellant as the natural and probable result of the negligent act. There is much in this case to indulge sympathetic inquiry and to suggest speculative theory, but a proper regard for the wholesome administration of law by the application of settled principles requires this Court to hold that there can be no recovery under the facts presented at the trial in the Court below. *Judgment reversed and is here entered for defendant.*<sup>1</sup>

<sup>1</sup> [PROBLEMS:

The plaintiff was proceeding on a road to a field, to drive the cows home. He rode a mule. On reaching the defendant's railroad crossing, the mule balked at the crossing. The plaintiff dismounted to drag the mule off. The defendant's engine came suddenly past, without warning, and killed the mule; the plaintiff jumping aside safely. His illness was caused by the fright. Has he an action? (1898, *Mack v. R. Co.*, 52 S. C. 323, 29 S. E. 905.)

The plaintiff, riding in the defendant's car, was by the defendant's fault so shaken as to be thrown against a car-seat; a nervous shock and illness was thus caused. Has she an action? (1902, *Homans v. R. Co.*, 180 Mass. 456, 62 N. E. 737; 1900, *Denver & R. G. R. Co. v. Roller*, C. C. A., 100 Fed. 738.)

The defendant's blasting of rock shattered the house and furniture where the plaintiff lived, startled her, made her think that her mother was killed, and thus brought on an illness. May she recover? (1899, *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 135.)

The plaintiff was in a train, which the defendants culpably caused to go at a great rate of speed down an incline, till it stopped violently. The plaintiff was nervously shocked and was injured in health. Has she an action? (1890, *Bell v. R. Co.*, 26 L. R. Ire. 428.)

The defendant's agent wrongfully ordered the plaintiff's husband out of the ladies' waiting-room, where he was with her; the agent insisting that the man

**SUB-TITLE (II): SENSORY HARMS (NUISANCE)**

[See the cases post, under Title D, *Mixed Harms*, Nos. 323-330]

**SUB-TITLE (III): MENTAL HARMS****Topic 1. Sundry Sorts of Mental Suffering accompanying some other Cause of Action**

39. LORD WENSLEYDALE (BARON PARKE) in *Lynch v. Knight* (1861, 9 H. L. C. 577, 598). Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossi-

was not her husband. The plaintiff was nervously shocked and was made ill for a week. May she recover? (1899, *Bucknam v. R. Co.*, 76 Minn. 373, 79 N. W. 98.)

Plaintiff and her husband resided on a farm about forty rods from the residence of defendant. One evening defendant, dressed in woman's clothes, navy-blue bicycle skirt, light waist, sailor hat, with flowers on it, and a thin, black face-veil, took a parasol, and went to her house. He had been a frequent visitor there, and was accustomed to play with her children. Although for many years he had been regarded insane or incompetent, his malady was of a harmless character. He went about the house this time, mumbling, and tapping on the floor with his parasol. The plaintiff, being pregnant, took fright and suffered a miscarriage. Has she an action? (1899, *Melson v. Crawford*, 122 Mich. 466, 81 N. W. 335.)

The plaintiff was unlawfully threatened by the defendant that, if she did not sign a mortgage, he would arrest her husband and close up their store by attachment. She signed. The excitement and fear made her ill. Has she an action? (1889, *Wulstein v. Mohlmann*, 5 N. Y. Suppl. 569; 1898, *Botkin v. Cassady*, 106 Ia. 334, 76 N. W. 723.)

The defendant's street-car became derailed and dashed across the street towards her. She ran for safety, fell, and was bodily injured. Has she an action? (1901, *Tuttle v. R. Co.*, 66 N. J. L. 327, 49 Atl. 450.)

The plaintiff was a pregnant woman. The defendant sent her a letter, unlawfully threatening her with imprisonment. She was terrified, and made ill. Has she an action? (1874, *Grimes v. Gates*, 47 Vt. 594.)

The defendant as a "practical joke" told the plaintiff that her husband had broken his legs in an accident. The shock made her ill. Has she an action? (*Wilkinson v. Downton*, 1897, 2 Q. B. 57.)

The plaintiff was riding in the defendant's street-car, and a collision was made imminent by the defendant's fault. In the excitement and confusion the plaintiff was frightened, went into convulsions, and became ill. Has she an action? (1892, *Purcell v. R. Co.*, 48 Minn. 134; 1904, *Mullin v. Elev. R. Co.*, 185 Mass. 522, 70 N. E. 1021.)

The plaintiff was on her land husking corn. The defendant was blasting on an adjacent part of the field. After two or three explosions came a terrific one which frightened the plaintiff so that she fainted and afterwards was severely ill. Has she an action? (1889, *Fox v. Barkey*, 126 Pa. 164.)

The plaintiff was pregnant and in bed in her house. The defendant came into the hall and began a violent quarrel with A and the plaintiff's husband, finally



ble a jury, in estimating it, should altogether overlook the feelings of the party interested. For instance, where a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant, the loss of whose service is a material damage which a jury has to estimate; when juries estimate that, they usually cannot avoid considering the injured honour and wounded feelings of the parent.

#### 40. CRAKER *v.* CHICAGO & NORTHWESTERN RAILWAY COMPANY

SUPREME COURT OF WISCONSIN. 1875

36 Wis. 657

APPEAL from the Circuit Court for Sauk County.

Action for insulting, violent and abusive acts alleged to have been done to the plaintiff by the conductor of one of defendant's trains while plaintiff was a passenger on such train. Answer, a general denial.

drawing a knife and threatening to kill the husband. The plaintiff was frightened and suffered a miscarriage. The defendant did not know that the plaintiff was in the adjoining room. Has she an action? (1877, *Phillips v. Dickerson*, 85 Ill. 11.)

The plaintiff was helping in her husband's public-house, standing behind the bar. The defendant negligently drove a van into the room. The plaintiff was then pregnant and sustained a severe fright and shock, and gave premature birth to a child. Would an action lie? (*Dulieu v. White*, 1901, 2 K. B. 669.)

The defendant's horse ran away, dashed towards the plaintiff, but was stopped by colliding with a post. The plaintiff was pregnant at the time, sustained a mental shock, and a nervous illness ensued. May she recover? (1888, *Lehman v. R. Co.*, 47 Hun, 355.)

The plaintiff's intestate, a boy, was lawfully standing in a railway station, through which express trains passed at a high rate of speed. A moving train always drags with it, at the sides, a current of air, which moves with the train; the air close to the car goes at a speed approximate to that of the car. The defendant's train came through without warning and the air-current at its sides threw the boy down. He rolled under the train and was killed. Does an action lie? (1897, *Graney v. R. Co.*, 140 Mo. 89, 41 S. W. 246, 157 Mo. 666, 57 S. W. 276.)

[ESSAYS :

*Francis M. Burdick*, "Tort Liability for Mental Disturbance and Nervous Shock" (*Columbia Law Rev.*, 1905, V, 179).]

NOTES :

"Mental disturbance and nervous shock." (C. L. R., V, 179.)

"Mental suffering; consequent illness." (C. L. R., VI, 277.)

"Damage from nervous shock resulting from wilful act." (H. L. R., X, 252; XI, 201.)

"Nervous shock from fright caused by negligence." (H. L. R., IV, 197; VI, 260; VII, 304; X, 239, 387; XI, 202, 556; XIII, 226; XV, 304.)

"Recovery for nervous shock from tort to third person." (H. L. R., XVI, 378.)

"Sickness following mental suffering as element of damage." (H. L. R., XIX, 539.)]



The substance of plaintiff's testimony at the trial was as follows: She was about twenty years of age, and a school teacher, when the facts occurred on which the action was founded. On a certain morning, she went to defendant's depot at Reedsburgh in Sauk County, for the purpose of taking the train to Baraboo in that county, but was a few minutes too late. The station agent informed her that there was no other passenger train until 9 o'clock P. M., but there was a freight and accommodation train in the afternoon. She waited for this train; purchased a ticket during the interval, paying the full fare charged on passenger trains; took said afternoon train under the guidance of the station agent; and delivered up her ticket to the conductor of the train, at his request, and was given a seat in the car in an office chair. There was another passenger on the car, besides the conductor and a brakeman. Near Ableman's (a station on the road) the other passenger and the brakeman left the car, plaintiff and the conductor being the only persons remaining in it. The conductor then came and sat down near the plaintiff, and asked her several questions as to where she was going, where she lived, and whether she was acquainted with certain persons. What followed is thus stated by the witness:

"He said, 'I suppose you are married like all the rest of the school marms?' I said, 'No, I am not.' Then he sat up nearer to me, and put his hand in my muff, and said, 'There is room for two hands in this muff, ain't there?' I said, 'No, sir, there is not for yours,' and jerked my muff away. He then said, 'My hand is pretty dirty, ain't it? It looks as though it needed washing.' I told him to wash it, then, water was plenty. He then said, 'It is thawing considerable, that's so.' I had the tassel of my muff in my hand, tossing it, and he said, 'If you don't stop twisting that, you will wear it all out.' I said, 'I don't care if I do.' He then said, 'What makes you look so cross?' I did n't answer him, but turned away from him. Pretty soon he got up, and I supposed he was going away. He stepped to the side of my chair, threw his arms around me, and held my arms down. He threw his left arm around my shoulder, and took hold of my arm between the shoulder and left elbow with his right arm; he pressed his elbow on my right arm, and then commenced kissing me. I said, 'Oh, let me go; you will kill me.' He said, 'I am not a-going to hurt you.' Then I said, 'Do let me go; I will jump out of the car, if you will.' I tried to get up on my feet, and he pushed me back in the chair, and said, 'I ain't a-going to hurt you.' Then I said, 'What have I ever done to you, that you should treat me in this way?' After he had kissed me five or six times, he said, 'Look me in the eye, and tell me if you are mad.' I said, 'Yes, I am mad.'"

Plaintiff continued in the car until she reached her place of destination.

It appeared from the cross-examination that the conductor in question was a young man; that the plaintiff had never seen him before; and that immediately after committing the acts described he left the car. It also appeared that on complaint of this plaintiff he was arrested and convicted on a criminal charge of assault and battery, for the same acts here complained of, and was fined \$25, and committed until said fine and the costs of the prosecution were paid; and that he was discharged

from the employment of the defendant company immediately upon its being informed of this charge against him by the plaintiff. . . .

The Court refused a nonsuit, and instructed the jury, in substance, that if the plaintiff, whilst a passenger as above stated, was abused, insulted, or ill-treated by the conductor of the train, defendant was liable to her for such injury as might be found from the evidence to have been inflicted; that the measure of damages would be such compensation as the jury might see fit to award for the injury sustained, including injury to the feelings, "the elements of which are, such insult, indignity, contumely, and the like, as she may have suffered"; that they could not "give anything by way of example or punishment," or what is termed vindictive damages, as they might do if they had the party committing the assault before them; and that they were not to be governed by any different rules than those which would govern them if the action were against an individual, situated, in reference to the transaction, similarly to the defendant corporation; that they were not to assume that plaintiff had received any other injury, in reputation or otherwise, than was shown by the testimony; and that in reference to the point or points upon which they were to assess damages, they were to be governed by a sound discretion and good judgment, and give such damages as they thought, under the circumstances, should be given. . . .

Plaintiff had a verdict for \$1,000 damages; a new trial was denied, and the defendant appealed from a judgment on the verdict.

*Smith & Lamb*, for appellant, argued . . . that in any case the rule of damages given to the jury was erroneous: first, because, in the absence of any actual bodily injury, there was no basis for damages for the injury to the feelings; . . . and secondly, because, according to the language of the Court in *Wilson v. Young*, 31 Wis. 582, damages for injury to the feelings, like vindictive damages, "depend entirely on the malice of the defendant," and the malice of a servant cannot be imputed to his master, innocent in fact. . . .

RYAN, C. J. . . . It is said in *Railroad Co. v. Finney*, 10 Wis. 388, that the plaintiff in such a case is not entitled to exemplary damages against the principal, for the malicious act of the agent, without proof that the principal expressly authorized or confirmed it. Without now discussing what would or would not be competent or sufficient evidence of such authority or confirmation, we may say that we have, on very mature consideration, concluded that the rule in *Railroad Co. v. Finney* is the better and safer rule. . . .

It was also said in *Railroad Co. v. Finney*, that the action is in tort; but that, in cases not calling for exemplary damages, the rule of damages should be as in actions *ex contractu*, — the actual loss sustained by reason of the misconduct of the conductor.

This was said *arguendo*, without attempt at close connection of exact statement; and it is not altogether easy to ascertain its precise meaning. If it mean, as it may, that in such cases the recovery against

the principal for the tort committed by the agent is limited to the mere pecuniary loss, we cannot sanction it. Such a rule would be in conflict with all known rules of damages in actions of tort for personal wrongs; and would be almost equivalent to a license to officers of railroad trains and steamboats to insult and outrage passengers committed to their care for courtesy and protection: mischievous alike to the companies and the public. But if it mean, as it may and probably was intended, compensatory damages as in like actions for other personal torts, we affirm and adopt it as the rule of the Court. We see no reason for distinguishing such actions from others of like character, in the rule of damages.

In *Wilson v. Young*, 31 Wis. 574, Lyon, J., inadvertently fell into some subtleties found in Mr. Sedgwick's excellent work, which appear to us all now to confuse compensatory and exemplary damages. The distinction was not in that case, and the passage in Sedgwick was cited and approved, as such high authorities often are, without sufficient consideration. We all now concur in disapproving the distinction. In giving elements of damages, Mr. Sedgwick distinguishes between "the mental suffering produced by the act or omission in question: vexation: anxiety": which he holds to be ground for compensatory damages; and the "sense of wrong or insult, in the sufferer's breast, from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade, or insult," which he holds to be ground for exemplary damages only. Sedgwick's *Measure of Damages*, 35. Mr. Sedgwick himself says that the rule in favor of exemplary damages "blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender" (ib. 38); and, following him, this Court held in the leading case of *McWilliams v. Bragg*, 3 Wis. 424, and has often since reaffirmed, that exemplary damages are "in addition to actual damages."

In actions of tort, as a rule, when the plaintiff's right to recover is established, he is entitled to full compensatory damages. When proper ground is established for it, he is also entitled to exemplary damages, in addition. The former are for the compensation of the plaintiff; the latter, for the punishment of the defendant and for example to others. This is Sedgwick's blending together of the interest of society and the interest of plaintiff. And it is plain that there cannot well be common ground for the two. The injury to the plaintiff is the same, and for that he is entitled to full compensation, malice or no malice. If malice be established, then the interest of society comes in, to punish the defendant and deter others in like cases, by adding exemplary to compensatory damages.

We need add no authority to Mr. Sedgwick's that, in actions for personal tort, mental suffering, vexation, and anxiety are subject of compensation in damages. And it is difficult to see how these are to be distinguished from the sense of wrong and insult arising from injustice and intention to vex and degrade. The appearance of malicious intent may

indeed add to the sense of wrong; and equally, whether such intent be really there or not. But that goes to mental suffering, and mental suffering to compensation. So it seems to us. But if there be a subtle, metaphysical distinction which we cannot see, what human creature can penetrate the mysteries of his own sensations, and parcel out separately his mental suffering and his sense of wrong,—so much for compensatory, and so much for vindictive damages? And if one cannot scrutinize the anatomy of his own, how impossible to dissect the mental agonies of another, as a surgeon does corporal muscles. If possible, juries are surely not metaphysicians to do it. And we must hold that all mental suffering directly consequent upon tort, irrespectively of all such inscrutable distinctions, is ground for compensatory damages in action for the tort.

With these views, we can see no error in the charge of the Court below on the subject of damages. . . .

By the Court. The judgment of the Court below is affirmed.

#### 41. CHICAGO *v.* McLEAN

SUPREME COURT OF ILLINOIS. 1890

133 *Ill.* 148, 24 *N. E.* 527

APPEAL from Appellate Court, First District.

*Geo. F. Sugg* and *Charles S. Cameron* (*Wm. E. Hughes*, of counsel), for appellant.

*Frederick Peake* (*James Frake*, of counsel), for appellee.

MAGRUDER, J. This is an action of case commenced by the appellee against the appellant in the Circuit Court of Cook County on March 13, 1888, to recover damages for a personal injury. The trial resulted in a verdict and judgment for the plaintiff, which judgment has been affirmed by the Appellate Court. The cause is brought here by appeal from the Appellate Court.

The declaration avers, in substance, that the city wrongfully and negligently suffered the sidewalk of Hermitage Avenue to be and remain in an unsafe and dangerous condition; that a part of the sidewalk, about four feet in length, had been “torn down,” or the sidewalk had never been built, so as to extend over said space of four feet in length, as it should have been, and would have been, had the sidewalk been complete; that such space was open and uncovered, except by one plank laid lengthwise with the sidewalk, across said open space, which plank was loose and insecure; that in the evening of March 15, 1886, plaintiff was passing along said sidewalk, it being then dark, and there being a driving snow-storm; that, while plaintiff was using all due care to prevent injury to herself, she stepped into said open space, and fell to the ground, and was injured, etc. The facts are settled by the judgment of the Appellate Court.

Appellant complains of an instruction given by the trial Court, which

told the jury that if they found the defendant guilty, and that plaintiff had sustained damages by reason of the injury, they had a right, in estimating such damages, to "take into consideration all the facts and circumstances in evidence before them; the nature and effect of the plaintiff's physical injuries, if any, shown by the evidence to have been sustained from the cause alleged in the declaration; her suffering in body and mind, if any, resulting from such injuries," etc. The part of the instruction which is particularly objected to is that which allows damages for "suffering in mind." The instruction here complained of is substantially the same as the fifth instruction in *Railroad Co. v. Martin*, 111 Ill. 219, which was held to be good. In that case we said: "Where suffering in body and mind is the result of injuries caused by negligence, it is proper to take it into consideration in estimating the amount of damages." The decision in the *Martin* case is conclusive upon the point here made, and we must hold that the instruction given by the trial Court was not erroneous.

Upon her direct examination plaintiff was asked this question: "How has your mind been since that time, — your faculties?" to which she answered as follows: "Very poor; very different from what it was before." An objection to this question and answer by defendant's counsel was overruled, and exception was taken. Counsel for appellant urge, as a reason why their objection should have been sustained, that the effect of the injury upon the plaintiff's mind was matter of special damage, and should have been specially pleaded in the declaration. In the first place, the language of the declaration is broad enough to cover such effect upon the mind as may have resulted from the injury to the body. It is averred that plaintiff "suffered great pain and agony." "Agony" has been defined to be violent pain of body or mind. In the second place, the plaintiff is always entitled to recover all damages which are the natural and proximate consequence of the act complained of; and those damages which necessarily result from the injury are termed "general," and may be shown under the general allegations of the declaration. Only those damages which are not the necessary result of the injury are termed "special," and required to be stated specially in the declaration. *Coal Co. v. Hood*, 77 Ill. 68. But the body and mind are so intimately connected that the mind is very often directly and necessarily affected by physical injury. There cannot be severe physical pain without a certain amount of mental suffering. The mind, unless it is so overpowered that consciousness is destroyed, takes cognizance of physical pain, and must be more or less affected thereby. *Railroad Co. v. Stables*, 62 Ill. 313. We do not understand that the instruction, or the admitted proof in this case, contemplated any other mental suffering than that which was inseparable from the bodily injury. Therefore no allegation of special damage was necessary. Any mental anguish which may not have been connected with the bodily injury, but caused by some conception arising from a different source, could not properly have been

taken into consideration by the jury. We are of the opinion that it was not error to overrule the objection. . . .

We perceive no such error in the record as would justify a reversal. The judgment of the Appellate Court is affirmed.

## 42. LARSON *v.* CHASE

SUPREME COURT OF MINNESOTA. 1891

47 Minn. 307, 50 N. W. 238

APPEAL from District Court, Hennepin County; *Hooker*, Judge.

Action by Lena Larson against Charles A. Chase for the unlawful mutilation and dissection of the body of plaintiff's husband. Demurrer to complaint overruled. Defendant appeals. Affirmed.

*Bradish & Dunn* and *Babcock & Garrigues*, for appellant.

*Arctander & Arctander*, for respondent.

MITCHELL, J. This was an action for damages for the unlawful mutilation and dissection of the body of plaintiff's deceased husband. The complaint alleges that she was the person charged with the burial of the body, and entitled to the exclusive charge and control of the same. The only damages alleged are mental suffering and nervous shock. A demurrer to the complaint, as not stating a cause of action, was overruled, and the defendant appealed.

The contentions of defendant may be resolved into two propositions: First. That the widow has no legal interest in or right to the body of her deceased husband, so as to enable her to maintain an action for damages for its mutilation or disturbance; that, if any one can maintain such an action, it is the personal representative. Second. That a dead body is not property, and that mental anguish and injury to the feelings, independent of any actual tangible injury to person or property, constitute no ground of action.

Time will not permit, and the occasion does not require, us to enter into any extended discussion of the history of the law, civil, common, or ecclesiastical, of burial and the disposition of the body after death. . . . But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it has any value as an article of traffic. The important fact is that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right by mutilating or otherwise disturbing the body is an actionable wrong. And we think it may be safely laid down as a general rule that an injury to any right recognized and protected by the common law will, if the direct and proximate consequence of an actionable wrong, be a subject for compensation.

It is also elementary that while the law as a general rule only gives



compensation for actual injury, yet, whenever the breach of a contract or the invasion of a legal right is established, the law infers some damage, and, if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages. Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. Counsel cites the leading case of *Lynch v. Knight*, 9 H. L. Cas. 577-598. We think he is laboring under the same misconception of the meaning of the language used in that case into which Courts have not infrequently fallen. Taking the language in connection with the question actually before the Court, that case is not authority for defendant's position. It is unquestionably the law, as claimed by appellant, that "for the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest, of the party complaining. Neither one without the other is sufficient." This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But, where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental, — as, for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction substantial damages are allowed for mental sufferings, although there be no proof of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument. In *Meagher v. Driscoll*, 99 Mass. 281, where the



defendant entered upon plaintiff's land, and dug up and removed the dead body of his child, it was held that plaintiff might recover compensation for the mental anguish caused thereby. It is true that in that case the Court takes occasion to repeat the old saying that a dead body is not property, and makes the gist of the action the trespass upon plaintiff's land; but it would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead. *Order affirmed.*

#### 43. CHAPMAN *v.* WESTERN UNION TELEGRAPH COMPANY

SUPREME COURT OF GEORGIA. 1892

88 Ga. 763, 15 S. E. 901

ERROR from City Court of Macon. JOHN P. ROSS, Judge.

Action by Carleton B. Chapman against the Western Union Telegraph Company for failure to deliver a message promptly. Judgment for defendant. Plaintiff brings error. Affirmed.

*Hardeman, Davis & Turner*, for plaintiff in error.

*Gustin, Guerry & Hall*, for defendant in error.

LUMPKIN, J. The exact question, briefly stated, is whether a person to whom a telegraphic message announcing the dying condition of a brother was sent, but by gross negligence of the company was not delivered with due promptness, so that he was unable to reach the brother's bedside before death transpired, can recover substantial damages for the mental suffering caused by the company's failure of duty. The plaintiff does not claim to have sustained any pecuniary loss, but seeks recompense for the mental anguish due to losing the opportunity of being with his brother in his last hours. The question has not been ruled on by this Court. The expressions used in *Cooper v. Mullins*, 30 Ga. 152, do not cover it, because that was a case of physical injury. But there is no lack of authority in other jurisdictions. The trouble lies in the directly opposite views of the several learned courts which have passed upon the question. . . .

These rulings involve various perplexing questions on which they do not all agree. Whether the person to whom the message is sent, as well as the sender, can recover; whether the action is grounded in contract or in tort; whether the violation of a contract involving feeling is a proper basis for awarding substantial damages for injury to feelings alone; to what extent the message must show on its face the family relationship; whether the damages to be given are in their nature punitive or com-

pensatory, — these are the chief problems encountered, and solved in variant ways. Some of the cases rest on breach of contract; of which some hold that the sendee also, being the beneficiary of the contract, can maintain the action for its violation. Cases of *Henderson*, *Richardson*, *Levy*, *Chapman*, and others. This view grapples with the big question, How can one, in an action for breach of contract, recover for mere disappointment or anguish of mind resulting from the breach? See *Walsh v. Railroad Co.*, 42 Wis. 23. The answer given is that the subject-matter of the contract is feeling, and the damage to feeling by non-compliance was plainly in contemplation of the parties making the contract. The breach of many a contract, which the injured party desires performed, brings disappointment and blasted hopes. Yet these mental consequences, if unattended with other loss, have not usually been regarded ground of recovery. The stronger view is that the recovery, whether by sender or sendee, is had for the tort, or breach of common law or statutory duty, the contract serving merely to create the relation of duty between the parties. Cases of *Young*, *Reese*, *Stuart*, *Wadsworth*, and others. The difficulty arising here is whether, as there is no tort independently of the contract, the contract can rightly be treated as not precluding recovery in tort, and the telegraph company be dealt with, in this respect, like a common carrier. A tendency is observed to escape this difficulty by applying Code provisions which abolish the distinction between contract and tort, and allow the plaintiff to recover on a simple statement of the facts of his case. *Stuart* and *Wadsworth* cases. In this State no such abolition has been effected. Regarding the nature of the damages, the majority opinion in this class of decisions is that they are strictly compensatory, and taken on the vindictive or exemplary feature only in cases where the injury is wilful, wanton, or malicious.

As against the above authorities, there are strong decisions denying the right of substantial recovery altogether. . . . This seems to us the sounder view of the law. It is remarkable that the opinions declaring in favor of recovery can point to no positive authority older than the first Texas decision, in 1881. They do refer to certain classes of cases where mental suffering is admitted as an element to be considered by the jury in making their estimate of the damages, namely, actions for slander or libel, for seduction, for assault without physical injury, for breach of promise of marriage, and for physical injuries. But, in every one of these, it has been maintained that there is a necessary and inseparable ingredient of pecuniary injury. See *Telegraph Co. v. Rogers*, *supra*. In slander and libel, where the action is founded on words not actionable per se, there must be proof of special damage. And where the words are actionable per se they have a sure tendency to degrade the citizen in the estimation of his fellows, which results in damage to his social influence and business efficiency. Besides, malice (express or implied) is an essential element in such cases. In seduction, it has been necessary from ancient times for the plaintiff to prove a loss of services, or a relation from which such loss

might occur, else the action could not be maintained. Thus a brother, not standing in loco parentis, however great his anguish, and however keenly he may have felt the disgrace and mortification caused by the wrongdoer, could not recover for his mental suffering. In actions for technical assault, where no physical injury was inflicted or battery committed, damages are said by some of these authorities to be given wholly for mental suffering. Yet it may be that, the injury being essentially wilful, substantial damages are given by way of punishing or making an example of the wrongdoer. An assault is an active threat against the body, an offer of violence endangering the person, which the law redresses even in its initial stage, thus protecting the physical person more completely. . . . In actions for physical injuries, the great consideration is the loss of time and the diminution of capacity for work, of course allowing also for the pain endured. So far as mental suffering originating in physical injury is concerned, it is rightly treated as undistinguishable from the physical pain. On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguishable as mental and another as physical. So, in cases of physical injury, the mental suffering is taken into view. But according to good authorities, where it is distinct and separate from the physical injury, it cannot be considered. . . . In an action for false imprisonment, or for malicious arrest and prosecution, mental anguish has been held a proper subject for compensatory damages. *Fisher v. Hamilton*, 49 Ind. 341; *Stewart v. Maddox*, 63 Ind. 51; *Coleman v. Allen*, 79 Ga. 637, 5 S. E. Rep. 204. Of course, such injuries are essentially wilful, and besides are violations of the great right of personal security or personal liberty. Reference has been made also to cases of passengers being put off railway trains, when the mortification, insult, and wounded feelings come in to enhance the damages. From the moment the passenger is ordered to get off, he is under duress; his body is not free to remain where he chooses, and where it has the right to be. It is like an illegal arrest or an illegal imprisonment. In all these cases, where personal security or personal liberty is infringed, the mental suffering seems to be a necessary component in the injury. But conceding to the fullest extent that mental suffering enters as an item of damage, or is the gravamen of damage, in certain cases, it hardly admits of discussion to show that any deduction from them which would sanction a recovery in the present case, for mental suffering alone, would authorize a like recovery in every case attended with mental suffering. But this would be an unwarrantable extension of them; they stand each on its own ground, in well-defined limits.

In *Lynch v. Knight*, 9 H. L. Cas. 577, Lord Wensleydale expressed the opinion that, where the only injury is to the feelings, the law does not pretend to give redress. Though Mr. Sedgwick (Dam. § 43 et seq.) seeks to restrict this language to the case then before the Court, and disputes its accuracy as a general proposition, it may be questioned whether

the learned author is able to cite a single case sustaining his contention. He does refer to a number of cases, but in all of them the mental pain may be viewed as an accompaniment or part only of some substantial injury entitling the party to compensation. But, even in cases where a recovery must be had on other grounds, it is frequently held incompetent to give damages for the accompanying mental injury. Thus, where a father sues for a grievous physical injury to his minor child, he cannot recover for the laceration of his parental feelings, even in conjunction with damages for the loss of service, though his mental sufferings be necessarily severe and heartrending. *Flemington v. Smithers*, 2 Car. & P. 292; *Black v. Railroad Co.*, 10 La. Ann. 33; *Railroad Co. v. Kelly*, 31 Pa. St. 372; *Railroad Co. v. Fielding*, 48 Pa. St. 320. Statutes have been passed giving recovery for homicide against the slayer, but the policy has invariably been to confine the right of action to a party sustaining pecuniary loss. And in actions on such statutes, even by the widow of the deceased, grief and anguish cannot come in for compensation. 2 Sedg. Dam. § 573, and cases cited; Field, Dam. § 630, and cases cited; *Gillard v. Railroad Co.*, 12 Law T. 356; *Blake v. Railroad Co.*, 10 Eng. Law & Eq. 437, 18 Q. B. 93, 21 Law J. Q. B. 233; *Railroad v. Orr*, 91 Ala. 548, 8 South. Rep. 360; *Killian v. Railroad Co.*, 79 Ga. 234, 4 S. E. Rep. 165. Where an action was brought for injury to real estate by blasting, it was held that the plaintiff could not recover for mental anxiety for the safety of himself and family. *Wyman v. Leavitt*, 71 Me. 227. In forcible entry and detainer, damages for mental anguish cannot be recovered. *Anderson v. Taylor*, 56 Cal. 131. But in addition to these cases, where damages for mental suffering in conjunction with other damages were refused, cases may be found denying the right to recover where the whole injury is to feeling. Thus where fright caused by negligence of the defendant was so great and sudden as to immediately produce physical sickness and suffering, it is held that damages cannot be had. The principle is that for the mere mental suffering there could be no recovery, and the physical injury is too remote, being unlikely to result from the wrongful act. *Commissioners v. Coultas*, 13 App. Cas. 222; *Fox v. Borkey*, 126 Pa. St. 164, 17 Atl. Rep. 604; *Ewing v. Railroad Co.* (Pa. Sup.), 23 Atl. Rep. 340, 34 Cent. Law J. 236, and 45 Alb. Law J. 211; *Lehman v. Railroad Co.*, 47 Hun, 355; *Allsop v. Allsop*, 5 Hurl. & N. 534. . . .

The law protects the person and the purse. The person includes the reputation. *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. Rep. 250. The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of every one by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves

feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries. The case of *Telegraph Co. v. Rogers*, *supra*, suggests that the doctrine it opposes would open up a new field of litigation. This is worthy of remark. Except in Texas, suits like this have been infrequent in the past. If their foundation principle be sanctioned, they are likely to multiply indefinitely. Nowhere can be found any satisfactory suggestion of a principle to restrain such suits within reasonable limits. How much mental suffering shall be necessary to constitute a cause of action? Let some of the Courts favoring recovery measure out the quantity. If they are unable to do this, then, on principle, any mental suffering would be actionable, the degree of it merely determining the quantum of damages. The cases do suggest as a restriction that the plaintiff must be entitled to damages on some other ground, or to nominal damages, at least; in other words, there must be an infraction of some legal right of the plaintiff. Then the damages may be increased for the mental suffering. If the plaintiff must be entitled to substantial damages on other grounds, then mental suffering alone is not a ground for damages, which is the very point contended for. To speak of the right to nominal damages as a condition for giving substantial damages is a palpable contradiction. To give nominal damages necessarily denies any further recovery.

It is said there must be an infraction of some legal right attended with mental suffering, for this kind of damages to be given. If this be true law, why is not the mental distress always an item to be allowed for in the damages? We have seen that, though allowed in some, it is in many cases excluded. Every man knows that the violation of any material right is necessarily productive of more or less pain of mind. Then why not compensate it in every instance where a right has been violated? In no case whatever are damages recoverable unless a legal duty has been broken. By the test proposed, it is first granted that mental suffering alone is not actionable; then a case arises in which there is no actual damage, unless mental suffering be such, when it is simply assumed that it is actual damage. Throwing away the lame pretence of basing recovery for mental suffering upon an otherwise harmless transgression, and stripping it of all false form and confusing technicality, it is manifest that to allow such a recovery is, in real substance, an effort to protect feeling by legal remedy. If mental suffering be a self-sufficient element of damage, as in reason it must be to recover when no other damage is claimed, why is not the causing of mental suffering itself an infraction of a legal right?

Why should the law of torts lag behind the law of damages? Can it do so in a sound system? . . .

It seems there is no public policy to be subserved by giving damages for mental suffering as a general rule, and the law does not allow it. . . . There was no error in sustaining the demurrer to so much of the plaintiff's petition as sought recovery simply for pain and anguish of mind.

*Judgment affirmed.*

#### 44. SULLIVAN v. OLD COLONY STREET RAILWAY COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1908

197 Mass. 512, 83 N. E. 1091

TORT by a married woman for personal injuries sustained on the evening of April 17, 1905, when the plaintiff was a passenger on a car of the defendant, from the car leaving the track and coming in collision with a post upon the edge of a sidewalk of High Street in Dedham. Writ dated May 3, 1905.

At the trial in the Superior Court before *Crosby*, J., the defendant admitted its liability, and the evidence related solely to the question of damages. The plaintiff's attending physician testified that the physical examination on the day following the accident showed, so far as he could recall, but a single bruise, which was over her right lower ribs and was about the size of a silver dollar, and that she was at the time of the trial and had been since the accident suffering from no organic trouble, but from a functional disturbance of the nervous system, commonly known as hysteria, and that it came on principally as a result of the excitement and fright of the accident, which would be an adequate cause of her condition, though the blows and "all those things" came in as contributing causes. It further appeared that about November 1, 1905, she became pregnant, and that on July 5, 1906, she gave birth to a child. . . . A physician, called by the defendant, testified on his cross-examination that "premature birth might result from a nervously disturbed condition of the mother if such condition affected the mother profoundly."

At the close of the evidence, the defendant asked the judge to instruct the jury, among other things, as follows:

1. The jury should take great care not to allow the plaintiff any damages by reason of the death of the child. . . .
2. There is no sufficient evidence that the fact that the child did not live was in any way attributable to the accident.

The presiding judge refused to give the second instruction requested. He did, however, give the first instruction requested, but also charged the jury upon this branch of the case as follows:

"There is a difference in the claim made by the plaintiff and that of the defendant as to whether the birth of this child and its subsequent death was in any



way or manner attributable to this injury which Mrs. Sullivan sustained, and I instruct you that if . . . you should find that . . . the child's birth, the date of its birth, the day of its birth, and its subsequent death, was affected by reason of the injuries which Mrs. Sullivan received while she was a passenger in the car of the defendant as she claims, . . . it would be your duty to take into account that mental suffering, if there was any, in connection with the damages which she has sustained. If she does not satisfy you that this child's death was attributable to the accident, or if you should find that she did not suffer mentally as the result of this child's death, then you would leave out of consideration that question in passing upon the question of damages."

The jury returned a verdict for the plaintiff in the sum of \$2,100; and the defendant alleged exceptions.

*Asa P. French (J. S. Allen, Jr., with him), for the defendant.*

*E. Greenhood, for the plaintiff.*

RUGG, J. The connection between the tortious act of a person sought to be charged for the consequences of an injury, as the cause, and the injury sustained, as the effect, must be established by a fair preponderance of the evidence before a plaintiff can be permitted to recover. . . .

Although careful instructions were given to exclude the death of the child as an element of damage, the jury were permitted to take into account the mental suffering of the mother on this account. She was thus permitted to recover money compensation for the sorrow and anguish endured as a result of the contemplation of the death of her child conceived nearly seven months and born fourteen months after the injury. This is extending the rule of damages beyond any limits heretofore recognized. It is an expansion which finds no support in any principle of law. Mental suffering connected with and growing out of physical injury is a legitimate element to be considered in determining damages against a person wrongfully causing an injury. Such suffering is to a greater or less extent inseparably connected with physical harm, and flows from it as a natural result. *Canning v. Williamstown*, 1 Cush. 541. The rule of damages is a practical instrumentality for the administration of justice. The principle on which it is founded is compensation. Its object is to afford the equivalent in money for the actual loss caused by the wrong of another. Recurrence to this fundamental conception tests the soundness of claims for the inclusion of new elements of damage. The landowner, whose home, rendered dear by ties of ancestry and personal attachment, is seized under the power of eminent domain, has a right to receive no larger sum, on account of the suffering of mind he endures in leaving it, than a mere stranger, holding it purely for speculative purposes. The parent, who sues for the loss of services of his minor child, cannot recover for his own sympathetic sorrow in witnessing the sufferings, which cause his loss of service. In an action for deprivation of consortium, the anguish of mind of the husband, in observing the bodily pain of a sensitive wife, forms no element in the



damages he may recover. These considerations apply peculiarly to a case like the present. Wealth brings no consolation to those who mourn. The grief occasioned by the death of loved ones touches chords in the human soul which lie outside the compass of pecuniary relief. The solace, which stills the voice of lamentation, comes from sources which cannot be found through the medium of money. The mental suffering, for which damages can be recovered, therefore, are limited to those, which result to the person injured, as the necessary or natural consequence of the physical injury. But sentiments of grief, sorrow, and mourning, which are aroused by extraneous causes, thoughts, or reflections, are excluded. The contemplation of the suffering and death of a child, begotten long after the event complained of, is too remote from the original physical injury to the parent and too intangible and ethereal to be connected with the original wrong of the defendant as a result to be reasonably apprehended from such a cause. The law cannot enter the realm of pure sentiment in this class of case, and award pecuniary compensation for those injured feelings, which spring from sympathy and the severance of ties of love and affection. It follows that there can be no recovery for the mental suffering which ensues from the contemplation of the pain, deformity, imperfections, or characteristics of any other person or thing. See *McDermott v. Severe*, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162.

The extent to which recovery may be had for mental suffering has been the subject of somewhat conflicting decisions in various jurisdictions. But so far as we have been able to discover, there is unanimity of decision that, for mental suffering of a class like that under discussion (except by express provision of statute, see *Kelley v. Ohio R. Co.*, 58 W. Va. 216, 52 S. E. 520, 2 L. R. A. n. s. 898), there can be no recovery (*Maynard v. Oregon R. Co.*, 46 Or. 15, 78 Pac. 983, 68 L. R. A. 477; *Bovee v. Danville*, 53 Vt. 183; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; *Railway Co. v. Douglass*, 69 Tex. 694, 7 S. W. 77; *Railway Co. v. Chance*, 57 Kan. 40, 45 Pac. 60; *Butler v. Manhattan St. Ry. Co.*, 143 N. Y. 417, 38 N. E. 454, 26 L. R. A. 46, 42 Am. St. Rep. 738; *Lennox v. Interurban St. Ry. Co.*, 104 App. Div. 110, 93 N. Y. Supp. 230).

*Exceptions sustained.<sup>1</sup>*

<sup>1</sup> [For mental suffering caused by a seduction of a daughter, see Nos. 72-74, post.]

#### PROBLEMS:

The plaintiff's declaration averred that she worked in a paper-box factory, receiving nine dollars a week; that she bought a ticket at the defendant's dance-hall and entered; that while dancing with a gentleman she was seized by the defendant, addressed in rude language, and evicted from the hall; and that she suffered great mental distress and anguish. Was the last allegation demurrable? (1898, *Maisenbacker v. Society Concordia*, 71 Conn. 369, 42 Atl. 67.)

The defendant takes part in an unlawful post-mortem dissection of a corpse,

## Topic 2. Fear

## 45. CANNING v. WILLIAMSTOWN

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1848

1 Cush. 451

THIS was an action on the case, to recover damages for an injury sustained by the plaintiff, in consequence of a defect in a bridge in the town of Williamstown. The trial was before *Forbes, J.*, in the Court of Common Pleas.

It was in evidence, that the plaintiff was riding over the bridge, in which is wantonly mutilated. May the relatives recover for mental anguish? (1895, *Young v. College*, 81 Md. 358, 32 Atl. 177.)

The plaintiff was corporally disabled by the fault of the defendant. May he recover for his anguish in meditating on the helpless condition of his family consequential upon his inability to support them? (1904, *Maynard v. Oregon R. & N. Co.*, 46 Or. 15, 78 Pac. 983; 1896, *Atchison, T. & S. F. R. Co. v. Chance*, 57 Kan. 40, 45 Pac. 62.)

The plaintiff is corporally injured by the fault of the defendant. May he recover for the "humiliation of going through life in a crippled condition?" (1899, *Chicago City R. Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366.)

The plaintiff had bought in one store something which she carried in a box, and then entered the defendant's store to make another purchase. The defendant approached her, rudely snatched the box from her, and examined it, and ordered her to leave the store. He mistook her for a shop-lifter. May the plaintiff recover for the humiliation and mental anguish? (1909, *Small v. Longergan*, — Kan. —, 105 Pac. 27.)]

A mob took the plaintiff into the woods, put a rope around his neck, threatened and made a demonstration of hanging. May he recover for mental anguish? (1904, *Warner v. Talbot*, 112 La. 817, 36 So. 743.)

## NOTES:

"Recovery for mental suffering." (C. L. R., I, 327, 404, 483, 489.)

"Mental anguish in telegraph cases: conflict of laws." (C. L. R., VII, 273.)

"Mental anguish in negligence cases: must be result of physical injury, not in contemplation thereof." (C. L. R., VIII, 658.)

"Mental suffering, without physical injury, due to negligent transmission of telegram." (H. L. R., XVII, 572.)

"Recovery by parent for mental suffering due to negligent mistreatment of child." (H. L. R., XX, 149.)

"Damages for mental suffering." (M. L. R., II, 150, 226, 411, 485, 641, 642.)

"Damages for mental anguish unaccompanied by physical injury." (M. L. R., IV, 244, 308.)

"Damages for mental suffering." (M. L. R., III, 74.)

"Damages for mental suffering." (M. L. R., V, 126, 382, 474.)

"Damages for mental anguish." (M. L. R., V, 208.)]

## CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:

*Henry Sidgwick*, "Elements of Politics," c. IV, § 4, par. V.

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. XI, § 340, p. 336.

*A. J. Willard*, "Principles of the Law: Personal Rights," c. XXVI, p. 244.]

company with two other persons, in a light carriage drawn by two horses; that when the horses had arrived near the centre of the bridge, it gave way, and the plaintiff was precipitated about fifteen feet down upon the rocks and stones in the stream below, by which he was injured in the cheek or side of the face, and became sore and lame; and that the plaintiff, though the injury was not very severe, was, by the accident, put in considerable peril.

It was contended, for the defendants, that they were not liable in damages for the risk and peril sustained by the plaintiff, but only for the actual damage to his person.

It was contended, on the part of the plaintiff, that the life of the plaintiff was put in great jeopardy; that the accident could not have happened in the manner proved, without great terror and mental suffering; and that the jury, in estimating the damages, had a right to consider not only the injury to the person of the plaintiff, but also his mental anguish, and the risk and peril attending the accident.

The presiding judge, after calling the attention of the jury to the provisions of the Rev. Sts. c. 25, § 22, instructed them, that towns are liable, in cases like the present, only so far as they are made liable by the express provision of law; and, that for mere risk and peril, no action can be sustained against them; but, that where an injury to the person is sustained, the damages are to be commensurate with the injury; and, that if the injury to the person is of such a character, as to be necessarily attended with mental suffering, such suffering is, within the meaning of the statute, a part of the injury to the person, and may be considered in the estimate of damages.

The jury thereupon returned a verdict for the plaintiff, and the defendants filed exceptions.

*D. N. Dewey*, for the defendants.

*H. Byington*, for the plaintiff.

METCALF, J. The Rev. Sts. c. 25, § 22, provide, that if any person "shall receive any injury in his person," by reason of any defect or want of repair in a road, he may recover, of the party that is by law obliged to repair the road, the amount of damage sustained by such injury.

The argument for the defendants assumes that the plaintiff sustained no injury in his person, within the meaning of the statute, but merely incurred risk and peril, which caused fright and mental suffering. If such were the fact, the verdict would be contrary to law. But we must suppose that the jury, under the instructions given to them, found that the plaintiff received an injury in his person — a bodily injury — and that they did not return their verdict for damages sustained by mere mental suffering caused by the risk and peril which he incurred. And though that bodily injury may have been very small, yet if it was a ground of action, within the statute, and caused mental suffering to the plaintiff, that suffering was a part of the injury for which he was entitled to damages.

We are of opinion, that there was no error in the instructions; and we cannot presume that they were misunderstood or disregarded by the jury.

*Exceptions overruled.*<sup>1</sup>

46. **REGISTRUM BREVIUM** (1595). *Breve de insultu facto et minis impositis* (fol. 108). Ostensus quare vi &c. in ipsam Agnetem apud B. insultum fecerit &c. tractavit, & eidem A. de domibus suis ibidem prosternendis, quousque eadem A. finem pro viginti solidos pro saluatione domorum suarum praedictarum cum praefatis I. & R. fecisset, comminati fuerunt, & alia enormia &c. T. anno eodem.

## 47. MORTIN *v.* SHOPPEE

NISI PRIUS. 1828

3 C. & P. 373

**ASSAULT.** Plea: General issue. The plaintiff was walking along a foot-path by the roadside at Hillingdon, and the defendant, who was on

### <sup>1</sup> [PROBLEMS:

The plaintiff, riding on a train, was unlawfully compelled by the defendant's conductor to jump from the moving train; the conductor threatening to push him off if he did not jump. While preparing to jump, the plaintiff, who was afflicted with hernia, suffered fear at the prospect of renewing it by the fall. May he recover for this fear? (1890, *Fell v. R. Co.*, 44 Fed. 248.)

The plaintiff was bitten by the defendant's dog. May he claim for the fear of hydrophobia suffered by him, past and to come? (1909, *Buck v. Brady*, 111 Md. —, 73 Atl. 277); 1880, *Godeau v. Blood*, 52 Vt. 251; 1894, *Warner v. Chamberlain*, 7 Del. (Houston) 18, 30 Atl. 638; 1898, *Trinity & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690, 46 S. W. 389.)

The defendant's train culpably struck the plaintiff's wagon at a crossing. The plaintiff was thrown out and corporally injured. May he include his fright in the items of damage? (1895, *Warren v. R. Co.*, 163 Mass. 895, 40 N. E. 895; 1896, *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297, 60 id. 457, 35 Atl. 100.)

The defendant was landlord of the plaintiff and desired to evict her, the lease having expired. The plaintiff was ill in bed. The defendant entered and tried to smoke her out, by taking off the stove-lid and pouring water in the stove. The plaintiff brings an action of assault and trespass. (1879, *Wood v. Young*, — Ky. —, 50 S. W. 541.)

The plaintiff was wrongfully forced to leave the defendant's train between stations. To return to the station, he had to cross a covered railroad bridge on a narrow planking. He was lame; it was dark; trains were liable to pass over the bridge without warning. May he recover for the terror thereby suffered? (1867, *Chicago & O. R. Co. v. Flagg*, 43 Ill. 364.)

The defendant threw a stone against the plaintiff's house, intending to injure it. The plaintiff was in the room which it struck, and she heard the crash. But it did not appear that the plaintiff knew of the defendant's intention to damage the house; nor that the defendant knew of the plaintiff's presence in that room. May the plaintiff recover for fright? (1897, *White v. Sander*, 168 Mass. 296, 47 N. E. 90.)

The plaintiff, while riding in the defendant's train, was corporally injured in a collision caused by the defendant's fault. May he include his fright in the items of damage? (1901, *Shay v. R. Co.*, 66 N. J. L. 334, 49 Atl. 547.)]

horseback, rode after him at a quick pace. The plaintiff ran away, and got into his own garden; when the defendant rode up to the garden-gate (the plaintiff then being in the garden about three yards from him), and, shaking his whip, said, "Come out, and I will lick you before your own servants."

*Denman*, C. S., objected, that this did not amount to an assault.

Lord TENTERDEN, C. J. If the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter, to avoid being beaten, that is in law an assault.

*Verdict for the plaintiff. Damages, 40s.*

#### 48. READ v. COKER

COMMON PLEAS. 1853

13 C. B. N. S. 850

ASSAULT and false imprisonment. The first count charged an assault committed by the defendant on the plaintiff on the 24th of March, 1853, by thrusting him out of a certain workshop.

Plea: Not guilty "by statute," upon which issue was joined.

The cause was tried before *Talfourd*, J., at the first sitting in London in Easter term last. The facts which appeared in evidence were as follows: The plaintiff was a paper-stainer, carrying on business in the City Road, upon premises which he rented of one Molineux, at a rent of 8s. per week. . . . It was agreed between the plaintiff and the defendant that the business should be carried on for their mutual benefit, the defendant paying the rent of the premises and other outgoings, and allowing the plaintiff a certain sum weekly.

The defendant, becoming dissatisfied with the speculation, dismissed the plaintiff on the 22d of March. On the 24th, the plaintiff came to the premises, and, refusing to leave when ordered by the defendant, the latter collected together some of his workmen, who mustered round the plaintiff, tucking up their sleeves and aprons, and threatened to break his neck if he did not go out; and, fearing that the men would strike him if he did not do so, the plaintiff went out. This was the assault complained of in the first count. Upon this evidence the learned judge left it to the jury to say whether there was an intention on the part of the defendant to assault the plaintiff, and whether the plaintiff was apprehensive of personal violence if he did not retire. The jury found for the plaintiff on this count. Damages, one farthing.

*Byles*, Serjt., on a former day in this term, moved for a rule nisi for a new trial, on the ground of misdirection, and that the verdict was not warranted by the evidence. That which was proved as to the first count clearly did not amount to an assault. . . . To constitute an assault, there must be something more than a threat of violence. An assault is thus defined in Buller's Nisi Prius, p. 15:

"An assault is an attempt or offer, by force or violence, to do a corporal hurt to another, as by pointing a pitchfork at him, when standing within reach; presenting a gun at him [within shooting distance]; drawing a sword, and waving it in a menacing manner, &c. *The Queen v. Ingram*. But no words can amount to an assault, though perhaps they may in some cases serve to explain a doubtful action." . . .

So, in 3 Bl. Comm. 120, an assault is said to be "an attempt or offer to beat another, without touching him; as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him but misses him; this is an assault, insultus, which Finch (L. 202) describes to be 'an unlawful setting upon one's person.'" [JERVIS, C. J. If a man comes into a room, and lays his cane on the table, and says to another, "If you don't go out I will knock you on the head," would not that be an assault?] Clearly not: it is a mere threat, unaccompanied by any gesture or action towards carrying it into effect. The direction of the learned judge as to this point was erroneous. He should have told the jury that to constitute an assault there must be an attempt, coupled with a present ability, to do personal violence to the party; instead of leaving it to them, as he did, to say what the plaintiff thought, and not what they (the jury) thought was the defendant's intention. There must be some act done denoting a present ability and an intention to assault.

A rule nisi having been granted,

JERVIS, C. J. I am of opinion that this rule cannot be made absolute to its full extent; but that, so far as regards the first count of the declaration, it must be discharged. If anything short of actual striking will in law constitute an assault, the facts here clearly showed that the defendant was guilty of an assault. There was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution.

MAULE, J., CRESSWELL, J., and TALFOURD, J., concurring.

*Rule discharged as to the first count.*

#### 49. BEACH *v.* HANCOCK

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1853

27 N. H. 223

TRESPASS, for an assault.

Upon the general issue it appeared that, the plaintiff and defendant being engaged in an angry altercation, the defendant stepped into his office, which was at hand, and brought out a gun, which he aimed at the plaintiff in an excited and threatening manner, the plaintiff being three or four rods distant. The evidence tended to show that the defendant snapped the gun twice at the plaintiff, and that the plaintiff did not know whether the gun was loaded or not, and that, in fact, the gun was not loaded.



The Court ruled that the pointing of a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded, and that it made no difference whether the gun was snapped or not. . . .

The defendant excepted to these rulings and instructions.

The jury having found a verdict for the plaintiff, the defendant moved for a new trial by reason of said exceptions.

*Morrison and Fitch*, for the defendant. The first question arising in this case is, Is it an assault to point an unloaded gun at a person in a threatening manner? . . . The Court erred in instructing the jury that the pointing of a gun in an angry and threatening manner was an assault. It is well settled that the intention to do harm is the essence of an assault, and this intent is to be collected by the jury from the circumstances of the case. 2 Greenl. Ev. 73.

*D. and D. J. Clerk*, for the plaintiff.

GILCHRIST, C. J. Several cases have been cited by the counsel of the defendant to show that the ruling of the Court was incorrect. Among them is . . . the case of *Regina v. St. George*, 9 C. & P. 483 . . . In this case, Parke, B., said: "If a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent." So if a person present a pistol purporting to be a loaded pistol at another, and so near as to have been dangerous to life if the pistol had gone off; semble, that this is an assault, even though the pistol were, in fact, not loaded. *Ibid.* . . .

One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury, when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort, if such things could be done with impunity.

We think the defendant guilty of an assault. . . .

*Judgment on the verdict.*<sup>1</sup>

<sup>1</sup> [PROBLEMS :

The appellant, while standing on the opposite side of a table from the prosecutrix, a girl about fourteen years of age, made, as she describes it, a "kissing sign" to her; that is, "he puckered his lips and smacked them." He did not come near enough to touch her, nor did he make any effort to kiss her, or use any violence. Appellant was a near neighbor, and some intimacy existed between the two families, and the girl was in the habit of visiting at his house. On the



## 50. WYMAN v. LEAVITT

SUPREME JUDICIAL COURT OF MAINE. 1880

71 Me. 227

ON exceptions and motion to set aside the verdict.

The facts sufficiently appear in the opinion.

*Baker & Baker*, for the plaintiffs. . . . This is an action for injury to the domicil of the plaintiff, while she and her family were occupying it, and it is a legitimate element of damages, that the peace of the house was disturbed, and that the plaintiff was put in fear and peril, not as a ground of action, but as an inevitable consequence. It is absurd to hold that if a person assaults a dwelling-house with huge rocks, and breaks in the roof, and endangers the lives of the owner and occupant, and her children, although they are not in fact killed or wounded, that the owner is to have no compensation for her fear, peril and mental suffering. Suppose the danger so alarming as to cause a fright, so great as to produce sickness, fever, or insanity, would this be no element of damage? . . .

*A. P. Gould* and *J. E. Moore*, for the defendant. . . .

VIRGIN, J. These are actions on the case against a sub-contractor to recover damages caused by his alleged negligence in blasting out a ledge within the located limits of a railroad, whereby rocks were thrown upon the plaintiffs' adjoining lands and buildings, and for not removing, within a reasonable time thereafter, rocks thus lodged on their respective premises.

The cases were tried together. At the trial, Mrs. Wyman's counsel asked her, when upon the stand as a witness, to "give the jury some idea of her anxiety in relation to the blasting of the ledge while she was in and about the house — in relation to herself and family." The question was seasonably objected to by the defendant, but the witness was allowed to answer as follows: "At first, I was not much frightened; then after the second Jordan began the heavy blasting, I used to watch my little boy when he went to school and came." This answer was objected to and admitted. After giving a detailed statement of the warnings of the blastings, she further testified in answer to the above general question: "I felt afraid the rocks would hit him" . . . "I was afraid." (Objected to; admitted.) "I was in fear from the time the second

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particular occasion he had called to return some article which he had borrowed. Was it an assault? (1902, *Fuller v. State*, 44 Tex. Cr. 463, 72 S. W. 184.)

The defendant came into the house where Mrs. S. was sitting at a window. He had a musket and a club. He raised the club over her head, and said that if she said a word (or, if she opened her mouth) he would strike her. Was this an assault? (1837, *U. S. v. Allison*, 5 Cr. C. C. 348.)]

Jordan began to blow those heavy blasts, until they got through." This was also objected to.

The jury were required to find specially, among other things, how much damages they assessed in each action, "for negligence in blasting, including as well the mental anxiety, as the other source of damages." The jury answered these questions; and in the case of Mrs. Wyman, they found the sum of \$264.

There is no evidence in the cases of any injury to the persons of either party or to their child; or of any wanton conduct on the part of the defendant or of his servants. Was the testimony objected to and admitted in relation to Mrs. Wyman's fear of her own or of her child's safety, legally admissible?

As a general proposition, damages are recoverable when they are the natural and reasonable result of the defendant's unlawful act — that is when they are such a consequence as in the ordinary course of things, would flow from such an act. This is the broad rule, covering all the elements of damages, some of which do not enter into every case. The rule though correct as a general abstract statement has its limitations in particular cases. It may include insult and contumely, but they do not exist in every case of personal injury. Personal injury usually consists in pain inflicted both bodily and mental. When bodily pain is caused, mental follows as a necessary consequence, especially when the former is so severe as to create apprehension and anxiety. And not only the suffering experienced before the trial, but such as is reasonably certain to continue afterward, as the result of the injury, rightfully enters into the assessment of damages.

In trespass for assault and battery, the jury may consider not only the mental suffering which accompanies and is a part of the bodily pain, but that other mental condition of the injured person which arises from the insult of the defendant's blows. *Prentiss v. Shaw*, 56 Me. 427; *Wadsworth v. Treat*, 43 Me. 163. Or for an assault alone, when maliciously done, though no actual personal injury be inflicted. *Goddard v. Grand T. Ry.*, 57 Me. 202; *Beach v. Hancock*, 27 N. H. 223; 2 *Greene's Cr. Rep.* 269. So in various other torts to property alone when the tortfeasor is actuated by wantonness or malice, or a wilful disregard of others' rights therein, injury to the feelings of the plaintiff, resulting from such conduct of the defendant, may properly be considered by the jury in fixing the amount of their verdict.

But we have been unable to find any decided case, which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can sustain an action. And the fact that no such case exists, and that no elementary writer asserts such a doctrine, is a strong argument against it. On the contrary it has been held that a verdict, founded upon fright and mental suffering, caused by risk and peril, would in the absence of personal injury, be contrary to law. *Canning v. Williamstown*, 1 Cush. 451. So it is said (in *Lynch*

*v. Knight*, 9 Ho. L. 577, 598), that, "mental pain and anxiety, the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone." Again, in *Johnson v. Wells*, 6 Nev. 224 (3 Am. R. 245), after a very elaborate examination, it was held that pain of mind, aside and distinct from bodily suffering, cannot be considered in estimating damages in an action against a common carrier of passengers. If the law were otherwise, it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision or by the trains leaving the track, could maintain an action against the company. See an elaborate note by Mr. Wood in his edition of *Mayne on Damages*, 70 et seq. We are of the opinion, therefore, that Mrs. Wyman's testimony relating to her fears, as to her own personal safety, was erroneously admitted. Whether a fright of sufficient severity to cause a physical disease would support an action, we need not now inquire.

We also think that her testimony, relating to her anxiety about her child's safety, was inadmissible. . . .

We fail to perceive upon what principle of law the mother or father could recover for parental feelings in an action like the one at the bar.

As to the action of Mr. Wyman — the jury found specially, as in his wife's case, a certain sum for mental anxiety, though less in amount, although there was no testimony upon that point coming from him. The two cases were properly tried together, and the wife must necessarily have had more or less influence upon the other, and cannot well be now separated. We therefore think exceptions should be sustained in both cases.

*Exceptions sustained.*

APPLETON, C. J., DANFORTH, PETERS, and LIBBEY, JJ., concurred.<sup>1</sup>

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### Topic 3. Loss of Privacy

[See the cases post, under Title D, *Mixed Harms*, Nos. 333–336.]

#### <sup>1</sup> [PROBLEMS:

The defendant was trying to set fire to the house in which the plaintiff was, and he pointed a gun at her and told her that he would blow her head off if she did not go back into the house. She was frightened, took her children, ran away, caught cold from exposure and was ill. May she recover for the mental suffering? (1902, *Kline v. Kline*, 158 Ind. 602, 64 N. E. 9.)

The plaintiff was unlawfully obliged to leave the defendant's train before her destination, and to walk along a side-track in which there was a culvert. She fell into this, and while there was frightened by the approach of cars being switched on the side track. She was not physically injured nor made ill. Could she recover for the fright? (1888, *Stutz v. R. Co.*, 73 Wis. 147.)]

**SUB-TITLE (IV): LOSS OF LIBERTY (IMPRISONMENT)****Topic 1. Imprisonment, in General**

51. **REGISTRUM BREVIUM** (1595). *Breve de imprisonamento* (fol. 93). Quare vi & armis in ipsum A. apud N. insultum fecit, & ipsum verberavit, vulneravit, imprisonavit, & male tractavit, & alia enormia &c.

52. **REGISTRUM BREVIUM** (1595). *Breve de imprisonamento quosque finem et quoddam scriptum obligatorium fecisset* (fol. 93). Pone B. etc. Quare vi & armis ipsum A. apud N. cepit, imprisonavit, & male tractavit, & ipsum sic imprisonatum abinde vsque T. duxit, & ipsum ibidem in priona, quousque idem A. finem per vndecim solidos pro deliberatione sua habenda cum praefato B. ac quoddam scriptum obligatorium viginti librarum quod ipse praefatum B., occasione imprisonamenti praedicti non prosequetur, eidem B. fecisset, detinuit, & alia enormia &c.

53. **W. S.** *An Exact Collection of Choice Declarations etc. diligently Perused and Translated into English for the benefit and helpe of young Clerkes.* (1653. Part 2, p. 111.) Declaration in trespass and false imprisonment: I. I. lately of, etc. and B. P. lately of, etc. were attached to answer W. N. of a Plea, wherefore by force and arms, him the said W. at London, they took, imprisoned, and evill handled, and him there so in prison against the Law and Custome of the Realm of our Lady the Queen that now is, they long deteyned, and other harms to him they did, to the great Damage of him the said W. and against the Peace of our Lady the Queen, etc. And whereupon the same W. by I. W. his Attorney complaines, that the aforesaid I. and B. (such a day and year) by force and arms, that is to say, with Clubs and Knives, him the said W. at London, etc. they took, imprisoned, and evill handled, And him there in Prison against the Law and Custome of the Realm of our Lady the Queen that now is, they long, that is to say, for the space of thirty dayes they deteyned, And other harms, etc. To the great Damage, etc. And against the Peace, etc. Whereupon he saith, he is worsted, and hath Damage, to the value of 300 pounds, And thereupon he brings his Sute, etc.

**54. WRIGHT v. WILSON**

**NISI PRIUS.** 1699

**1 Ld. Raym.** 739

A. HAS a chamber adjoining to the chamber of B. and has a door that opens into it, by which there is a passage to go out; and A. has another door, which C. stops, so that A. cannot go out by that. This is no imprisonment of A. by C. because A. may go out by the door in the chamber of B.; though he be a trespasser by doing it. But A. may have a special action upon his case against C. Ruled by **HOLT, C. J.**, in evidence at a trial at the Summer assizes at Lincoln, 1699, in an action of false imprisonment. And the plaintiff was nonsuit.

## 55. HERRING v. BOYLE

EXCHEQUER. 1834

1 Cr. M. &amp; R. 377

TRESPASS for assault and false imprisonment. Plea, the general issue. At the trial at the Middlesex Sittings in Easter Term before *Gurney*, B., the following appeared to be the facts of the case: The plaintiff, who sued by his next friend, was an infant about ten years old. He was placed by his mother, who was a widow, at a school kept by the defendant at Stockwell. The terms of the defendant's school were twenty guineas a year, payable quarterly. The first quarter, which became due on the 29th of September, 1833, was duly paid. On the 24th of December in the same year, the plaintiff's mother went to the school and asked the defendant to permit the plaintiff to go home with her for a few days. The defendant refused, and would not permit the mother to see her son, and told the mother that he would not allow him to go home, unless the quarter ending on the 25th of December was paid. The mother remonstrated, and said she would pay the quarter's schooling in a short time, but it was not due until the next day. A few days afterwards, the mother went again to the defendant at his school, and demanded from him to see her son, and be allowed to take him home with her. The defendant refused. On the 31st of December, the mother went again with a friend, and made the same demand; but the defendant refused to let her see the plaintiff, or to allow her to take him home, and he then claimed another quarter's schooling, as a few days of the quarter after the 25th of December had then elapsed, and he insisted on keeping the plaintiff until that amount also should be paid. A formal demand was afterwards made, and on a writ of habeas corpus being sued out, the plaintiff was sent home, seventeen days having elapsed after the first demand by his mother. No proof was given that the plaintiff knew of the denial to his mother, nor was there any evidence of any actual restraint upon him. On these facts the learned Baron was of opinion that there was no evidence of an imprisonment to go to the jury, and he nonsuited the plaintiff.

*Comyn* obtained a rule to set aside the nonsuit and for a new trial, against which cause was now shown by

*Hutchinson*, for the defendant. The nonsuit was right. There was no corporal touch or restraint on the plaintiff. The form of the proceeding in trespass shows that there must be an actual force. . . .

*Comyn* and *Butt*, contra. The boy was sent by his mother to the defendant's school. She had authority to place him in the care of the schoolmaster, and she had authority to determine his continuance there. Now it was proved that the authority from the mother to the master was withdrawn, and the defendant could not justify the detention after such authority was withdrawn. . . . [ALDERSON, B. The fallacy seems to me to be, that you assume, for the purpose of your argument, that every

boy at school is in prison. If that were so, you would go a long way to convince us that when the authority to keep him there is at an end, his remaining at school might be an imprisonment. That, however, is not so with regard to a boy at school. In the case of a lunatic perhaps it may be different. A person of full age restrained as a lunatic, might probably be taken *prima facie* to be detained against his will.] The assent of a child of such tender years may perhaps be assumed, in the first instance, because the law will presume the assent of an infant to what is for his benefit; but that assent must be taken to be revoked when the contract for schooling is determined by the act of the mother. In the present case, the plaintiff was detained during the holidays, and it may fairly be presumed that a keeping at school during the holidays is against the will of a school-boy. [BOLLAND, B. The evidence did not bring the schoolmaster and the plaintiff into contact, so as to show that there was any the least restraint of the one upon the other.] Every detention against the will is a false imprisonment. . . . The only question is, whether there was any evidence to go to the jury of a detention against the will of the plaintiff. It is submitted that there was. . . .

. . . BOLLAND, B. This was an action of trespass for assault and false imprisonment, brought by an infant by his next friend. . . . In the present case, as far as we know, the boy may have been willing to stay; he does not appear to have been cognizant of any restraint, and there was no evidence of any act whatsoever done by the defendant in his presence. I think that we cannot construe the refusal to the mother in the boy's absence, and without his being cognizant of any restraint, to be an imprisonment of him against his will; and therefore I am of opinion that the rule must be discharged. . . .

GURNEY, B. This plaintiff complains of an assault and false imprisonment. There was no evidence of any restraint upon him. There was no evidence that he had any knowledge of his mother having desired that he should be permitted to go home, nor that anything passed between the plaintiff and defendant which showed that there was any compulsion upon the boy; and there was nothing to show that he was conscious that he was in any respect restrained. . . .

*Rule discharged.*

## 56. BIRD *v.* JONES

QUEEN'S BENCH. 1845

7 Q. B. 742

THIS action was tried before Lord DENMAN, C. J., at the Middlesex sittings after Michaelmas term, 1843, when a verdict was found for the plaintiff.

In Hilary term, 1844, *The tiger* obtained a rule nisi for a new trial, on the ground of misdirection.

In Trinity term, in the same year (June 5), *Platt, Humfrey*, and



*Hance* showed cause, and Sir *F. Thesiger*, Solicitor-General, supported the rule.

The judgments sufficiently explain the nature of the case.

*Cur. adv. vult.*

In this vacation (9th July), there being a difference of opinion on the bench, the learned judges who heard the argument delivered judgment *seriatim*.

COLERIDGE, J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed.<sup>1</sup> . . .

This point is, whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows:

A part of a public highway was inclosed, and appropriated for spectators of a boat-race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant; but after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go; but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and during that time remained where he had thus placed himself.

These are the facts; and, setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure; and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much.

I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment, neither more nor less, from their being wrongful or capable of justification.

And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed; but a boundary it

<sup>1</sup> [WILLIAMS and PATTESON, JJ., concurred with the judgment of COLERIDGE, J.]



must have, and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom; it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power: it includes the notion of restraint within some limits defined by a will or power exterior to our own.

In Com. Dig. Imprisonment (G), it is said: "Every restraint of the liberty of a free man will be an imprisonment." For this the authorities cited are 2 Inst. 482; Cro. Car. 209. But when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. . . .

If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison, and yet, as obviously, none would be confined to it.

Knowing that my lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own; but, if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.

LORD DENMAN, C. J. [dissenting]. I have not drawn up a formal judgment in this case, because I hoped to the last that the arguments which my learned brothers would produce in support of their opinion might alter mine. We have freely discussed the matter both orally and in written communications; but, after hearing what they have advanced, I am compelled to say that my first impression remains. . . .

I consider these acts as amounting to imprisonment. That word I understand to mean any restraint of the person by force. In Buller's *Nisi Prius*, p. 22, it is said:

"Every restraint of a man's liberty under the custody of another, either in a gaol, house, stocks, or in the street, is in law an imprisonment; and whenever it is done without a proper authority, is false imprisonment, for which the law gives an action; and this is commonly joined to assault and battery; for every imprisonment includes a battery, and every battery an assault."

It appears, therefore, that the technical language has received a very large construction, and that there need not be any touching of the per-

son; a locking up would constitute an imprisonment, without touching. From the language of Thorpe, C. J., which Mr. Selwyn cites from the Book of Assizes, it appears that, even in very early times, restraint of liberty by force was understood to be the reasonable definition of imprisonment.

I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may find some means of escape.

It is said that the party here was at liberty to go in another direction. I am not sure that in fact he was, because the same unlawful power which prevented him from taking one course might, in case of acquiescence, have refused him any other. But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained? If I am locked in a room, am I not imprisoned, because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water, or by taking a route so circuitous that my necessary affairs should suffer by delay?

It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty; and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person. . . .

The plaintiff did right to resist it as an outrageous violation of the liberty of the subject from the very first. *Rule absolute.*

## 57. WOOD v. CUMMINGS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1908

197 Mass. 80, 83, N. E. 318

SUPERIOR COURT, Essex County. Action by William L. Wood against Arthur C. Cummings. Verdict directed for defendant, and case reported to the Supreme Judicial Court. Judgment ordered for plaintiff.

This was an action of tort in three counts: The first for assault and battery; second, for false imprisonment; and, third, for conversion of a lot of wood-working machinery. January 20, 1904, John F. Smith was adjudicated a bankrupt, and on February 29, 1904, defendant qualified as trustee of the estate. Plaintiff held a mortgage on Smith's goods and chattels of the date May 28, 1900, which also covered the engine hereinafter mentioned, and of which there was a breach of condition in payment of principal and interest at the time of bankruptcy. February 24, 1904,

defendant took possession of the shop and contents as trustee, and locked the door, keeping the key. March 2, 1904, defendant and plaintiff entered the shop together; defendant having the door locked behind them. After checking the property, defendant, on demand of plaintiff, had the door unlocked so he could leave. Plaintiff testified that he sustained no injury or damage from such act of defendant. Later plaintiff got permission from Mrs. Smith, who owned the premises, to enter the shop, and, finding defendant's lock on the door, broke it off and entered in defendant's absence, declaring his intention to take possession and foreclose his mortgage. Defendant appeared and endeavored to eject plaintiff bodily, but failed, and left. Plaintiff then locked the door with a padlock of his own. Plaintiff testified that he sustained no injury or damage from this act of defendant. . . .

*Harrison Dunham and Oscar E. Jackson, for plaintiff.*

*Alden P. White and Guy C. Richards, for defendant.*

KNOWLTON, C. J. The plaintiff's claim of damages for false imprisonment is not sustained by the evidence. The testimony shows that the locking of the door was not to imprison the plaintiff, but for another purpose. As soon as the plaintiff made known his desire to go out, the door was unlocked, and the plaintiff suffered no injury nor damage. At the time of the alleged assault the plaintiff had entered the shop with the permission of the owner. The defendant, appearing later, objected, and said he would try to put the plaintiff out of the shop. "At once they wrestled with each other, and after some time the defendant, not being able to put the plaintiff out, left the premises." Here was a use of force upon the person of the plaintiff, against his will and without justification in law. For this the plaintiff has a right of action, and may recover nominal damages. *Com. v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328. . . .

*Judgment for the plaintiff for nominal damages.*

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## Topic 2. Imprisonment by an Officer of Justice (Arrest)

### 58. GENNER *v.* SPARKES

KING'S BENCH. 1704

1 *Salk.* 79, 6 *Mod.* 173

GENNER, a bailiff, having a warrant against Sparkes, went to him in his yard, and, being at some distance, told him he had a warrant, and said he arrested him. Sparkes, having a fork in his hand, keeps off the bailiff from touching him, and retreats into his house. And this was moved as a contempt. Et per CURIAM. The bailiff cannot have an attachment, for here was no arrest nor rescous. Bare words will not make an arrest; but if the bailiff had touched him, that had been an

arrest, and the retreat a rescous, and the bailiff might have pursued and broke open the house, or might have had an attachment or a rescous against him; but as this case is, the bailiff has no remedy but an action for the assault; for the holding up of the fork at him when he was within reach, is good evidence of that.

### 59. RUSSEN *v.* LUCAS

NISI PRIUS. 1824

1 C. & P. 153

**ACTION** against the sheriff for an escape. The only point in dispute was, whether a person named Hamer was arrested by the sheriff's officer, and escaped.

The officer having the warrant went to the One Tun Tavern in Jermyn Street, where Hamer was sitting. He said: "Mr. Hamer, I want you." Hamer replied, "Wait for me outside the door, and I will come to you." The officer went out to wait, and Hamer went out at another door, and got away.

**ABBOTT, C. J.** Mere words will not constitute an arrest; and if the officer says, "I arrest you," and the party runs away, it is no escape; but if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest. If Hamer had gone even into the passage with the officer, the arrest would have been complete; but, on these facts, if I had been applied to for an escape-warrant, I would not have granted it.

*Nonsuit.*

### 60. GOODELL *v.* TOWER

SUPREME COURT OF VERMONT. 1904

77 Vt. 61, 58 Atl. 790

**EXCEPTIONS** from Rutland County Court; **MUNSON, Judge.**

Action by Horatio U. Goodell against William W. Tower and others. From a judgment in favor of plaintiff, defendants bring exceptions. Affirmed.

Argued before **ROWELL, C. J.**, and **TYLER, START, WATSON, STAFFORD**, and **HASELTON, JJ.**

*William W. Stickney, John G. Sargent, and Homer L. Skeels*, for plaintiff.

*Butler & Moloney*, for defendants.

**TYLER, J.** This action is trespass for false imprisonment. The question arises upon the complaint upon which the warrant was issued. V. S. 5001, reads: "Sheriffs, deputy sheriffs, constables, police officers, other prosecuting officers, and all officers of societies for the prevention of

cruelty to animals, shall prosecute violations of the preceding sections of this chapter which come to their notice or knowledge." The complaint was made by William W. Tower, who described himself therein as "officer or agent of the Society for the Prevention of Cruelty to Animals within and for the county of Rutland," and signed it "William W. Tower, Agent," and thereupon the justice issued the warrant. It could not be maintained, and it is not insisted, that Tower had authority under the statute to make the complaint as agent; therefore we are not called upon to decide whether a legally organized society of this kind might confer authority upon a certain officer to make complaint for a violation of this statute. That question does not arise. . . .

2. It is contended in defendant Hastings' behalf that he did not restrain the plaintiff of his liberty. The trial Court found that, having the complaint and warrant signed, respectively, by the other two defendants, he met the plaintiff, and stopped him by speaking to him as he was driving along on a business errand, read the paper to him, and told him he would have to go with him (Hastings); that the plaintiff told the officer that he would have to get some one to take his team; that the officer permitted him to do his errand, but directed him to return as soon as he could; that the plaintiff then drove along; that Hastings became impatient, and went to meet him, turned in behind the plaintiff's team, and followed him to the village; that he went to the place of trial with the plaintiff, delivered the paper to the justice, and informed him that the plaintiff was present; that this was all that Hastings did besides making his return upon the warrant; that he understood that the plaintiff was in his custody. The action of the officer constituted a false imprisonment of the plaintiff. It was not necessary that he should lay his hands on him. It was sufficient that the plaintiff was within his power and submitted to the arrest. *Mowry et al. v. Chase*, 100 Mass. 79. Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner in which the restraint is effected. 2 Kent's Comm. 26. And see *Pike v. Hanson*, 9 N. H. 491, cited in the notes, where it was held that words may constitute an imprisonment, if they impose a restraint upon a person, and he is accordingly restrained and submits. The law is so well settled upon this subject that it is hardly necessary to cite authorities, but the notes in *Bissell v. Gold*, 1 Wend. 210, 19 Am. Dec. 480, are interesting, and clearly elucidate the rule that, to constitute an arrest, there must be some real or pretended legal authority for taking the party into custody; that he must be restrained of his liberty; that, if he submits, and is within the power of the officer, it is sufficient without an actual touching of his person. This is the rule laid down by Savage, C. J., in the main case, and it has not been departed from in recent authorities. . . .

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> [PROBLEMS :

The plaintiff was assessed for taxes, which she deemed illegal. The collector, being in a room with her, demanded payment, which she declined, until ar-

## SUB-TITLE (V): LOSS OF LIFE (DEATH)

### Topic 1. Death, as creating a Cause of Action ,

61. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England* (1765. Book III, p. 119; Book IV, p. 312). I. As to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

1. With regard to the first subdivision, or injuries affecting the life of man, they do not fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next book of our commentaries. . . .

[Book IV] An appeal, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferior one which is the general use of the word; but it here means an original suit, at the time of its first commencement.<sup>1</sup> An appeal therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public. . . .

This private process, for the punishment of public crimes, had probably its original in those times when a private pecuniary satisfaction, called a weregild, was constantly paid to the party injured, or his relations, to expiate enormous offences. This was a custom derived to us, in common with other northern nations,<sup>2</sup> from our ancestors, the ancient Germans; . . . And thus we find in our Saxon laws (particularly those of king Athelstan<sup>3</sup>) the several weregilds for homicide established in progressive order from the death of the ceorl or peasant, up to that of the king himself.<sup>4</sup> And in the laws of king Henry I<sup>5</sup> we have an account of what other offences were then redeemable by weregild, and what were not so.<sup>6</sup> As therefore during the continuance of this custom, a process was cer-

<sup>1</sup> It is derived from the French, "appeller," the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter, which signifies the same as the ordinary sense of "appeal" English.

<sup>2</sup> Stiernh. de jure Sueon. 1. 3, c. 4.

<sup>3</sup> Judic. Civit. Lund., Wilkins, 71.

<sup>4</sup> The weregild of a ceorl was 266 thrysmas, that of the king 30,000; each thryisma being equal to about a shilling of our present money. The weregild of a subject was paid entirely to the relations of the party slain; but that of the king was divided; one half being paid to the public, the other to the royal family.

<sup>5</sup> c. 12.

<sup>6</sup> In Turkey this principle is still carried so far, that even murder is never prosecuted by the officers of the government, as with us. It is the business of the next relations, and them only, to revenge the slaughter of their kinsmen; and if they rather choose (as they generally do) to compound the matter for money, nothing more is said about it. (Lady M. W. Montague, lett. 42.)

rested. He then told her that he arrested her, but he did not lay his hand on her. She then paid the tax. Has she an action for false arrest? (1838, *Pike v. Hanson*, 9 N. H. 491.)]

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT :

A. J. Willard, "Principles of the Law: Personal Rights," c. XXVIII, pp. 277-280.

Herbert Spencer, "Justice," c. X, The Rights to Free Motion and Locomotion."



tainly given, for recovering the weregild by the party to whom it was due; it seems that, when these offences by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offence. . . .

An appeal of felony may be brought for crimes committed either against the parties themselves, or their relations. . . . The only crime against one's relation, for which an appeal can be brought, is that of killing him, by either murder or manslaughter. But this cannot be brought by every relation: but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was also confirmed, by an ordinance of king Henry the First, to the four nearest degrees of blood.<sup>1</sup> . . . And, by the statute of Gloucester, 6 Edw. I, c. 9, all appeals of death must be sued within a year and a day after the completion of the felony by the death of the party: which seems to be only declaratory of the old common law: for in the Gothic constitutions we find the same "*praescriptio annalis, quae currit adversus actorem, si de homicida ei non constet intra annum a caede facta, nec quenquam interea arguat et accuset.*"<sup>2</sup>

These appeals may be brought previous to any indictment: and if the appellee be acquitted thereon, he cannot be afterwards indicted for the same offence. . . . If the appellee be found guilty he shall suffer the same judgment, as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong, the king can no more pardon it, than he can remit the damages recovered on an action of battery.<sup>3</sup> . . .

[*Editor's note.*] Injury to life, in general, cannot be the subject of a civil action; the civil remedy being merged in the offence to the public. Therefore an action will not lie for battery of wife or servant, whereby death caused. Styles, 347; 1 Lev. 247; Yelv. 89, 90; 1 Ld. Raym. 339. The remedy is by indictment for murder, or, formerly, by appeal. . . . In general, all felonies suspend the civil remedies, Styles, 346, 7: and before conviction of the offender there is no remedy against him at law or in equity, *id. ibid.* 17 Ves. 331; but after conviction and punishment on an indictment of the party for stealing, the party robbed may support trespass or trover against the offender, Styles, 347; Latch, 144; Sir Wm. Jones, 147; 1 Lev. 247; Bro. Ab. tit. Trespass. And after an acquittal of the defendant, upon an indictment for a felonious assault upon a party by stabbing him, the latter may maintain trespass to recover damages for the civil injury, if it be not shewn that he colluded in procuring such acquittal. 12 East, 409. In some cases, by express enactment, the civil remedy is not affected by the criminality of the offender.

## 62. HUGGINS (OR HIGGINS) *v.* BUTCHER

KING'S BENCH. 1607

1 *Brownlow*, 205; *Yelv.* 89

THE plaintiff declared that the defendant such a day did assault and beat his Wife, of which she died such a day following, to his damage 100*l.*

<sup>1</sup> *Mirr.* c. 2, 7.

<sup>2</sup> *Stiernh. de jure Goth.* 1. 3, c. 4.

<sup>3</sup> 2 *Hawk. P. C.* 392.



And Serjeant *Foster* moved that the declaration was not good, because it was brought by the plaintiff for a battery done upon his wife; and this being a personal wrong done unto the woman, is gone by her death: And if the woman had been in life, he could not have brought it alone, but the woman must have joyned in the action, for the damages must be given for the wrong offered to the body of the woman, which was agreed. And TANFIELD [J.] said, that if one beat the servant of F. S. so that he die of that beating, the master shall not have an Action against the other for the battery and loss of service, because, the servant dying of the extremity of the beating, it is now become an offence against the Crown, and turned into Felony, and this hath drowned the particular offence, and prevails over the wrong done to the Master before: And his Action by that is gone, which FENNER and YELVERTON [JJ.] agreed to.

### 63. BAKER v. BOLTON

NISI PRIUS. 1808

1 *Camp.* 493; *Rev. Rep.* X, 734

THIS was an action against the defendants as proprietors of a stage coach, on the top of which the plaintiff and his late wife were travelling from Portsmouth to London, when it was overturned; whereby the plaintiff himself was much bruised, and his wife was so severely hurt that she died about a month after in a hospital. The declaration, besides other special damage, stated, that "by means of the premises, the plaintiff had wholly lost, and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind."

It appeared that the plaintiff was much attached to his deceased wife, and that, being a publican, she had been of great use to him in conducting his business. But,

Lord ELLENBOROUGH said, the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence.

Verdict for the plaintiff, with £100 damages.

*Park and Marryat*, for the plaintiff.

*The Attorney-General*, for the defendant.

Q. If the wife be killed on the spot, is this to be considered *damnum absque injuria*? — REPORTER.

**Topic 2. Death, as extinguishing a Cause of Action already existing**

**64. HAMBLY v. TROTT**

KING'S BENCH. 1776

*Cowper, 371; English Ruling Cases, II, 1*

IN trover against an administrator cum testamento annexo, the declaration laid the conversion by the testator in his lifetime. Plea, that the testator was not guilty. Verdict for the plaintiff.

Mr. *Kerby* had moved an arrest of judgment upon the ground of this being a personal tort, which dies with the person, upon the authority of *Collins v. Pennerel*, and had a rule to shew cause.

Mr. *Butler* last shewed cause. The objection made to the plaintiff's title to recover in this case is founded upon the old maxim of law which says: "actio personalis moritur cum persona." But that objection does not hold here; nor is the maxim applicable to all personal actions; if it were, neither debt nor assumpsit would lie against an executor or administrator. If it is not applicable to all personal actions, there must be some restriction; and the true distinction is this: Where the action is founded merely upon an injury done to the person, and no property is in question; there, the action dies with the person: as in assault and battery, and the like. But where property is concerned, as in this case, the action remains notwithstanding the death of the party. . . .

Mr. *Kerby*, contra, for the defendant, cited Palm. 330, where Jones, Justice, said, "that when the act of the testator includes a tort, it does not extend to the executor; but being personal dies with him; as trover and conversion does not lie against an executor for trover *sait par luy*." *Collins v. Pennerel*, above cited. . . .

Afterwards, on Monday, February 12, in this term, Lord MANSFIELD delivered the unanimous opinion of the Court as follows:

This was an action of trover against an administrator, with the will annexed. The trover and conversion were both charged to have been committed by the testator in his lifetime: The plea pleaded was, that the testator was not guilty. A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a tort, for which an executor or administrator is not liable to answer.

The maxim, "actio personalis moritur cum persona," upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in form a fiction, and in substance founded on property, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant; if no other action could be brought against the executor, it seems unjust and

inconvenient, that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

We therefore thought the matter well deserved consideration: We have carefully looked into all the cases upon the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them:

First, as to actions which survive against an executor, or die with the person, on account of the *cause* of action. Secondly, as to actions which survive against an executor, or die with the person, on account of the *form* of action.

As to the first; where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labour, or property of another, or a promise to the testator express or implied, — where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises *ex delicto* (as said in Raym. 57, *Hole v. Blandford*, supposed to be by force and against the King's peace, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water course, escape against the sheriff, and many other cases of the like kind.

Secondly, as to those which survive or die in respect of the form of action. . . . No action where in form the declaration must be "*quare vi et armis, et contra pacem*," or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record, the cause of action arises *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. An action on the custom of the realm against a common carrier, is for a tort and supposed crime: The plea is not guilty; therefore, it will not lie against an executor. But *assumpsit*, which is another action for the same cause, will lie. — So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him: but an action for the use and hire of the horse will lie against the executor. . . .

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be

chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

So far as the tort itself goes, an executor shall not be liable: and therefore it is, that all public and private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.

The form of the plea is decisive, viz., that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise *ex delicto*, or *ex maleficio* of the testator, but is founded in a duty, which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an action for money had and received. Therefore, we are all of opinion that the judgment must be arrested.

*Per Curiam. Judgment arrested.*

## 65. PULLING v. GREAT EASTERN RAILWAY COMPANY

QUEEN'S BENCH DIVISION. 1882

*L. R. 9 Q. B. D. 110*

STATEMENT OF CLAIM was in substance as follows:

The plaintiff was the administratrix of Edward Pulling, deceased, her husband, and he had commenced the action in his lifetime. By an order of the Court the plaintiff had been substituted as plaintiff in the action in place of the said Edward Pulling, deceased. The plaintiff alleged that the said Edward Pulling while crossing the defendants' railway by a level crossing on a highway, was by and through the negligence of the defendants in and about the working of the defendants' railway and the management of an engine of the defendants, knocked down and run over by the engine, and sustained personal injuries. It was further alleged that in consequence of the aforesaid injuries the deceased was forced to leave his employment, and was prevented, from the time when he was so injured until his death, from following his occupation and from deriving therefrom the wages and profits which he otherwise might and would have earned and acquired, and he also incurred expenses in obtaining medical attendance and nursing and otherwise during his illness, and at the time of his death his personal estate and effects were much diminished in value by reason of the circumstances aforesaid. Demurrer.

*Lush Wilson*, for the defendants, in support of the demurrer, was stopped by the Court.

*Clay*, for the plaintiff, in support of the statement of claim contended that, inasmuch as damages had been occasioned to the estate of the intestate, he having incurred medical expenses and sustained pecuniary

loss in his lifetime through his injuries, the action was maintainable by his administratrix under St. Edw. III, c. 7. . . .

DENMAN, J. I think that our judgment must be in favour of the demurrer. This action is clearly an action of tort, the cause of action alleged being the negligent management by the defendants of their railway and engine, whereby the original plaintiff sustained personal injury. The present plaintiff, his administratrix, alleges that the effect of the tort was to cause him to incur medical expenses before his death, and in respect of those expenses it is contended that the action is maintainable. I do not think that we can hold this action maintainable without in practice entirely abrogating the doctrine of law expressed in the maxim "actio personalis moritur cum persona." To a certain extent that doctrine has been qualified. Under the statute of Edward III it has in many cases been held that, where the cause of action, whatever its form may be, is in respect of a tortious impairment of the personal estate, such action may be maintained by the personal representative. But none of the authorities go so far as to say that, where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. . . . Here the tort complained of is an injury to the person arising from the defendants' negligence. There is no decision which supports the proposition that, because in consequence of such injury the person injured is put to expense, the case is brought within the category of cases to which the statute of Edward III applies. Medical expenses are almost always made an element of damage in actions for injury to the person, but it has never before been suggested that the personal representative could maintain an action on the strength of such expenses. For these reasons I think our judgment must be for the defendants.

POLLOCK, B., concurred.

*Judgment for the defendants.*

**TITLE B: SOCIETARY HARMS****SUB-TITLE (I): HARMS TO THE DOMESTIC RELATIONS****Toplo 1. Parent's Interest in the Filial Relation**

66. REGISTRUM BREVIVM (1595). *Breve de herede maritata* (fol. 98 b). Si Reginaldus Ireys &c. tunc pone &c. W. & R. quod sint coram iustitiariis &c. quare vi & armis Iohannam filiam & haeredem praedicti Reginaldi apud I. inuentam rapuerunt, maritauerunt, & abduxerunt, et alia enormia &c.; vel rapuerunt, abduxerunt, et maritauerunt &c.

67. REGISTRUM BREVIVM (1595). *Breve de herede rapto in socagio* (fol. 163 b). Si A. fecerit &c. tunc pone &c. N. quod sit &c. ostensurus quare cum custodia terrae & haeredis C. vsque ad legitimam aetatem ipsius haeredis ad ipsum A. pertineat, eo quod praedictus C. terram suam tenuit in socagio, & praedictus A. propinquior est haeredi ipsius C. ac idem A. in plena & pacifica seisina eiusdem custodiae diu extiterit; praedictus N. filium & haeredem praedicti C. infra aetatem & in custodia ipsius A. existentem apud N. inuentum vi & armis cepit & abduxit, & alia enormia ei intulit, ad graue damnum ipsius A. & contra pacem nostram.

68. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England*. 1765. (Book III, p. 140; and Editor's Note 27; ed. 1856, Philadelphia.) II. Injuries that may be offered to a person considered in the relation of a parent were likewise of two kinds: 1. Abduction, or taking his children away; and, 2. Marrying his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage. But this last injury is now ceased, together with the right upon which it was grounded; for, the father being no longer entitled to the value of the marriage, the marrying his heir does him no sort of injury for which a civil action will lie. As to the other, of abduction, or taking away the children from the father, that is also a matter of doubt whether it be a civil injury or no; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away any other child besides the heir: some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away any of the children, for that the parent hath an interest in them all, to provide for their education.<sup>1</sup> If therefore before the abolition of these tenures it was an injury to the father to take away the rest of his children, as well as his heir (as I am inclined to think it was), it still remains an injury, and is remediable by writ of ravishment, or action of trespass vi et armis, de filio, vel filia, rapto vel abducto;<sup>2</sup> in the same manner as the husband may have it, on account of the abduction of his wife. . . .

[NOTE.] It has been disputed, but the better opinion is, that the father has an interest in his legitimate child, sufficient to enable him to support an action in that character, for taking the child away, he being entitled to the custody of it. Cro. Eliz. 770; 23 Vin. 451; 2 P. W. 116; 3 Co. 38; 5 East, 221. No modern

<sup>1</sup> Cro. Eliz. 770.<sup>2</sup> F. N. B. 90.

instance, however, of such action can be adduced, and it is now usual for the father to bring his action for any injury done to his child, as for debauching her, or beating him or her, in the character of master, *per quod servitium amisit*, in which case some evidence must be adduced of service. 5 T. R. 360, 1.

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## 69. HALL *v.* HOLLANDER

KING'S BENCH. 1825

7 *Dowl. & Ry.* 133; 4 *B. & C.* 660; *Rev. Rep.* XXVIII, 437

TRESPASS for driving a carriage against the plaintiff's son and servant, whereby he was injured, and the plaintiff, for a long space of time, to wit, &c., was deprived of the service of his said son and servant, and of all the benefit which would otherwise have accrued to him from such service, and was forced to expend a large sum of money, to wit, &c., in the cure of his said servant. Plea, not guilty. At the trial before *Abbott*, C. J., at the Westminster sittings after last Trinity term, the plaintiff proved that the defendant drove his carriage against the plaintiff's son, then an infant two years and a half old. The child was much injured, and at first was taken to the Middlesex hospital, where he might have remained without expense to his father, but he was afterwards taken home by his father, who thought he would be better there, and was taken daily to the hospital for advice for some months, at the expiration of which time he was dismissed as cured. The father also hired a servant to attend the child during his illness. Upon this evidence it was objected for the defendant that the child was not competent to perform any service by reason of his tender age, and that as loss of service was the gist of the action, the plaintiff must be nonsuited. The Lord Chief Justice was of that opinion, but offered to leave it to the jury to say, whether the child was capable of performing services to which any value could be attached. The counsel for the plaintiff did not desire the question to be so left, and thereupon the plaintiff was nonsuited.

*Lawes*, now moved for a new trial, and contended that the plaintiff was entitled to recover without proving any actual service by the child. In this respect the case of a child differs from that of a mere hired servant. In the latter cause, loss of actual service must be proved; but in the former, the child being resident with and under the control of the parent, must unavoidably be, in legal acceptation, a servant, so as to support an action of this nature. *Jones v. Brown*, Peake, N. P. C. 233, 1 Esp. 217, s. c.; *Fores v. Wilson*, Peake, N. P. C. 55. At all events, the plaintiff was entitled to recover the expenses which he was put to in obtaining the cure of his son.

BAYLEY, J. I am of the opinion that the nonsuit in this case was right. It has been contended that the action is maintainable on two grounds: first, for the loss of the services of the child, and, secondly, for the ex-



penses incurred by the father, in consequence of the injury sustained by the child. With respect to the first ground, I apprehend that the gist of the action depends upon the capacity of the child to perform acts of service. Here it is manifest that the child was incapable of performing any service. The authorities upon this point are all one way. In the cases which have been cited, the child being incapable of performing acts of service, and living with the parent, would naturally be called upon to perform some acts of service; and it was, therefore, held, that the service might be presumed, and that evidence of it need not be given. In *Weedon v. Timbrel*, 5 T. R. 357, both Lord Kenyon and Ashhurst, J., say, that the loss of service is the gist of such an action as the present, and that the plaintiff must give some proof of acts of service, in order to support the allegation in the declaration, although very slight evidence is sufficient; and in a case of *Satterthwaite v. Duest* it was held that an action for debauching a daughter could not be maintained by a father, unless she was his servant, and that the action could not be maintained on the ground of expense having been incurred in providing for her during her confinement. In this case, too, it was proved that the father did not necessarily incur any expense; if he had done so I am not prepared to say that he could not have recovered upon a declaration describing, as the cause of action, the obligation of the father to incur that expense.

70. CUMMING *v.* BROOKLYN CITY RAILWAY COMPANY

COURT OF APPEALS OF NEW YORK. 1888

109 N. Y. 95, 16 N. E. 65

APPEAL from general term, Supreme Court, Second department.

Action by Isabella Cumming to recover for loss of services resulting from injuries inflicted on her daughter Bessie I. Cumming, by the Brooklyn City Railroad Company, defendant. Judgment for plaintiff, affirmed by the general term, and defendant appeals.

*Morris & Pearsall*, for appellant.

*Carpenter & Roderick*, for respondent.

ANDREWS, J. It seems to be the doctrine of the law of England that the right of a parent to maintain an action for an injury to his minor child, from the tortious act of a third person, is founded exclusively upon the loss of service, and that the parent has no remedy even for expenses incurred, unless the child is old enough to be capable of rendering some act of service, and the relation of master and servant, express or implied, exists between them. *Grinnell v. Wells*, 7 Man. & G. 1041; 2 Add. Torts, § 902. But when the action is maintainable on the ground of loss of service, then, both by the law of England and of this country, the parent may claim indemnity, not only for the actual loss of service to the time of the trial, but also for any loss of service during the child's minority, which, in the judgment of the jury, and according to the evidence,

will be sustained in the future, and for expenses necessarily incurred by the parent in the cure and care of the child in consequence of the injury. *Cowden v. Wright*, 24 Wend. 429; *Drew v. Railroad*, 26 N. Y. 49; *Dixon v. Bell*, 1 Starkie, 287; *Schouler*, Dom. Rel. 351. The English rule which denies to the parent any remedy for medical or other expenses incurred in consequence of the injury to the child, except as incident to the loss of service, ignores the parental relation and obligation as an independent ground of recovery, although it may be manifest that the parent had sustained a pecuniary loss as the proximate result of the wrong. The Court of Massachusetts, in the case of *Dennis v. Clark*, 2 Cush. 347, held a more liberal, and, as it seems to us, a more reasonable and equitable doctrine, and decided that when an infant, residing with his father, receives an injury such as would give the child a right of action, the father who is put to necessary expense in the care and cure of the child, may maintain an action for indemnity, although the child was, by reason of his tender age, incapable of rendering any service. This doctrine casts upon the wrongdoer responsibility for a pecuniary loss flowing from his wrongful act, actually sustained by the parent in the discharge of his parental obligation to care for and maintain his infant children.

But there is another phase of the question presented in the present case. The mother, the father being dead, brings her action, founded upon loss of service for an injury to her minor child, and is permitted to recover not only prospective damages for loss of service during the fifteen years before the child will reach her majority, but also for surgical expenses which have not been in fact incurred, and the incurring of which is not presently necessary, but which, in the opinion of experts examined on the trial, it will become necessary to incur, in consequence of the injury, at some time during the child's minority. The trial judge, with a view to the ascertainment of this item of damages, permitted a surgeon, against the objection of the defendant, to testify that the expense of an operation, which, in his judgment, would become necessary at some remote period during the child's minority, would be \$300. In other words, the jury were permitted to include, as a part of the damages in the action, the value of contingent and prospective surgical services. The right of the parent, in an action for loss of service of a child disabled by a tortious injury, to recover for prospective loss of service during the child's minority, is well settled. These damages are, however, of necessity to a great extent speculative or conjectural. There are many contingencies which may deprive the parent of the services of a child, and even make the child a pecuniary burden to the parent, although the particular injury had not happened. The child may die from disease or other accident, or the parent may die. The prospective damages for loss of service, recoverable in such a case as this, may never in fact be sustained. But as only one action can be maintained against a wrongdoer for a single wrong, the law, from necessity, permits consequences not yet fully ascertained, but which are reasonably certain to happen, to be anticipated,

and a jury is allowed to estimate the damages for future loss of service in the light of experience and of such evidence as can be given. The damages allowed in this case for prospective surgical expenses have still another element of uncertainty. If recoverable by the parent, it must be upon the ground of the parent's obligation to maintain the child. But not only may the parent die or the child die, thereby rendering the surgical expenses unnecessary, but the parent may become wholly unable to pay for the services, if required, or the child may be treated in a hospital, or at public expense, as was in fact the case in this instance, when the child's leg was amputated. There is adequate reason for permitting the parent to recover medical or other expenses actually incurred, consequent upon an injury to the child from the wrongful act of a third person. In case of an injury to a minor child, whose parents are living, there is a double right of action: an action by the child, and an action by the parent. In the child's action, plainly, there can be no recovery for expenses actually incurred by the parent, and so far a double recovery is prevented. But it is not so plain that the child may not recover, as part of his damages, all the proximate pecuniary consequences of his disability, including medical and other expenses, as under the evidence the jury shall find it will be necessary in the future to incur. The denial of this right would, in many cases, deprive the child of the means of necessary relief. It cannot, I suppose, be doubted that, the parents being dead, all the future consequences of the injury and necessary expenses flowing from the disability would be a proper element to be considered by the jury in an action brought by the child, nor is there much doubt that these considerations enter into every verdict rendered in an action brought by a minor for his personal injury.

There is perhaps a logical difficulty in denying the right of the parent to recover the damages now in question, but the same difficulty attends a denial of the child's right. It appears by the record that the child has brought an action, and has recovered her damages. In the absence of controlling authority, we are of opinion that in an action by a parent, founded on loss of service of the child, only expenses actually incurred by the parent, for medicine or medical attendance, or which are immediately necessary to be incurred, are recoverable as incident to the main cause of action, and that future, prospective, contingent expenses of this kind are recoverable only in an action by the child. The parent, in an indirect way, is benefited by a recovery by the child, and this rule will be most likely to accomplish justice and prevent a double recovery in such cases. • The obligation of parents to maintain and provide for their children has its most effectual sanction in the natural affections. The law, at best, can but imperfectly enforce it. It does not undertake to do so directly until children have become, or are likely to become, a public charge. The law of necessities is so limited and guarded that the wants of children can only be supplied under this rule in exceptional cases. The legal obligation of maintenance and support resting on the

mother is especially imperfect. In all cases it necessarily can be enforced only in cases of the pecuniary ability of the parent, and in case of the mother the child's means are first chargeable with his support. *Furman v. Van Sise*, 56 N. Y. 435. A recovery in the child's action for a personal injury, for prospective medical services, where the fund recovered is usually preserved through a guardian, or in other ways, will be most likely to secure such services when needed. Whether, in any view, the attempt to fix a definite sum for contingent expenses which may never be incurred, was not pushing the evidence further than is permissible, need not be considered.

These views lead to a reversal of the judgment.

All concur.

## 71. *McGARR v. NATIONAL & PROVIDENCE WORSTED MILLS*

SUPREME COURT OF RHODE ISLAND. 1902

24 R. I. 447; 53 Atl. 320

ACTION by Annie McGarr against the National & Providence Worsted Mills. After verdict for plaintiff, defendant petitions for a new trial. Granted.

Argued before STINESS, C. J., and TILLINGHAST and ROGERS, JJ.

*J. W. Hogan* and *P. S. Knauer*, for plaintiff.

*Walter B. Vincent* and *Huddy & Easton*, for defendant.

TILLINGHAST, J. This is an action of trespass on the case for negligence, and is brought to recover damages for the loss of service of the plaintiff's minor daughter, Sarah McGarr, and also to recover for the expenses incurred by the plaintiff for medicines, medical attendance, and nursing, occasioned by reason of personal injuries sustained by said Sarah while in the employ of the defendant corporation. Said Sarah McGarr, by her father and next friend, Owen McGarr, had previously brought suit against the defendant to recover damages for personal injuries growing out of the accident in question (see 22 R. I. 347, 47 Atl. 1092), and had obtained a substantial verdict therein; and thereafterwards the mother, Annie McGarr, brought this action to recover for the consequential damages suffered by herself on account of said injuries to her daughter, and upon trial thereof a verdict was rendered in her favor for the sum of \$9,500. The case is now before us upon the defendant's petition for a new trial upon the grounds (1) that the verdict is against the law and the evidence; (2) that the presiding justice erred in admitting certain evidence against the objection of the defendant, and also erred in refusing to admit certain evidence offered by the defendant; (3) that the presiding justice also erred in his instructions to the jury; and (4) that the damages awarded by the jury were excessive and unjust. At the trial of the case all of the questions involved, including the ques-

tion of the defendant's negligence, were considered as fully as if there had been no prior verdict and judgment in favor of the daughter, Sarah McGarr. The proof shows that she was employed by the defendant as a spinner, and at the time of the accident, January 6, 1899, was engaged in tending a spinning frame in No. 6 mill of the defendant company. The spinning frame was run by an overhead belt some ten feet from, and substantially parallel with, the floor. The claim of the plaintiff is that this belt, by reason of its improper and insufficient lacing, suddenly broke, and that one end of it struck her daughter upon the side of her head, inflicting severe injuries, from which major hysteria developed, together with other physical ailments of a very serious and permanent nature. Owen McGarr, the father of Sarah and the husband of the plaintiff, died on November 5, 1900.

Defendant's counsel starts out with the broad contention that the action will not lie, on the ground that the plaintiff, as the mother of said Sarah, is not entitled to maintain it: First, because she was not bound to support her child, Sarah; and, second, because the right of action for loss of service, having become vested in the father during his lifetime, could not become divested and vest in the mother after his death. Having taken this position at the jury trial, the defendant objected to the introduction of any testimony as to damages. And as the trial Court overruled this objection, subject to exception by the defendant, the first question which logically presents itself is whether the action will lie.

1. That at the common law the father is entitled to the benefit of his minor children's labor while they live with him and are supported by him, there can be no doubt. His right to their services, like his right to their custody, rests upon the parental duty of maintenance, and is said to furnish some compensation to him for his own services rendered to the child. Schouler, Dom. Rel. (5th ed.) § 252; *Brown v. Smith*, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680. The mother, on the other hand, not being thus bound for the maintenance of her minor children, has no implied right, at the common law, to their services and earnings. The common-law doctrine as thus briefly stated, however, has been greatly relaxed by modern decisions in this country, if not in England; and the strong tendency of the courts in this country, as well stated by Field, C. J., in *Horgan v. Mills*, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504,

"is to give to a widow left with minor children, who keeps the family together and supports herself and them with the aid of their services, very much the same control over them and their earnings during their minority, and to impose on her, to the extent of her ability, much the same civil responsibility for their education and maintenance, as are given to and imposed on a father."

The Chief Justice then stated the opinion of the Court in that case to be as follows:

"We are of opinion that when a minor child lives with its mother, who is a widow, and the child is supported by the mother, and works for her as one of

the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child negligently caused by the defendant."

This statement of the law is abundantly supported by the authorities cited in the opinion, and by numerous others which might be added. See 17 Am. & Eng. Enc. Law (1st ed.), p. 387, and cases collected in notes 1 and 2; *Drew v. Railroad Co.*, 26 N. Y. 49; *McElmurray v. Turner*, 86 Ga. 215, 12 S. E. 359; 2 Kent, Comm. 205, 206; *Nightingale v. Withington*, 15 Mass. 274, 8 Am. Dec. 101; *Railroad Co. v. Cook*, 63 Miss. 38; *Commissioners v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Kennedy v. Railroad Co.*, 35 Hun, 186; *Moritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 762; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Matthews v. Railway Co.*, 26 Mo. App. 75.

2. It being well settled, then, that a widow may maintain an action for loss of services of her minor child, the next question which arises is whether the plaintiff can maintain her action, the cause of which accrued prior to the death of her husband. The answer to this question, in so far as it relates to the plaintiff's right to recover for loss of service, etc., prior to the death of the father, depends primarily upon the relation which existed between the mother and daughter at the time of the accident as to the right of service; that is, whether the mother or the father of the girl at that time was legally entitled to her services. And as the father was presumably entitled thereto, it devolves upon the plaintiff to prove that he had in some way relinquished his right or conferred it upon her. While the right to the child's services is naturally in the father, he can doubtless surrender this right to another by contract or otherwise, in various ways, as (a) by binding the child as an apprentice (*Ames v. Railroad Co.*, 117 Mass. 541, 19 Am. Rep. 426); (b) by allowing another person to so act that he stands in loco parentis (*Whitaker v. Warren*, 60 N. H. 26, 49 Am. Rep. 302). This principle is fully recognized in *Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 73, where it was held that the right of a parent to the services of his minor children "is bottomed on his duty to maintain, protect, and educate them. . . . But this right and this duty may be transferred to another, and may be relinquished to a child." The law doubtless is, however, that the father cannot permanently transfer his rights and duties to another, except by deed. *State v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223.

The testimony upon which the plaintiff relies to show that the services of Sarah belonged to her at the time of the accident is to the effect that, the plaintiff is, and long has been, the real head of the family; that she owns the property, takes care of the family, and pays the bills; and that, by express direction from the father in his lifetime, she was entitled to, and did, receive all of the earnings of the daughter, Sarah. She employed the physician who has attended the daughter since the accident, and is personally responsible to him for his services. Dr. O'Keefe testifies that



he rendered his services at the request of the mother; that the night he was called he saw the case would be prolonged, and he had a talk with the mother, and she told him she wanted him to attend her daughter, and would see him paid; and that his services have been charged to her. The testimony further shows that the father had no property, and no income except his current earnings. In view of this state of the proof, plaintiff's counsel contends that the wages of Sarah were the property of the mother, for the recovery of which she could have maintained an action. . . . If the case were one which simply showed the payment to the mother of the child's wages by direction of the father, we should not deem this sufficient to enable the mother to maintain an action of this sort, as it is matter of common knowledge that for prudential and other reasons this is frequently done. But where, as in the case at bar, there is other evidence which, taken in connection with this, shows a relinquishment by the father of his right to the child's services, and an assumption of his duties to the child by the mother, then she can maintain the action. . . . In *Harper v. Luffkin*, 7 Barn. & C. 387, the father was allowed to recover for the seduction of his married daughter, although her husband had not consented to his wife becoming the servant of her father. In delivering the opinion of the Court, Lord Tenterden, C. J., in speaking of the husband, said:

"He may put an end to that relation of master and servant, but, unless he interferes, it by no means follows that such a relation may not exist, especially as against third persons who are wrongdoers. It appears to me that such a relation might, and did in fact, exist in this case, and that, in the absence of any interference by the husband, it is not competent for the defendant to set up his rights as an answer to the action."

In *Parker v. Meek*, 35 Tenn. 29, the mother was held entitled to recover for loss of services consequent upon the seduction of her daughter, who was twenty-four years of age, although the father of said daughter was living at the time of the seduction. In delivering the opinion of the Court, McKinney, J., said:

"Where the action is case, it is no more necessary in the case of a daughter of full age than in that of a minor that she should have been living in the family of the parent at the time of the seduction. Nor is it any more important in the one than in the other who was entitled to or enjoying her services at the time of the injury. The only inquiry of importance in either case is, on whom has the consequential injury fallen? And such person, whether father, mother, or other person standing in loco parentis, is entitled to legal redress in the present form of action." . . .

An examination of the numerous cases bearing upon the general question involved shows that the consensus of opinion is to the effect that, in cases of wrongful injury, whoever, by reason of right or relationship, suffers consequential damage thereby, and may be liable for necessary expenses consequent upon such injury, is entitled to recover against the



wrongdoer the amount of such damages and necessary expenses. The right of recovery is based both upon the right to service, and upon the liability to support and maintain the person injured, where the result of the injury may be to render the person injured a public charge. The right to such recovery, in so far as it is based upon the liability to support the person injured, rests upon the pauper statutes, so called, beginning with the forty-third Elizabeth, which is as follows (chapter 2, § 7):

"And be it further enacted that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner and according to that rate as, by the justices of the peace of that county where such person dwell, sufficient persons, or the greater number of them, at their general quarter sessions shall be assessed, upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein."

Our own pauper statute (Gen. Laws, c. 79, § 5) is a practical re-enactment thereof, and is as follows:

"SEC. 5. The kindred of any such poor person, if any he shall have, in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, or children by adoption, living within this state and of sufficient ability shall be holden to support such pauper in proportion to such ability."

A number of Courts have upheld the right of one standing in loco parentis to a child to recover for loss of services of such child, resting such right upon the liability of such person for the maintenance of the child under statutes similar to 43 Elizabeth. Thus in *Moritz v. Garnhart*, supra, the Court said of a grandparent (and in that case it is pertinent to note that both the mother and putative father of the child were alive):

"He is, indeed, not a parent, but is chargeable by the poor laws with the duty of one. The rights of a parent are pupillary, and, as they are given for the benefit of the child, the person in the exercise of them must necessarily have a correlative remedy for their infraction."

In *Mathewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339, the Court said:

"Our statute concerning the support of paupers by relatives imposes the obligation to provide for children alike on father and mother, making each liable if of sufficient ability. Gen. St. tit. 50, § 40. The provisions of this statute are taken substantially from the forty-third Elizabeth. If the right to receive the earnings of minor children, which is conceded to the father, be made to rest on the liability of the father for their support, the mother, having the same liability, should be entitled to the same right."

See also *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288; *Whitaker v. Warren*, 60 N. H. 26, 49 Am. Rep. 302; *Railroad Co. v. Jones*, 21 Colo. 347, 40 Pac. 891.

The uncontradicted evidence in the case at bar shows that the plaintiff

has supported, cared for, and nursed her said daughter, Sarah, since the happening of the accident in question, and also that she has lost the benefit of her services during all of said time. And we are of the opinion, and therefore decide, that, upon the facts and law as above stated, the rulings of the trial Court, whereby the plaintiff was permitted to introduce evidence of loss of services, etc., from the date of the accident, were correct, and should be sustained. The exceptions to such rulings are therefore overruled.

. . . 5. There is also an exception by the defendant to the granting of a request made by the plaintiff to charge the jury to the effect that damages might be awarded for loss of the society of the child, caused by the accident. The Court instructed the jury that, if the plaintiff lost the society of the child "through the wrongful act of another, she would be entitled to recover for that." This was error. In an action of this sort, the proper measure of damages is the pecuniary value of the child's services from the time of the injury until it attains its majority, less its support and maintenance, together with the necessary costs and expenses incident to the care and cure of the child, — such as those for medical and surgical attendance. 2 Sedg. Dam. (7th ed.) p. 520, note b, and cases cited. But the jury are not at liberty to consider the fact that the plaintiff has been deprived of the comfort and society of the child, nor can they consider any physical or mental suffering or pain which may have been sustained by the parent by reason of the injury to the child. *Railway Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010; *Railway Co. v. Fielding*, 48 Pa. 320; *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633. In short, the measure of damages in such a case is the same as that which obtains in a case brought by a master for the loss of services of his servant or apprentice. It is therefore practically a business and commercial question only, and the elements of affection and sentiment have no place therein. Moreover, in the case at bar the plaintiff does not allege in her declaration that any damages were sustained by reason of the loss of the society of her daughter, but only that she sustained damages by reason of having been deprived "of the earnings and income and services of her minor daughter and servant," and in nursing and caring for her, as aforesaid. In actions for the seduction of a daughter and for the alienation of the affections of a wife, a different rule doubtless prevails, and damages may be recovered for the disgrace and humiliation brought upon the parent in the former class of cases, in addition to those sustained by loss of service, — Cooley, Torts (2d ed.), 271; 2 Greenl. Ev. (16th ed.) § 579; 3 Suth. Dam. (2d ed.) § 1283, — and for loss of the society and affection of the wife in the latter class. The defendant's exception to that part of the charge referred to is therefore sustained. . . .

The verdict is set aside, and a new trial granted. Case remitted to the Common Pleas division for further proceedings.

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72. EVANS *v.* WALTON

COMMON PLEAS DIVISION. 1867

*L. R. 2 C. P. 615*

THE first count of the declaration stated that Louisa Evans was and still is the servant of the plaintiff in his business of a publican and victualler; and that the defendant, well knowing the same, wrongfully enticed and procured the said Louisa Evans unlawfully and without the consent and against the will of the plaintiff, her said master, to depart from the service of the plaintiff; whereby the plaintiff had lost the service of the said Louisa Evans in his said business.

Pleas: Not guilty; and that Louisa Evans was not the servant of the plaintiff, as alleged. Issue thereon.

The cause was tried before Pigott, B., at the last Spring Assizes, at Oxford. The plaintiff was a licensed victualler in Birmingham, and was assisted in his business by his daughter Louisa, a girl about nineteen years of age, who served in the bar and kept the accounts. On the 10th of November, 1866, the daughter, with her mother's permission, which was procured by means of a fabricated letter purporting to be an invitation to her to spend a few days with a friend at Manchester, left the plaintiff's house and went to a lodging-house in the neighborhood of Birmingham, where she cohabited with the defendant, at whose dictation the above-mentioned letter had been written. On the 19th of November the daughter returned home, and resumed her duties for a short time, but ultimately left her home again, and on the 9th of February was again found cohabiting with the defendant at the same lodging-house.

On the part of the defendant it was submitted that, in order to sustain the action, in the absence of an allegation that the defendant had debauched the plaintiff's daughter, it was necessary to show a binding contract of service.

The learned Baron, after consulting Blackburn, J., intimated an opinion that the action would lie upon the declaration as framed; but he reserved to the defendant leave to move to enter a nonsuit if the Court should be of opinion that in point of law the action was not maintainable, — the Court to have power to draw any inferences of fact, and to amend the declaration if necessary, according to the facts proved.

The case was then left to the jury, who returned a verdict for the plaintiff, damages £50.

*Huddleston*, Q. C., in Easter term, obtained a rule nisi.

*Powell*, Q. C., and *J. O. Griffiths* (June 11) showed cause, submitting that the action would lie upon the declaration as it stood.

The Court called on

*H. James* and *Jelf*, in support of the rule. . . . To sustain an action for enticing away a servant, it is necessary to show a valid and binding

contract of service, which has been broken through the procurement of the defendant. Actual service is not enough. Here, there was no contract, express or implied, for the breach of which the father could have sued his daughter. All that the defendant can be charged with having done is, inciting the daughter to do that which in the exercise of her own free will she had an undoubted right to do. . . .

BOVILL, C. J. The rule in this case was granted principally on the contention of the defendant's counsel that, in order to sustain the action, it was necessary to show that there was a binding contract of service between the father and the daughter. . . . No authority is to be found where it has been held that in an action for enticing away the plaintiff's daughter a binding contract of service must be alleged and proved. But there are abundant authorities to show the contrary. . . .

WILLES, J. I am of the same opinion. I cannot look at it as an anomaly to hold that the daughter was the servant of her father at the time the defendant by his enticement induced her to forbear from rendering to her father the services which were due to him from her. There is a series of cases in the books, of which that in the Year-Book of 11 Hen. IV, fol. 2, is probably the first, to show that this action is maintainable. This case was followed by a very remarkable one of M. 22 Hen. VI, fol. 30, in which that doctrine is fully recognized, and where service at will and service upon a retainer are put upon the same footing with regard to any complaint of being wrongfully deprived of their fruits, and it is pointed out that the writ at common law ran, "*quare un tiel servientem meum in servitio meo existentem cepit et abduxit*," without alleging any contract or retainer. That runs so completely with the earlier case, and also with the doctrine of Lord Denman in *Sykes v. Dixon*, and of Maule, J., in *Hartley v. Cummings*, and also with the observations of Bramwell, B., in *Thompson v. Ross*, that I feel no difficulty in holding that, upon authority, as well as in good sense, the father of a family, in respect of such service as his daughter renders him from her sense of duty and filial gratitude, stands in the same position as an ordinary master. If she is in his service, whether *de son bon gre* or *sur retainer*, he is equally entitled to her services, and to maintain an action against one who entices her away. Assuming that the service was at the will of both parties, like a tenancy at will, the relation must be put an end to in some way before the rights of the master under it can be lost. As a question of fact, was the daughter in the service of her father at the time the cause of action arose? Was the relation of master and servant put an end to by her quitting her father's house by means of the false pretence to which the defendant induced her to resort? . . . The conclusion I arrive at is, that it was a question for the jury whether at the time the daughter left her father's house there was an existing service *de facto*, and whether by the defendant's means and procurement that service was denied to the plaintiff.

If both those questions were found against the defendant, the plaintiff was clearly entitled to the verdict. I think there was abundant evidence to support the finding, and that the rule must be discharged.

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### 73. GRINNELL *v.* WELLS

COMMON PLEAS. 1844

7 *Man. & Gr.* 1033

CASE, for the seduction of the plaintiff's daughter.

The declaration stated that before and at the time of committing the grievances, and from thence until the time of the pregnancy and sickness, and of the plaintiff's expending the moneys and incurring the debts, thereafter mentioned, Alice Grinnell, the daughter of the plaintiff, was a poor person who maintained herself by her labour and personal services, and, except by her labour and personal services, was not of sufficient ability to maintain herself, and was, during all that time, unmarried, and an infant under the age of twenty-one years, to wit, of the age of fourteen years, and at and during, and after the time of her pregnancy and sickness, as thereafter mentioned, and of the plaintiff's expending the moneys, and incurring the debts, thereafter mentioned, the said Alice was such poor person, infant, and unmarried and was not of sufficient ability to maintain herself: yet the defendant, well knowing the premises, but contriving to injure the plaintiff, and to compel him to maintain the said Alice, on the 27th of May, 1841, and on divers other days, &c., debauched and carnally knew the said Alice, whereby she became pregnant and sick with child, and so continued for a long time, to wit, for the space of nine months then next following, at the expiration whereof, to wit, &c., the said Alice was delivered of the child with which she was so pregnant as aforesaid; by means of which premises the said Alice, for a long time to wit, &c., became and was unable to work or to maintain herself, which she might, and otherwise would, have done; and the plaintiff, so being her father, and being of sufficient ability to maintain the said Alice, was, by means of the premises, during all that time, forced and obliged to, and necessarily did, maintain the said Alice at his own charges; and also by means of the premises, the plaintiff was obliged to, and did necessarily, pay, lay out and expend divers moneys, and incur divers debts, in the whole amounting to 50*l.*, in and about maintaining, nursing, taking care of, and curing the said Alice, and in and about her delivery, during the time she was so unable to maintain herself as aforesaid. Wherefore the plaintiff saith that he is injured and hath damages to the value of 500*l.*, &c.

Plea not guilty; whereupon issue was joined.

The cause was first tried before *Erskine*, J., at the spring assizes at

Gloucester in 1843, when a verdict was found for the plaintiff, damages 300*l.* In the following term a rule nisi was obtained for a new trial on the ground of excessive damages, the declaration only pointing to expenses actually incurred by the plaintiff in his daughter's maintenance and cure, and upon affidavits impugning the character of the principal witness; and also to arrest the judgment. In Trinity term the rule was made absolute for a new trial on payment of costs, the defendant agreeing that any damages to be assessed on the second trial might be estimated agreeably to the principles applicable to ordinary actions for seduction. At the second trial, which took place before *Williams, J.*, at the Gloucester Summer Assizes, 1843, the jury again found a verdict for the plaintiff, damages 200*l.*

*Talfourd, Serjt.*, (with whom was *Greaves*,) in Michaelmas term, 1843, moved in arrest of judgment. The declaration discloses no legal ground of action. This is not an action brought in the ordinary form for seduction; but for an act of incontinence committed by third persons, from which act damage is alleged to have arisen to the plaintiff. In *Satterthwaite v. Dewhurst*, 4 Dougl. 315,<sup>1</sup> the Court, upon a motion to arrest the judgment, held that the action would not lie unless it were laid with a *per quod servitium amisit*. The relation of master and servant has always been held a necessary ingredient in such an action. Formerly, parties declared in trespass, *per quod servitium amisit*; and a count for debauching the plaintiff's daughter might be joined with a count for breaking and entering the plaintiff's house; *Woodward v. Walton*, 2 N. R. 476. Now, however, it is, perhaps more properly, considered as an action upon the case; but it is agreed that the mere relation of parent and child without some service, does not give the father a remedy against the seducer of his daughter; . . . The common law imputes no obligation on a parent to support his child; *Mortimore v. Wright*, 6 M. & W. 482. The 43 Eliz. c. 2, s. 7, provides "that the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person, in that manner and according to that rate as by the justices of peace of, &c., shall be assessed, upon pain that every one of them shall forfeit 20*s.* for every month which they fail therein."<sup>2</sup> But all the circumstances which constitute the breach of duty, must appear upon the record; . . .

Sir *T. Wilde, Serjt.*, (with whom were *Channell, Serjt.*, and *Godson*,) in Easter term last, showed cause. . . . The father, if of ability, is, by the statute 43 Eliz. c. 2, s. 7, bound to maintain his poor child. It would seem to mark a very defective state of society, that a legislative provision should be required for the purpose of enforcing an obligation so sacred; but the statute of Elizabeth is not directed so much to the relation of

<sup>1</sup> Shortly reported per nomen *Satterthwaite v. Duerst*, 5 East, 47 n.

<sup>2</sup> And see 4 & 5 W. 4, c. 76, s. 56.



parent and child as to relieve third persons from the obligation of providing for a party whose relations were of ability to support him. The parent might leave the burden of supporting his child to the parish, if he knew that the child must be provided for, with or without any exertion on his part. If a moral obligation is capable of being enforced by legal means, the party is not bound to wait until he is actually coerced; *Blyth v. Smith*, 6 Scott, N. R. 360. . . . In *Hall v. Hollander*, power in the father to command the services of the child, and capacity in the child to perform the services when required, were held to be sufficient. . . .

TINDAL, C. J., now delivered the judgment of the Court. The question in this case arises upon a motion in arrest of judgment, and is this — whether a father can maintain an action upon the case for the seduction of his daughter, where he is unable to allege in the declaration the loss of her service by reason of the defendant's wrongful act.

The declaration in this case contains no allegation of the loss of the service of the daughter, but, instead thereof, alleges that the daughter was a poor person, maintaining herself by her labour and personal services, and not of sufficient ability to maintain herself otherwise; and, after stating that the defendant debauched her, and that she was delivered of a child, and her thereby becoming unable to work or maintain herself, alleges, as the gravamen of the plaintiff, that he, being her father, and being of sufficient ability to maintain his said daughter, was, by means of the premises, forced and obliged to, and necessarily did, maintain his said daughter, at his own charges, and did necessarily pay large divers money, and incur divers debts in and about the maintaining and nursing, &c., of his said daughter, during the time she was unable to maintain herself. And the question arises — whether the want of the allegation of the loss of service is supplied by the substitution of the before-recited allegation.

The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. Such is the language of Lord Holt in *Russell v. Corne*, and such the opinion of the Court in the earlier case of *Gray v. Jefferies*, with reference to an action by a father for a personal injury to a child, which stands precisely on the same footing. See also *Randle v. Deane*, 2 Lutw. 1497. It has, therefore, always been held that the loss of service must be proved at the trial, or the plaintiff must fail. See *Bennett v. Alcott*. It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant; and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter. This distinction is most clearly and pointedly put by the Court in *Robert Mary's case*, where it is said, "If my servant be beaten, the master shall



not have an action for this beating, unless the battery is so great that by reason thereof he loses the service of his servant; but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod*, viz., *per quod servitium amisit*; so that the original act is not the cause of his action, but the consequent upon it, viz., the loss of the service, is the cause of his action."

No precedent in an action for seduction has been brought before us (except those in *Harris v. Butler* and *Blaymire v. Hayley*, in both of which cases the declarations were held bad), in which there has not been an allegation of the loss of service to the father: and the struggle has always been at the trial, to give some proof either of actual service or of the implied relation of master and servant. . . .

Many observations suggest themselves against the soundness of the argument upon which the plaintiff relies.

In the first place, if the liability to support the daughter under the statute of Elizabeth, would form a ground of action, *per se*, independently of any service, it would seem scarcely credible, — as that statute was passed long before any of the cases above referred to, — that the difficulty of proof of service, either actual or implied, which has occurred in so many cases, should not have been avoided and answered by framing the declaration, — like the present, — upon the legal liability of the father to maintain his daughter under the statute.

In the next place, if this ground of action is available in the case of seduction of a daughter, it is equally so in the case of every beating of a son, whether his service be lost or not; and, upon this supposition, the beating of a son, at whatever advanced age, and although altogether emancipated from his father's family, would form a ground of action at the suit of the father, if called upon under the statute, to maintain his son.

We therefore think, for the reasons above given, the cause of action, as stated on this record, is insufficient, and that the rule for arresting the judgment must be made absolute.

*Rule absolute.*

#### 74. ANDREWS *v.* ASKEY

NISI PRIUS, COMMON PLEAS. 1837

8 C. & P. 7, and Reporter's Note

ACTION for the seduction of Amelia Andrews, the daughter of the plaintiff, *per quod servitium amisit*.

The plaintiff was a widow, carrying on the business of a fruiterer in the Borough-market, Southwark, and the defendant was in the same line of business, at a stall in the same market. The principal witness was Amelia Andrews herself, who stated that the intercourse between the defendant and her commenced in August, 1835, and continued to the

1st of January, 1836, when it ceased — and that the child was born on the 20th of October, 1836. The only corroboration of the witness's testimony was, that the defendant and she were often found to be engaged in familiar conversation in the market, and that they amused themselves sometimes by throwing apples at each other. Amelia Andrews denied that she had ever had connexion with any other than the defendant and that she had ever told a person named Lloyd that she had. . . .

TINDAL, C. J., to the jury. You are not confined to the consideration of the mere loss of service, but may give some damage for the distress and anxiety of mind which the mother has felt. If you find for the plaintiff, you will take into consideration the situation in the life of the parties, and say what you think, under all the circumstances of the case, is a reasonable compensation to be given to the mother. The main question is, whether you believe the account given by Amelia Andrews; for, if you do, there is no doubt the case is made out.

*Verdict for the plaintiff, damages 50l.*

*Talfourd*, Serjeant, and *Ball*, for the plaintiff.

*Andrews*, Serjeant, for the defendant.

*Reporter's Note.* It is curious to see how the practice of recommending juries to give damages ultra the loss of service has grown up. In a case tried before Mr. Justice Chambre at Worcester, which was an action by a father for the seduction of his natural daughter, the learned judge is said to have told the jury that they must consider her merely in the character of a servant, and award the plaintiff a compensation for the loss of service only: see Selwyn's *Nisi Prius*, 5th ed., p. 1075. At the Bristol Summer Assizes, in the year 1800, Lord Eldon, who was then Chief Justice of the Common Pleas, told the jury, in the case of *Chambers v. Irwin*, which was an action by an aunt for the seduction of her niece, that they were not to look merely to the loss of service, but also to the wounded feelings of the party. In the year 1805, Lord Ellenborough, in a case of *Southernwood v. Ramsden*, told the jury that "damages might be conceded for the loss which the father sustained by being deprived of the society and comfort of his child, and by the dishonour which he receives." In *Irwin v. Dearman*, 11 East, 23, the Court of King's Bench refused to set aside an inquiry, on the ground of excessive damages. Lord Ellenborough, C. J., said, that the action of seduction was "a case sui generis, where, in estimating the damages, the parental feelings, and the feelings of those who stood in loco parentis, had always been taken into consideration; and, although it was difficult to conceive upon what legal principles the damages could be extended ultra the injury arising from the loss of service, yet the practice was now inveterate, and could not be shaken."

75. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England*. (Book III, p. 142. Editor's Note, 30. Phila. ed., 1856.) It appears to be a remarkable omission in the law of England, which with such scrupulous solicitude guards the rights of individuals, and secures the morals and good order of the community, that it should have afforded so little protection to female chastity. It is true that it has defended it by the punishment of death from force and violence, but has left it exposed to perhaps greater danger from the artifices and solicitations of seduction. In no case whatever, unless she has had a promise

of marriage, can a woman herself obtain any reparation for the injury she has sustained from the seducer of her virtue. And even where her weakness and credulity have been imposed upon by the most solemn promises of marriage, unless they have been overheard or made in writing, she cannot recover any compensation, being incapable of giving evidence in her own cause. Nor can a parent maintain any action in the temporal courts against the person who has done this wrong to his family, and to his honour and happiness, but by stating and proving that from the consequences of the seduction his daughter is less able to assist him as a servant, or that the seducer in the pursuit of his daughter was a trespasser upon his premises. Hence no action can be maintained for the seduction of a daughter, which is not attended with a loss of service or an injury to property. Therefore, in that action for seduction which is in most general use, viz., a *per quod servitium amisit*, the father must prove that his daughter, when seduced, actually assisted in some degree, however inconsiderable, in the housewifery of his family; and that she has been rendered less serviceable to him by her pregnancy; or the action would probably be sustained upon the evidence of a consumption or any other disorder, contracted by the daughter, in consequence of her seduction or of her shame and sorrow for the violation of her honour. It is immaterial what is the age of the daughter, but it is necessary that at the time of the seduction she should be living in, or be considered part of her father's family. 4 Burr. 1878. 3 Wils. 18. It should seem that this action may be brought by a grandfather, brother, uncle, aunt, or any relation under the protection of whom, in loco parentis, a woman resides; especially if the case be such that she can bring no action herself; but the courts would not permit a person to be punished twice by exemplary damages for the same injury. 2 T. R. 4.

## 76. SNIDER *v.* NEWELL

SUPREME COURT OF NORTH CAROLINA. 1903

132 N. C. 614; 44 S. E. 354

APPEAL from Superior Court, Mecklenburg County; SHAW, Judge.

Action by J. F. Snider against W. B. Newell. From a judgment of nonsuit, plaintiff appeals. Reversed.

*Jones & Tillett*, for appellant.

*Burwell & Cansler*, for appellee.

CONNOR, J. This is an action prosecuted by the plaintiff for the recovery of damages alleged to have been sustained by reason of the seduction by the defendant of his daughter, whereby he "lost the services of his said daughter, and the reputation of his family was thereby greatly injured, and he suffered great mental anguish and humiliation." The defendant admitted that he had illicit carnal intercourse with the daughter, but denied that the plaintiff lost her services thereby, or suffered otherwise. The plaintiff introduced evidence tending to show that his daughter, when about eighteen years of age, was seduced and debauched by the defendant; that he had repeated acts of sexual intercourse with her in the plaintiff's house, in which his daughter resided as one of his family; that such intercourse was had at night, the defendant going to the room of the daughter, entering through her bedroom window; that the

plaintiff knew nothing of the defendant's conduct until it had continued about a year, when he charged the defendant with it, when he admitted the truth of the charge. The plaintiff testified that he was greatly shocked; that the matter greatly pressed on his mind, and he thought they were all disgraced; that the daughter was, prior to the sexual intercourse with the defendant, chaste, pure, and virtuous; that defendant is a married man. The defendant introduced no testimony, but moved the Court to dismiss the action as upon a nonsuit. The Court allowed the motion, the plaintiff excepted and appealed.

The judgment of his honor is based upon the conclusion of law that the plaintiff had not shown any loss of service, or any diminution of the daughter's capacity to serve him, and could not, for the other injuries alleged, maintain the action. The demurrer to the evidence admits the truth of the plaintiff's testimony, together with every reasonable inference to be drawn therefrom most favorable to the plaintiff, but presents the question whether the plaintiff's testimony is sufficient to base a finding of such loss of service as is necessary to maintain the action. The plaintiff has alleged a loss of service, mental anguish, and mortification. We have been unable to find, after a very careful and diligent search, a case in England or America in which the declaration or complaint has failed to allege loss of service. The action at common law was trespass *vi et armis*, or trespass on the case *per quod servitium amisit*. *Briggs v. Evans*, 27 N. C. 16. The gravamen of the action was that the daughter was the servant of the plaintiff, and that by her seduction he lost her services. Taylor, C. J., in *McClure's Executors v. Miller*, 11 N. C. 133, says:

"It is characterized by a sensible writer as one of the 'quaintest fictions' in the world that satisfaction can only be come at by the father's bringing the action against the seducer for the loss of his daughter's services during her pregnancy and nurturing."

... The case of *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529, 44 L. R. A. 757, 72 Am. St. Rep. 360, unmistakably holds that "the action could be maintained on the bare relation of parent and child alone." It is one of the most striking illustrations of the conservatism of the profession and the bench that, although there has been a constant protest against the necessity for resorting to this "quaintest fiction" or legal "figment," the Courts have not felt justified in abandoning it. We find most careful and accurate counsel in all of the cases alleging loss of service. Sir Frederick Pollock, in his work on Torts, pp. 222, 223, says:

"There seems, in short, no reason why this class of wrongs [injuries in family relations] should not be treated by the common law in a fairly simple and rational manner, and with results generally not much unlike those we actually find, only free from the anomalies and injustice which flow from disguising real analogies under transparent but cumbrous fictions. But, as a matter of history (and pretty modern history), the development of the law has been strangely halting and one-sided. Starting from the particular case of a hired servant, the au-

thorities have dealt with other relations not by openly treating them as analogous in principle, but by importing into them the fiction of actual service, with the result that in the class of cases most prominent in modern practice, namely, actions brought by a parent (or person in loco parentis) for the seduction of a daughter, the test of the plaintiff's right has come to be, not whether he has been injured as the head of the family, but whether he can make out a constructive 'loss of service.'"

He discusses the question with his usual clearness and force, saying:

"The capricious working of the action for seduction in modern practice has often been the subject of censure. Thus, Sergeant Manning wrote more than fifty years ago: 'The quasi fiction of servitium amisit affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread among strangers.'"

While, in a certain sense, "fictions have had their day," and are not to be permitted to hamper the Courts in the administration of justice, we must be careful that we permit not ourselves, because we live in days of Codes of Civil Procedure, to conceive that we may altogether break away from the wisdom and experience of the past. As was said by the great Chief Justice Pearson in regard to estoppel:

"According to My Lord Coke, an estoppel is that which concludes and 'shuts a man's mouth from speaking the truth.' With this forbidding introduction, a principle is announced which lies at the foundation of all fair dealing between man and man, and without which it would be impossible to administer the law as a system." *Armfield v. Moore*, 44 N. C. 161.

Sir Henry Maine, in his great work on Ancient Law, tells us that a legal fiction is "a rude device, absolutely necessary in early stages of society; but fictions have had their day." He says:

"It is not difficult to see why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change, which is always present. At a particular stage of social progress, they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them — the fiction of adoption, which permits the family tie to be artificially created — it is difficult to understand how society would ever have escaped from its swaddling clothes, and taken its first step towards civilization. . . . To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of the law. But at the same time it would be equally foolish to argue with those theorists who, discovering that fictions have had their uses, argue that they ought to be stereotyped in our system." Pages 25, 26.

He wisely concludes that it will be necessary to "prune them away."

However interesting and inviting this field may be, it is hardly proper to investigate it in the decision of this case. We are not called upon to say more than that Courts should move forward, and yet cautiously, in dispensing with even "fictions." We must bear in mind that the law of procedure as well as substantive law is not a thing to be manufactured,

but is the result of growth and careful conservative progress. While we find no difficulty in holding that "it is not necessary, in order for a parent to maintain an action for the seduction of his daughter, that he prove actual services or the loss thereof," it is sufficient that it be shown that the child is a daughter of the person suing, and residing in his family as such, or is elsewhere with his consent and approval. Rogers on Domestic Relations, § 839. We carefully refrain from advancing further than is necessary in this case. It would not require any considerable foresight to see a large yielding of suits for seduction brought by collateral relations upon the suggestion of loss sustained in social position, business relations, mortified sensibilities, etc. We have a striking illustration of this in *Young v. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883, in which it was held that a husband, to whom a message had been sent notifying him of the sickness of his wife, could, in an action for failure to deliver promptly, recover, in addition to nominal damages, compensation for mental anguish. Since the decision of that case, we have suits for "compensation for mental anguish" brought by persons of almost every kind and degree of kinship, and we have good reason for thinking that "the end doth not yet appear." It is undoubtedly true that, as we come into a clearer view of social, domestic, and business relations, with their resulting rights and duties, the Courts will guard these relations, and protect them by appropriate remedies, both preventive and remedial. In doing so, the principles underlying our jurisprudence must not be violated, or sentimental emotions be made cause of actions; nor must we permit the tenderest and most sacred relations of life to become sources of profit and speculation. In the view which we take of this case, the plaintiff was entitled to maintain his action upon his allegation and proof. We find abundant authority, both in and beyond this State, to sustain this conclusion. . . .

We thus see that, while the Courts have protested against the rule of law requiring the allegation of the fiction upon which the action is based, they have wisely wrought out the substantial remedy by recognition of the relation, with all of its incidents, rights, and duties, of parent and child. It is difficult to conceive how a daughter who has been seduced and debauched, as the testimony in this case shows, can be said not to have had her ability to serve her father diminished; hence we place our decision upon the allegation and testimony in the record. His honor was in error in sustaining the demurrer to the evidence, and the case should have been submitted to the jury under proper instructions.

There must be a new trial.

WALKER, J., having been of counsel, did not sit on the hearing of this case.

CLARK, C. J. (concurring in result).<sup>1</sup>

<sup>1</sup> [PROBLEMS :

The plaintiff's child, three months old, being ill, was poisoned by administering a drug, culpably compounded by the error of the defendant druggist, and died in



**Topic 2. Child's Interest in the Parental Relation**

77. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England*. (1765. Book III, p. 142. We may observe that, in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom: while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture. The child hath no property in his father or guardian; as they have in him, for the sake of giving him education and nurture. Yet the wife or the child, if the husband or parent be slain, have a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction; which is called an appeal,<sup>1</sup> and which will be considered in the next book.<sup>2</sup>

consequence. May the parent recover for the loss of future services? (1909, *Scherer v. Schlager*, 17 N. D. — , 122 N. W. 1000.)

May the unmarried mother of an illegitimate child recover for its death? (1905, *McDonald v. R. Co.*, 71 S. C. 352, 51 S. E. 138; 1903, *Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S. W. 179; 1896, *McDonald v. R. Co.*, 144 Ind. 459, 43 N. E. 447.)

Is an action for seduction maintainable by a parent who has hired out the daughter to a third person by a contract determinable at the parent's option? (1874, *White v. Murtland*, 71 Ill. 250.)

Is an action for seduction maintainable by a parent whose minor daughter is employed by a third person but visits home occasionally? (*Whitbourne v. Williams*, 1901, 2 K. B. 722.)

Is an action for seduction maintainable by the mother when the father is living out of the State? (1898, *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268.)

**NOTES:**

"Prospective damage: Medical expenses." (C. L. R., II, 186.)

"Wrongful death: Right of mother to recover for illegitimate child." (C. L. R., VI, 63.)

"Recovery by parent for injury to child: What damages recoverable." (H. L. R., II, 189; XII, 283.)

"Prospective loss of services by child's death." (H. L. R., XII, 140.)

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT: see the citations *post*, footnote to No. 85.]

<sup>1</sup> [For the statute declaring the parent's duty to support the child, see No. 71, *ante*.

For the statutes concerning loss of support by liquor, see No. 89, *post*.

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:

*William Paley*, "Principles of Moral and Political Philosophy," b. III, pt. III, c. IX (16th ed., vol. I, p. 384).

*Charles S. M. Phillipps*, "Jurisprudence," b. I, c. III, § 227, p. 207.

*Theodore D. Woolsey*, "Political Science," § 46.]

<sup>2</sup> [See No. 61, *ante*.]



### Topic 3. Husband's Interest in the Marital Relation

78. REGISTRUM BREVIVM (1595). *Breve de trespass facta feminae* (fol. 105 b). Si A. & B. vxor eius &c. pone &c. C. quare &c. in ipsam B. apud N. insultum fecerit &c. et bona & catalla eiusdem A. ibidem inuenta ad valentiam &c. cepit et asportauit, et alia enormia &c. ad graue damnum ipsorum A. & B. &c.

Ib. *Breve de uxore abducta cum bonis viri* (fol. 97 a). Si A. &c. tunc attachies B, ita quod eum habeas coram nobis &c. ad respondendum praefato A. quare vi & armis C. vxorem ipsius A. apud N. rapuit & eam cum bonis & catallis eiusdem A. abduxit, & eam adhuc ei detinet, & alia enormia &c. ad graue damnum ipsius A. & contra pacem nostram, & contra formam statuti in huiusmodi casu provisi. Et habeas ibi hoc breue. T. &c.

79. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England* (1765, Book III, p. 139). I. Injuries that may be offered to a person, considered as a husband, are principally three: abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. 1. As to the first sort, abduction, or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore give a remedy by writ of ravishment, or action of trespass vi et armis, de uxore rapta et abducta.<sup>1</sup> This action lay at the common law; and thereby the husband shall recover, not the possession<sup>2</sup> of his wife, but damages for taking her away: . . . 2. Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass vi et armis against the adulterer, wherein the damages recovered are usually very large and exemplary. . . . 3. The third injury is that of beating a man's wife, or otherwise ill-using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass vi et armis, which must be brought in the names of the husband and wife jointly; but if the beating or other mal-treatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill-usage, per quod consortium amisit; in which he shall recover a satisfaction in damages.

80. ANON. *The Attorney's Practice in the Common Pleas* (1746, 2d ed., Vol. I, p. 439). Declaration for carrying away plaintiff's wife, goods, and chattels. Suffolk, to wit. M. W. late, etc. Malster, was attached to answer to S. F. Gent in a plea, wherefore with force and arms he took and carried away T. the wife of the said S. together with the goods and chattels of the said S. of the value of 500*l.* found at Stowmarket aforesaid, and detained the said T. the said wife of the said S. there from the said S. a long time, whereby the said S. lost the aid, comfort, fellowship, service and assistance of his said wife, and detained for a long time the said goods and chattels, and doth still detain the same, and did other wrongs to the said S. to the great damage of the said S. and against the

<sup>1</sup> F. N. B. 89.

<sup>2</sup> 2 Inst. 434.

peace of his present majesty, etc. And whereupon the said S. by T. K. his attorney complains, that the said M. on the 15th day of May in the year of our Lord 1733, at S. aforesaid in the county aforesaid, with force and arms, etc. took and carried away the said T. then and now the wife of the said S. together with the goods and chattels of the said S. to wit, a gold watch, a watch-chain and picture set in gold, one pair of ear-rings of gold set with diamonds, two other gold rings, four gowns, four petticoats, one cloth cloak, one velvet hood, 20 holland shifts, two head-dresses of lace, and two other head-dresses of cambrick and lace, of the value of 200*l.* found at S. aforesaid; and detained the said T. the said wife of the said S. there from the said S. a long time, to wit, from the said 15th day of May in the said year of our Lord 1733, until the 18th day of October in the year of our Lord 1735, whereby the said S. during all that time lost the aid, comfort, fellowship, service and assistance of his said wife; and also during all the time aforesaid detained the said goods and chattels, and doth still detain the same, and did other wrongs, etc. to the great damage, etc. and against the peace, etc. whereby the said S. says that he is injured, and hath damage to the value of 2000*l.* And thereupon he brings suit, etc.

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## 81. HYDE *v.* SCYSSOR

KINGS' BENCH. 1620

*Cro. Jac.* 538

TRESPASS; for that the defendant, 21 May, 6 Jac. 1, made an assault upon Elizabeth the plaintiff's wife, et illam verberavit, et male tractavit, necnon the said Elizabeth simul cum one gown, one petticoat, &c. of the goods of the plaintiff, simul cum the said Elizabeth, at D. tunc et ibidem cepit, abduxit, et abcaravit, necnon eandem Elizabetham per 5 annos ab eodem le plaintiff detinuit et custodivit, per quod le plaintiff solamen et consortium, necnon consilium et auxilium in rebus domesticis quae idem le plaintiff habere debuisset et potuisset cum uxore sua per totam tempus praedictum perdidit et amisit, et alia enormia, &c.

The defendant pleaded not guilty; and it was found against him, and damages assessed to three hundred pounds, and judgment found for the plaintiff: and now a writ of error thereof was brought in the Exchequer-Chamber.

The first error assigned was, because the action was by the husband solely for the battery of his wife, which ought not to be; for the tort and damages are properly done to the wife, and therefore the husband sole without the wife could not maintain this action; and then the damages being entirely given, the judgment is erroneous. Vide 9 Edw. 4, pl. 52. 46 Edw. 3, pl. 3. 22 Ass. pl. 16. Ante, 501, 502.

But all the justices and Barons held, that true it is the husband, for the battery of his wife, ought to join his wife with him in the action, if this had been brought for that cause; but here the action is not brought for the battery of his wife, but for the loss and damage of the husband,

for want of her company and aid; and all is concluded with the *per quod consortium amisit*, which extends to all that was before; as where an action brought by the master for the battery of his servant, *per quod servitium amisit*, &c.

A second error assigned was, because it is *cepit et abduxit*, where it ought to have been *rapuit*; for so is the register for writs brought in such cases. — *Sed non allocatur*; for it may be both ways. Wherefore the judgment was affirmed.

## 82. BIRMINGHAM SOUTHERN RAILWAY COMPANY *v.* LINTNER

SUPREME COURT OF ALABAMA. 1904

141 *Ala.* 420, 38 *So.* 363

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. *A. A. Coleman*.

This action was brought by the appellee, William Lintner, against the Birmingham Southern Railway Company, to recover damages alleged to have been caused by the negligence of the defendant in one of the engines operated on the defendant's road, running upon or against a horse and buggy which belonged to the plaintiff.

It is averred in each of the counts of the complaint that the plaintiff's wife, Clara Lintner, was in the buggy drawn by the horse, driving along a street in or near the town of Ensley, and as she drove across the track of the defendant which crossed said street, the said engine ran upon or against said horse and vehicle, and threw the plaintiff's wife from the vehicle, whereby she was severely injured in her person, and was made sick. It was then averred in each of the counts of the complaint, that as a proximate consequence of such injuries and sickness of the plaintiff's wife, "he lost the services and society of his said wife for a long time, and will likely continue to lose her said services and society for a long time, and he was put to great trouble, inconvenience and expense for medicine, medical attention, care and nursing in or about his efforts to heal and cure the said wife's said wounds, injuries and sickness." It is further averred in each of said counts that said vehicle was broken and otherwise injured, and the harness by which the horse was attached to said vehicle was greatly injured and damaged, and the horse was injured, for all of which damages the plaintiff claims \$5,000.

The defendant moved the Court to strike out of each count of the complaint the portions thereof which claimed damages on account of the loss of the services and society of the wife of the plaintiff, upon the ground that the plaintiff is not entitled to the services of his wife under the laws of the State of Alabama, and that the complaint shows that he has not lost the society of his wife, because she was living at the time

of the complaint. . . . Each of these motions was overruled by the Court, and to each of these rulings the defendant duly excepted. . . .

Plaintiff was the husband of Clara Lintner. On October 31, 1901, she had driven, in a buggy, to the place where her husband worked, to carry him to his work at the steel plant. She then started home, and in crossing the railroad of the appellant the horse and buggy were run into by an engine of the appellant on a public road crossing. The buggy was broken up and the horse slightly injured. The horse and buggy were the property of the appellee. Clara Lintner, wife of the appellee, was also injured. The extent of her injury was a disputed question. She claimed serious injury; this, however, was contradicted by the attending physician. She was in bed for a while, about one week, and testified that she had not entirely recovered at the time of the trial. . . . There were verdict and judgment for the plaintiff assessing his damages at \$500. The defendant appeals and assigns as error the several rulings of the trial Court, to which exceptions were reserved.

*A. G. & E. D. Smith*, for appellant. Our contention is, that our married-woman statutes, §§ 2520 to 2537, and especially §§ 2521 and 2527 of the Code have modified the common law in this respect; that the husband's legal right to the labor, the services, and the earnings of the wife, having been divested out of him by these statutes, that he cannot claim the value of such labor, services, or earnings in a suit of this character. The question is an open one in Alabama, but it has been passed on by the Supreme Court of Massachusetts under statutes similar to ours. *Harmon v. Old Colony R. R. Co.*, 31 L. R. A. 658; *Jordan v. R. R. Co.* 138 Mass. 425. . . .

*Bowman, Harsh & Beddow*, contra. . . .

MCCLELLAN, C. J. "The earnings of the wife are her separate property; but she is not entitled to compensation for services rendered to or for the husband, or to or for the family." Code, 2521. The whole scope and purpose of this enactment manifestly is to vest in the wife her earnings in service rendered to third persons, strangers to the household. It in no degree emancipates her from her household duties, nor authorizes her to enter upon such alien service as would conflict with and prevent the performance of her duties incident to the domestic establishment, the care, comfort, and convenience of the family — the duties, in short, which before the statute she owed to the husband as the husband and head of the family. These duties she owes now just as she did at the common law; and while the husband may allow her to pretermitt them and engage wholly or to any less extent in outside service the earnings of which belong to her, without such emancipation by the husband she owes these services to him now as before, and for any wrongful act of a stranger which deprives him of them he is entitled to recover for the consequent loss and injury. Nor does this, or any other statute absolve the husband from the duty of caring for the wife "in sickness and in health." If she be injured in her person by the wrongful act of a stranger,

a proximate, legal consequence of such injury is the expense to which the husband is put in the alleviation of her sufferings and the cure of her hurts; and such expense is a loss to the husband for which the wrongdoer is answerable to him in charges. 15 Am. & Eng. Ency. Law, p. 861; *Henry and Wife v. Klopfer*, 147 Pa. St. 178; *Tuttle v. C. R. I. & P. R. R. Co.*, 42 Iowa, 518; *Filer v. N. Y. R. R. Co.*, 49 N. Y. 47; *Douglas v. Gausman*, 68 Ill. 170.

The husband also, of course, has a legal right to the society of the wife, involving all the amenities and conjugal incidents of the relation. This right of society may be invaded by an act which while leaving to the husband the presence of the wife yet incapacitates her for the marital companionship and fellowship, and such incapacity may be deprivation of her society differing in degree only from total deprivation by her death. For such impairment, so to say, of the wife's society, of his right of consortium, such deprivation of the aid and comfort which the wife's society, as a thing different from mere services, is supposed to involve, he is entitled to recover. . . .

Upon the theory of the case, viz., that plaintiff suffered the loss or impairment of his wife's services and society in consequence of the injuries inflicted upon her, the extent and duration of her injuries had a direct bearing upon the extent of his loss to be measured by the jury in their assessment of his damages; and the Court properly received evidence to the effect that she was still suffering from the injuries. It is quite true that the rights of action for this suffering in and of itself is by statute vested in her; but that is not to say that the husband is without redress for the damnifying collateral consequences of her hurts to him. . . .

HARALSON, DOWDELL, and DENSON, JJ., concurring.

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### 83. WINSMORE *v.* GREENBANK

COMMON PLEAS. 1745

*Willes*, 577

IN order to understand the grounds of the motion in arrest of judgment, it is necessary to state some parts of the record.

The declaration contained four counts. The first stated that on the 1st of January, 1741, Mary, then and until the 24th of December, 1742, being the wife of the plaintiff (but since deceased), unlawfully and without his leave and against his consent departed and went away from him, &c., and lived and continued absent and apart from him from thence until and upon the 8th of August, 1742; and during the said time that the said Mary so lived and continued absent, a large estate, both real and personal, to the value of £30,000, was devised to her by W. Worth, D.D.,

her late father, for her sole and separate use, and at her sole and separate disposal; that thereupon she was desirous of being and intended to be again reconciled to the plaintiff, and to live and cohabit with him, whereby he would have had and received the benefit and advantage of the said real and personal estate (the plaintiff being willing and desirous to be reconciled, &c.), yet the defendant, knowing the said premises and having notice of the said Mary's intention, but contriving to injure the plaintiff, and to prevent Mary, the wife, from being reconciled to him, &c., and to prevent the plaintiff receiving any advantage from the said real and personal estate, &c., on the 8th of August, 1742, unlawfully and unjustly persuaded, procured, and enticed the said Mary to continue absent and apart from the plaintiff, and to secrete, hide, and conceal herself from the plaintiff, by means of which persuasion, procuration, and enticement the said Mary, from the said 8th of August, 1742, until the time of her death on the 24th of December, 1742, continued absent and apart, and secreted herself, &c.; whereby the plaintiff during all that time totally lost the comfort and society of his said wife, and her aid and assistance in his domestic affairs, and the profit and advantage that he would and ought to have had of and from the said real and personal estates, &c., and was put to great charges and expenses in endeavoring to find out and gain access to his said wife, in order to persuade and procure her to be reconciled to him.

The defendant pleaded not guilty; and the jury found a verdict for the plaintiff on the three first counts, and gave £3,000 damages, and a verdict for the defendant on the last.

This case was argued on the 18th and 26th of November, 1745, and the 29th of January following, by *Skinner* and *Willes*, King's Serjeants and *Draper* and *Heywood*, Serjeants, for the defendant, in support of the motion in arrest of judgment, and by *Prime* and *Birch*, King's Serjeants, and *Bootle*, Serjeant, for the plaintiff; and on the 1st of February following the rule to arrest the judgment was discharged.

WILLES, Lord Chief Justice, delivered his opinion, to the following effect:

Several objections have been taken by the defendant to this declaration in arrest of judgment: two general ones, and three to the particular penning of the declaration. I admit the rules laid down in most of the cases that were cited, and therefore shall have occasion to mention only a few of them, because they are not applicable to the present case.

The first general objection is, that there is no precedent of any such action as this, and that, therefore, it will not lie; and the objection is founded on Litt. § 108, and Co. Litt. 81 *b*, and several other books. But this general rule is not applicable to the present case; it would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy; but there must be new facts in every special action on the case. . . .



The principal objections were to the first count, and they were three.

First, that procuring, enticing, and persuading are not sufficient, if no ill consequence follows from it: . . .

Thirdly, that no notice or request is laid, which is necessary in the case of the continuance, though it be not necessary if the defendant had at first persuaded her.

To the first there were two answers.

First, That here is a consequence laid, that by means thereof the plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune, &c.

Secondly, Whether "enticing" goes so far or not I will not nor need determine, because "procuring" is certainly "persuading with effect." I need not cite any authority for this; because every one who understands the English language knows that this is the common acceptance of that word. . . .

As to the [third objection,] . . . that reason does not extend to the present case; because every moment that a wife continues absent from her husband without his consent, it is a new tort, and every one who persuades her to do so does a new injury, and cannot but know it to be so. . . .

I can see no reason to arrest this judgment, and therefore I am of opinion that the rule must be discharged.

ABNEY, J., and BURNETT, J., gave their opinions seriatim, agreeing with the Lord Chief Justice. *Rule discharged.*

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#### 84. YUNDT *v.* HARTRUNFT

SUPREME COURT OF ILLINOIS. 1866

41 Ill. 9

THIS was an action of trespass *vi et armis*, brought by Abraham Hartrunft, in the Superior Court of Chicago, against Allen C. Yundt. The declaration counts for the seduction of plaintiff's wife by defendant. The plea of not guilty was filed. Afterward the venue was changed to the Kane Circuit Court.

A trial was had by the Court and jury, which resulted in a verdict against the defendant, and the jury assessed the damages at the sum of \$5,000. A motion for a new trial was entered, but was overruled by the Court, and judgment was rendered upon the verdict. Defendant brings the case to this Court on appeal, and asks a reversal on various grounds. The facts necessary to an understanding of the case appear in the opinion of the Court.

Messrs. *Miller, Van Arman, and Lewis*, for the appellant.

Messrs. *Hurd, Booth, and Kreamer*, for the appellee.

Mr. Chief Justice WALKER delivered the opinion of the Court.



This was an action of trespass *vi et armis*, commenced in the Superior Court of Chicago by appellee against appellant, for seducing and debauching his wife. The case was taken by a change of venue to the Kane Circuit Court. A trial was afterward had in that court by a jury, which resulted in a verdict in favor of appellee for the sum of \$5,000. A motion for a new trial was entered, which was overruled by the Court, and judgment rendered on the verdict. And the cause is brought to this Court by appeal, and various errors are assigned upon the record. But appellant's counsel have confined their argument principally to the overruling of the motion for a new trial and the questions involved in that motion. . . .

It appears from the evidence, that appellee and wife were married, in the State of Pennsylvania, some time previous to their removal to this State. It also appears, that he went to California, some time in the year 1862, leaving his wife and children in Illinois. He returned to this State in the summer of 1864. The criminal conversation with appellee's wife is alleged to have taken place while he was absent in California. Appellant urges that appellee and his wife had permanently separated, and that appellee had deserted her. This was a question for the determination of the jury from all of the evidence in the case; and, inasmuch as the case will be submitted to another jury, it would be improper for us to express any opinion on the weight of evidence on this question. . . .

In this class of cases, the loss of services may be the alleged injury, but the injury to the character of the family is the real ground of recovery when the cause of action relates to the wife or daughter. The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has not been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury. Nor is it true, that, because appellee was absent from home, he therefore could have sustained no loss of service by reason of his wife being debauched. He had a right to her services in the nurture of his children, as well as a virtuous example to them by her. He had the right to the teachings of a virtuous and not of a depraved mother to his children. If he intrusted their care to a virtuous and undefiled mother, and appellant corrupted and debased her, he thereby became liable to appellee for the neglect to her family and her example to her children. And the circumstance that his wife died did not deprive him of his right of recovery. . . .

After a careful examination of all the instructions, we perceive no error in giving the others asked by the appellee. But it is insisted that the Court erred in refusing this instruction, asked by appellant:

"That, if, from the evidence, the jury believe, that, at the time of the alleged criminal intercourse between the defendant and plaintiff's wife, the plaintiff

was living in the State of California, separated from his wife, and that no pregnancy resulted from such criminal intercourse, and that no physical injury whatever to the wife, or loss of her service or assistance to the husband was occasioned by or resulted from such criminal intercourse, they the jury ought not to allow the plaintiff damages on account of loss of such service or assistance."

This action does not proceed upon the theory of the loss of service of the wife. It is for the injury the husband sustains by the dishonor of his bed; the alienation of his wife's affections; the destruction of his domestic comfort, and the suspicion cast upon the legitimacy of her offspring. 2 Starkie's Ev. 440. The actions of trespass and case are concurrent remedies for this injury. And Chitty, in his work on pleadings, says that though it had been usual to sue in case, it is considered preferable to declare in trespass. But in either form of action, loss of service may be averred in aggravation of damages. And being averred, a failure to prove actual loss of service would not defeat a right of recovery. 1 Chitt. Pl. 167. That is only alleged as aggravation and does not affect the question one way or the other. When loss of service is claimed, damages should not be given therefor unless it is proved. And whether there is such proof is a question for the jury to determine. This instruction should, therefore, have been given.

For the various errors above indicated, the judgment of the Court below must be reversed and the cause remanded.

*Judgment reversed.*

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## 85. RINEHART v. BILLS

SUPREME COURT OF MISSOURI. 1884

82 Mo. 534

MARTIN, C. On the 26th day of January, 1880, the plaintiff filed a complaint in equity against the defendant. In this complaint another party was originally included as defendant, but was discharged before trial. The object of the suit was to enjoin the transfer and collection of a certain promissory note in the sum of \$550, made by the plaintiff, to enforce its surrender and cancellation, and obtain a judgment for a part payment indorsed upon it. It is alleged in the petition that the note was without consideration, and was obtained by false representations, by threats of suit, and of personal violence. The defendant, in his answer, denied the allegations to the petition and recited the facts constituting the consideration of the note, which, in his own language, read as follows:

"Defendant, further answering, says: That on or about the 11th day of November, 1879, he learned for the first time that plaintiff, for a long time thereto, to wit, for eighteen months, then last past, had been making love to his (defendant's wife), whenever and wherever he could meet her. That he had plied every art and used every device in his power to win her love and esteem and

to alienate and estrange her from her husband. That he had told her, at divers times and places, that he loved her deeply, devotedly, madly, and that he could not live without her. That plaintiff had written her love-letters on divers occasions; had given her a fine gold finger-ring, and desired to leave and abandon his own wife and children, and take defendant's wife and go to a new country where they would not be known, and could marry and live together as man and wife. That plaintiff was rich and would maintain her in luxury and ease, and she could live like a lady without labor and toil. Defendant, further answering, states that plaintiff, by his persistent efforts, finally succeeded in alienating and estranging the love and affections of defendant's wife from defendant, and procured, in the manner and by the means aforesaid, her consent to leave and desert her husband and elope with plaintiff."

The answer goes on to recite that she had relented her rash promise to elope with plaintiff, had confessed everything to her husband, and begged to remain with him as his wife under the security of pardon and forgiveness. It is further alleged in substance that the defendant, smarting under the wrongs inflicted upon him by the plaintiff, repaired to the plaintiff's residence with his attorney, with a view of settling for these wrongs without suit; that in the interview the plaintiff admitted the facts as charged against him, and agreed to pay defendant, in liquidation of all damages by him sustained, and in final settlement thereof, the sum of \$600; that he paid down \$50 and gave the note in controversy for the remaining \$550, payable four months from date; that he afterwards paid \$205 on account of the note, which payment was indorsed on the same. The answer concludes with a prayer that the injunction be dissolved and judgment be rendered in defendant's favor, in the amount of the note remaining unpaid which, is stated to be \$345 with interest.

The plaintiff interposed a demurrer to this answer, which was overruled. The case was then tried by the Court without the intervention of a jury. The Court found the issues in favor of defendant, declaring in its decree that the matters and allegations in plaintiff's petition are untrue and not sustained by the evidence. The injunction was dissolved and the sum of \$40.05 was assessed as damages on the injunction bond against the plaintiff and his sureties. It was also adjudged that defendant recover of plaintiff the balance due on the note sought to be enjoined. The bill of exceptions does not contain the evidence, but merely recites that evidence was submitted by both parties tending to prove the allegations of their pleadings.

Only one question is presented to us in the record, for determination. The question involves the sufficiency of the defence, and is raised on the demurrer and in the motions made after judgment. The plaintiff contends that as the answer fails to show that defendant's wife had been actually debauched or seduced away from him, no wrong had been inflicted upon him, for which an action lies; and that the note taken in settlement of the supposed wrong was void as being without consideration. This position cannot be maintained upon either principle or authority. The injury to defendant consists in the alienation of his wife's affections

with malice or improper motives. Debauchery and elopement when they occur are only the immediate and legitimate consequences of the wrong. That the injury in this instance did not culminate in adultery and elopement, is a fact not due to the plaintiff's forbearance, but to the wife's prudent reflection and laudable repentance. The alienation of the wife's affections, for which the law gives redress, may be accomplished notwithstanding her continued residence under her husband's roof. Indeed it has been not unfrequently remarked by authors and jurists, that such continued residence after the alienation has been effected, so far from leaving the husband without a good cause of action, contributes an aggravation to his injury, from which an elopement might well be accepted in the nature of an alleviation. Schouler's Dom. Rel. 57; Cooley on Torts, 224; Hoard v. Peck, 56 Barb. 202; Heermance v. James, 47 Barb. 120. I think it would be difficult to regard it in any other light in the absence of contrition or change of heart. The demurrer admits the salacious and seductive solicitations of the plaintiff, extending over a period of eighteen months. It also admits the fact of actual estrangement and alienation which constitutes the essence of the offence. Everything which follows afterwards can be only in the nature of aggravation, mitigation or reparation of the wrong inflicted upon the sanctity of the defendant's home. . . .

*The judgment is affirmed. All concur.<sup>1</sup>*

<sup>1</sup> [PROBLEMS :

The plaintiff and his wife were injured corporally, while riding in the defendant's car, by the defendant's fault. The plaintiff brought suit and recovered for his own corporal injury. He now brings suit for the loss of services and society of his wife, and his medical expenses, during her illness. Is this claim maintainable? (1891, Skoglund v. Minneapolis St. R. Co., 45 Minn. 330, 47 N. W. 1071.)

The plaintiff petitioned for an injunction, alleging that the defendant had already partially alienated the wife's affections, and asking that the defendant be restrained from calling upon or writing or speaking to her, so as to prevent a total alienation. (1899, *Ex parte* Warfield, 40 Tex. 413, 50 S. W. 933.)

The defendant, mother of the plaintiff's husband, so influenced her son as to alienate his affections from the plaintiff, and on July 14, 1901, he left her for the mother's home, saying that he would never come back. He never did. On February 8, 1904, he began suit for divorce. On December 7, 1904, she began action against the defendant for loss of her husband's affections and society. By statute, causes of action in tort are barred from recovery after two years from accrual. Is her action barred? (1910, Farneman v. Farneman, — Ind. App. —, 90 N. E. 774.)

NOTES :

"Right to maintain action for alienation of husband's affections." (H. L. R., V, 414; VIII, 507; XI, 270; XII, 142; XIII, 49, 413; XVII, 282.)

"Alienation of affections: plaintiff's husband persuading party." (H. L. R., XVII, 197.)

"Wife's right of action for alienation of husband's affections." (M. L. R., II, 236, 237.)

Authorities collected in Lonstorf v. Lonstorf, (1903), 118 Wis. 159, 95 N. W.

**Topic 4. Wife's Interest in the Marital Relation**

**86. WOLF v. FRANK**

COURT OF APPEALS OF MARYLAND. 1900

92 Md. 138, 48 Atl. 132

APPEAL from Circuit Court, Washington County; *Edward Stake*, Judge.

Action by Amelia Frank against Mary J. Wolf. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, PAGE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

*L. D. Syester*, for appellant.

*M. L. Keedy* and *D. W. Doub*, for appellee.

BOYD, J. This suit was brought by the appellee against the appellant on March 31, 1900, by her next friend, Grafton C. Harper, but it was subsequently amended by striking out the next friend. The declaration alleges that the defendant wrongfully enticed and procured the husband of the plaintiff unlawfully, and without the consent and against the will of the plaintiff, to depart and remain absent from her home and society, whereby she lost the society, support, and protection of her husband. There are two counts which are similar, excepting the first alleges that the act complained of was done on the 25th day of December, 1899, while the second fixes no time. A demurrer was filed on the ground that the declaration stated no cause of action under the law of this State, which was overruled. During the progress of the trial, which resulted in a verdict for the plaintiff, two exceptions were taken to rulings of the Court in excluding certain testimony offered by the defendant. The defendant appealed from the judgment, and the questions presented for our consideration are the rulings of the Court on the demurrer and the offers of testimony embodied in the two bills of exception.

1. This is the first time a suit of this character has been before this Court. There has been but little, if any, difference of opinion as to the

961; *Humphrey v. Pope*, (1898), 122 Cal. 253, 54 Pac. 847; *Betser v. Betser*, (1900), 186 Ill. 537, 58 N. E. 249; *King v. Hanson* (1904), 13 N. D. 85, 99 N. W. 1085; *Dodge v. Rush* (1906), 28 D. C. App. 149.

**ESSAYS:**

*Irving Browne*, "The Husband-Seducer" (*American Law Rev.*, 1892, XXVI, 36).

**CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:**

*John Austin*, "Jurisprudence, or the Philosophy of Positive Law," 4th ed., vol. II, pp. 970, 979.

*Thomas E. Holland*, "Elements of Jurisprudence," 9th ed., c. XI, par. II, p. 164.

*Theodore D. Woolsey*, "Political Science," §§ 44-49.

*John W. Salmond*, "Jurisprudence," 2d ed., § 73.]

right of a husband to sue for what is termed "the loss of consortium," — that is, the loss of his wife's society, affection, and assistance, — and when any one, by the alienation of her affections, deprives him of his conjugal rights, he is liable to respond in damages. Indeed, such right has been sustained at least as far back as the case of *Winsmore v. Greenbank*, Willes, 577. The authorities are not so harmonious as to the right of the wife to sue for injuries sustained by her by being unlawfully deprived of the society, affection, etc., of the husband. But whatever differences now remain relative to it are, for the most part, as to the source from which she acquired the right, rather than whether such right exists at all. In countries and States where the common law has prevailed, members of the bench and bar have been accustomed in the past to consider the rights and liabilities of married women as they existed under its rules, and, although statutes have been passed from time to time enlarging their rights and increasing their liabilities, they have in many jurisdictions, including our own, been for the most part kept strictly within the lines fixed by legislative enactment. The tendency of modern legislation has been to greatly increase their powers, and in many States of this country such rights are conferred and such liabilities imposed on them as will probably furnish Courts difficult problems to solve in determining who is the head of the house. But, whatever their legal rights have been in the past, they have, as a rule, surpassed their husbands in their capacity to appreciate and enjoy domestic happiness. When, then, the marital rights of a woman are unlawfully invaded, so as to cause this "loss of consortium," why should she not be entitled to have the wrong done her redressed by the law, as her husband would be under such circumstances? If entitled to it, refusal to grant such redress can only be excused, if at all, on the ground that, by reason of her peculiar status as a married woman, no remedy had been or could be provided her; and hence we must inquire into and determine that question.

We have seen it stated that there are only two States in this country, in which the question has arisen, where the right of a married woman to maintain such an action is still denied. Whether that be correct or not we cannot say, but in our investigation of the authorities we have only found two, Wisconsin and Maine, although most of the decisions are based on statutes. In *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, it was decided that neither at common law nor under the statutes of that State could a wife maintain an action against one enticing away her husband for the loss of his society and support; and in *Doe v. Roe*, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, affirmed in *Morgan v. Martin*, 92 Me. 190, 42 Atl. 354, the right is denied, apparently on other grounds. The Wisconsin case is not alone as to the right to sue at common law, and the statute in force when that case arose was held not to sustain the right of action. The case of *Logan v. Logan*, 77 Ind. 558, cited in *Duffies v. Duffies*, is practically, although not in terms, overruled by *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787,



so far as it affects this question, and the case of *Van Arnham v. Ayers*, 67 Barb. 544, is overruled by *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553. There are other cases which have denied the right of recovery, under the peculiar facts that were alleged or proven. For example, in *Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843, 47 L. R. A. 310, and *Neville v. Gile*, 174 Mass. 305, 54 N. E. 841, it was held that the declarations were not sufficient, as in that State a husband could not recover for the mere alienation of the wife's affections, but there must be the loss of the wife's consortium, and a wife was in no better position than the husband. Then there are cases in which a distinction is made between suits against strangers and those against the parents of the husband or wife. If the latter act in good faith, and without malice, they are generally relieved because they are under obligation, by the law of nature, to protect their children and relieve them when in distress.

But there are many authorities which sustain this character of suit. That of *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, is a leading one, and has taken a more advanced position than most of the others, although it has been frequently referred to by other Courts. After referring to the right of the husband to sue, Justice Pardee, in delivering the opinion of the Court, said:

"Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society; the husband to the wife all that the wife owes to him. Upon principle, this right in the wife is equally valuable to her, as property, as is that of the husband to him."

He also said:

"The law will permit no one to obtain redress for wrong, except by its instrumentality, and it will furnish a mode of obtaining adequate redress for every wrong. This rule, lying at the foundation of all law, is more potent than, and it takes precedence of, the reason that the wife is in this regard without the pale of the law because of her inferiority."

And again:

"Wherever there is a valuable right, and an injury to it, with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will make the most complete reparation."

After speaking of the reason of the general rule that a husband shall join in a suit for damages resulting from an injury to the person, property, reputation, or feelings to the wife, he, with great force, shows why that should not be done in a case where the husband, by reason of his own conduct, has not suffered the injury, and cannot ask for redress himself; and added:

"To ask in his name would be to plant the seeds of death in the case at the outset, and the law does not compel those who have suffered wrong so to ask for



redress as to insure denial. In a case of this kind the wife can only ask for damages by and for herself. The law cannot make redress otherwise than to her solely, apart from all others, especially apart from her husband";

and the conclusion is reached that, of legal necessity, the damages for the injury must be to her solely, and the suit could therefore be maintained in her own name at common law. In *Lynch v. Knight*, 9 H. L. Cas. 577, Lord Chancellor Campbell thought that the wife could sue with her husband. Lord Cranworth was inclined to that view, but did not feel called upon to express a decided opinion, as the case was to be disposed of on other grounds. Lords Brougham and Wensleydale thought an action would not lie. In *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, the Court said:

"A remedy not provided by statute, but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle, and are caused by acts of the same nature as those of the husband, the remedy should be the same."

That case, however, based the right to maintain the action on the statute. It fully recognizes the right of the wife to damages for injury to her, but questions her right to sue at common law, unless her husband joins, and holds that the Code of that State, authorizing her to sue alone, enabled her to maintain a suit of this character. Some authorities hold that the common law gives a married woman a cause of action, but by reason of her disability of coverture the right remains in abeyance while she is married. There are others in which her right to damages is regarded as belonging to her at common law, and hence she can recover under statutes enabling her to sue as a feme sole; and still others sustain her right to sue under statutes giving equal rights to husband and wife, irrespective of any substantive right existing at common law. For authorities on the several grounds, see, in addition to the above, *Haynes v. Nowlin*, 129 Ind. 584, 29 N. E. 389, 14 L. R. A. 787; *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 26 L. R. A. 412 (s. c. 46 Am. St. Rep. 468, where there is an extensive note on the subject); *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120; *Westlake v. Westlake*, 34 Ohio St. 621; *Price v. Price*, 91 Iowa, 693, 60 N. W. 202, 29 L. R. A. 150; *Gerner v. Gerner*, 185 Pa. St. 233, 39 Atl. 884, 40 L. R. A. 549; and 15 Am. & Eng. Enc. Law (2d ed.) 864, where many of the above and other cases are cited.

Under our statute (section 5, art. 45, Code, as amended by Acts 1898, c. 457), married women have the power

"to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried."

As it is applicable to this case, there would seem to be no room to doubt that the appellee can, in her own name, maintain this suit. That, in our opinion, she had a cause of action is apparent from what we have already said. Whether or not it was possible for her to enforce such a claim at common law while still married is not now material. We have frequently held that for personal injuries to a wife she must at common law sue jointly with her husband; but if he died before judgment the action did not abate, but could be prosecuted by the widow, and, even if he died after judgment without disposing of it, it survived to her.

"Independently of his wife, the husband had no cause of action whatever for personal injury to her." *Clark v. Wootton*, 63 Md. 115.

Of course that does not refer to his right to sue for loss of services, expenses incurred, etc., by reason of the injury to his wife. Manifestly, then, the wife had at common law a cause of action for such injuries, although she was prevented from enforcing it during coverture without the joinder of her husband. In cases of this character, if it be admitted (although we do not determine that question) that she could not have sued at common law during coverture because her husband was a necessary party, and he ought not to be a party to a suit brought to recover damages sustained through his own misconduct, yet if he had been dead, or had abandoned his wife and left the State, as in *Wolf v. Bauereis*, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 380, before the suit was brought, she could have sued as if she were a feme sole, for her disability would then have been removed. . . . This suit was brought fifteen months after the act of 1898 took effect, and there is nothing in the declaration to show that the cause of action arose before that time; but, if it had, it would not have, for that reason, been defective or demurrable. The demurrer was properly overruled. . . .

3. We think, however, there was error in the ruling as presented in the second bill of exceptions. . . . The judgment must therefore be reversed for that error. Judgment reversed, and new trial awarded, the appellee to pay the costs.

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### 87. KROESSIN *v.* KELLER

SUPREME COURT OF MINNESOTA. 1895

60 *Minn.* 372, 62 *N. W.* 438

APPEAL by defendant from an order of the District Court for Stearns County, *Searle, J.*, overruling a demurrer to the complaint. Reversed.

*Theo. Bruener* and *D. T. Calhoun*, for appellant. At common law the actions by a husband for enticing away his wife and for criminal conversation were distinct. The basis of the action for criminal conversation does not exist where the wife is plaintiff. *Doe v. Roe*, 82 Me. 503, 20 Atl. 83; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 523.

The acts relating to married women do not create any new cause of action. The wife had no cause of action at common law. See *Winsmore v. Greenbank*, Willes, 577; *Bigelow*, Lead. Cas. 328. The cases relied on to sustain the action are nearly all for enticing away.

*Geo. H. Reynolds*, for respondent. Under G. S. 1894, § 5530, the wife "shall receive the same protection of all her rights, as a woman, which her husband does, as a man; and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal, in her own name alone, to the Courts of law or equity, for redress and protection that her husband has to appear in his name alone." In States where there are statutes not nearly so broad and comprehensive as in Minnesota, a married woman can maintain an action for alienation of her husband's affections. *Card v. Foot*, 57 Conn. 427, 18 Atl. 1027; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17; *Jaynes v. Jaynes*, 39 Hun, 40; *Mehrhoff v. Mehrhoff*, 26 Fed. 13; *Cooley*, Torts (2d ed.), 267, note 2; *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; *Waldron v. Waldron*, 45 Fed. 315; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638.

**COLLINS, J.** This is an action brought by a married woman against one of her own sex to recover damages, following, in a general way, the common-law form of declarations in crim. con. A general demurrer to the complaint was overruled in the Court below, and by this appeal we are required to determine whether such an action can be maintained; the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was the seducer of the husband, or that the plaintiff has been deprived of his support; nor is it an action for enticing the husband away, or for inducing him to abandon or desert his wife.

We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought crim. con., and he could sustain the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in *Cooley on Torts*, 224; and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife, — and no such disgrace has ever rested upon the wife, if there was one, of the guilty defendant, — and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him. Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law the female could not even give her consent to the adulterous acts, and, as a result, it was no defence in this form of action that the defendant had been enticed into criminal conversation through the acts and practices of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that

the principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defence that the defendant himself was the victim, and not the seducer, is suggestive of what the Courts might have to hold to be the rule of pleading, and what they might have to inquire into upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defence for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff wife? or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule.

We have been cited to quite a number of cases determined in the courts of last resort in this country, in which it has been held, without much stress being laid on statutes concerning the rights of married women, that an action may be maintained by a wife against one who wrongfully induces and procures her husband to abandon and send her away. *Westlake v. Westlake*, 34 Ohio St. 621, the Court being divided in opinion, is a leading case on this view of the subject. A later one, announcing the same doctrine, but made to rest much more on the married woman's acts in the State of Michigan, and similar to our own, is *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842. The plaintiff's counsel has been industrious in collecting this class of cases in his brief, and to them we add *Price v. Price* (Iowa), 60 N. W. 202. But even on this proposition, and despite broad statutory enactments affecting the rights of married women, the Courts are not entirely agreed, for in Maine and Wisconsin it has been held that such an action cannot be maintained. *Doe v. Roe*, 82 Me. 503, 20 Atl. 83; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522. But we need not decide as between these cases, for the exact question raised by the demurrer here was not the one under consideration in any we have cited. They were brought for enticing away the husband; causing him to withdraw his support from the wife; to abandon or desert her, — an entirely distinct and separate cause of action from that set out in the plaintiff's complaint. At common law this form of action was wholly different in pleadings and proof, as well as parties, from crim. con. It proceeded, and still proceeds, upon different grounds, and we do not regard cases of that nature as authority in this.

We are not unmindful of the fact that plaintiff's counsel has presented two cases — *Seaver v. Adams* (N. H.), 19 Atl. 776, and *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389 — in which it is held that an action by a wife against another woman, based on a complaint very much like this, will lie. But in these cases the authorities before referred to are cited and relied on as directly in point. The Courts rendering these decisions do not seem to have considered that there is, and inevitably must

be, a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife and to abandon and desert her, and one similar to crim. con. We think the difference noticeable and material, although we do not wish to be understood as holding that the one first mentioned will lie. That question is not before us, and we simply express our conviction that a wife cannot maintain an action in the nature of crim. con. Such actions would "seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured." The power to bring such actions would furnish wives "with the means of inflicting untold misery upon others, and little hope of redress for themselves."

We find nothing in our statutes in respect to the rights of married women which indicates that the power to proceed in this form of action was intended to be conferred. Attention has been called to G. S. 1894, sec. 5530 (Laws 1887, c. 207, § 1). We have heretofore had occasion to comment upon that act, and have not changed our views as then expressed. *Althen v. Tarbox*, 48 Minn. 18, 50 N. W. 1018.

*Order reversed.*

## 88. FENEFF *v.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1909

203 *Mass.* 287, 89 *N. E.* 436

EXCEPTIONS from Superior Court, Worcester County ; *Gaskill*, Judge.

Action by Melinda Feneff against the New York Central & Hudson River Railroad Company. Verdict was returned in favor of defendant, and plaintiff brings exceptions. Overruled.

*Clarence E. Tupper*, for plaintiff.

*Ralph A. Stewart* and *L. R. Chamberlin*, for defendant.

*Chas. M. Thayer* and *Alex. H. Bullock*, for Boston & M. R. R.

KNOWLTON, C. J. The plaintiff's husband was injured physically and mentally by the negligence of the defendants, and he has recovered full compensation for his injuries. *Feneff v. Boston & Maine Railroad et al.*, 196 *Mass.* 575, 82 *N. E.* 705. The plaintiff sues for damages suffered by her from his injury, by reason of her relation to him as his wife. In her declaration she avers that, by reason of his disability, she has endured great suffering and anxiety, and has been obliged to assume heavy and arduous duties which she did not have to assume before the injury, and that she has lost the comfort, society, aid, and assistance of her husband. In her bill of exceptions she says that the action is "for

the loss of consortium." This statement covers the case; for it is plain that the other averments in her declaration do not show an invasion of a legal right, nor anything more than a remote and consequential damage which did not result from any wrong done directly to her.

The right of consortium is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together. At the common law, the husband had a right to the labor and services of his wife, and in suing for the damages which are personal to the husband for an injury to his wife, he was permitted to recover, not only for the expenses of her care and cure, but for his loss of her labor and services and the loss of consortium. *Kelley v. N. Y., N. H., & H. R. R.*, 168 Mass. 308, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397, and cases there cited. It is said in that case, and in *Nolan v. Pearson*, 191 Mass. 283-286, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, that a wife could not maintain an action at common law for the loss of consortium of her husband. The reason of this was that she could not sue in her own name for a personal injury, and that a recovery for such a wrong could only be had in a suit brought jointly by her and her husband. The right to the consortium of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favor of each. Since the removal of the wife's disability to sue this is now settled in most courts by a great weight of authority. *Nolan v. Pearson*, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. N. S. 643, 114 Am. St. Rep. 605, and cases cited. It is now generally held, in accordance with the decision in *Nolan v. Pearson*, that, for a direct and intentional invasion of a wife's right of consortium by another woman, through the alienation of the husband's affections and criminal conversation with him, an action may be maintained, as a similar action may be maintained by a husband for a similar wrong inflicted through adultery with his wife. Formerly a wife could not maintain such an action, because her suit could only be brought by her husband, with whom she must join. The husband's own misconduct would ordinarily be a sufficient reason to prevent his bringing such a suit, if, indeed, it would not bar him, in most cases, from maintaining an action against a joint wrongdoer. The change of the statutes in this Commonwealth and similar changes in most other jurisdictions have given wives the same right as husbands to sue an offender for a wrong of this kind.

The wrong which may be redressed through such suits is one which has a direct tendency to deprive the husband or wife of the consortium of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through



the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury. The suits by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money and render services and be helpful to others, in a suit by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband. See cases cited in *Kelley v. N. Y., N. H., & H. R. R.*, *ubi supra*. There was not an allowance to the wife for her loss of ability to earn wages and render service, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful.

While there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others, whereby they will be detrimentally affected by the impairment of his physical or mental ability, makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. It may be conceivable that one may have a contractual right to the labor or services of another, continuing after the time of his injury, such that, if his ability is impaired, the contractor will be directly damaged. If there may be such a case it is unnecessary to consider whether the contractor with such a right should have his action for damages, and receive his proper share of the amount allowable for the impairment of the other's earning powers, and the damages of the other should be diminished accordingly. It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action.

The minor children of an injured father who is legally bound to furnish them with support may suffer indirectly from his injury. So too may his wife, to whom he owes the same legal duty to furnish support; yet it was never held that a wife or minor child could recover for the consequences of a father's disability, against one who had negligently injured him. The diminished value of the husband's consortium with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is supposed to have made full pecuniary compensation to the husband and father for his injury. In the benefit from this payment the wife and children may



be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential.

The case most relied on by the plaintiff, and the only one that comes near to supporting her contention, is *Kelley v. N. Y., N. H., & H. R. R.*, *ubi supra*. . . .

The doctrines stated in the case just cited are not to be applied to cases like the present, and to this extent the decision is overruled.

*Exceptions overruled.*<sup>1</sup>

### Topic 5. Other Family Relations

89. REVISED STATUTES OF THE STATE OF ILLINOIS, 1874. COMPILED AND EDITED BY HARVEY B. HURD, COMMISSIONER OF REVISION. *Dramshops*. (Ch. 43.) § 9. Every person who shall, by the sale of intoxicating liquors, with or without a license, cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and \$2 per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in an action of debt before any Court having competent jurisdiction. . . .

§ 10. Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suits and to control the same and the amount recovered, as a feme sole; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parent, guardian or next friend, as the Court shall direct; and the unlawful sale or giving away, of intoxicating liquors, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this act may be by any appropriate action in any of the courts of this State having competent jurisdiction.

<sup>1</sup> [For Problems, Notes, and other references concerning this Right, see the footnote to No. 85, ante.]

90. NAGLE *v.* KELLER

SUPREME COURT OF ILLINOIS. 1908

237 Ill. 431, 86 N. E. 694

APPEAL from Branch Appellate Court, First District, on Appeal from Circuit Court, Cook County. *R. W. Clifford*, Judge.

Action by Catherine Nagle against John Keller and others. Judgment for plaintiff was affirmed by the Appellate Court, and defendant Keller appeals. Affirmed.

*Goldzier, Rodgers & Froelich*, for appellant.

*C. H. Pendleton* and *W. W. Mattison*, for appellee.

DUNN, J. The appellee, Catherine Nagle, brought suit, under section 9 of the Dramshop Act (Hurd's Rev. St. 1908, c. 43), against John Keller, the appellant, Peter McCarthy, and Victor Briard, for damages to her means of support caused by the sale of intoxicating liquors to her brother, John W. Nagle. The cause was discontinued as to Victor Briard during the trial, and judgment for \$3,000 was rendered against the remaining defendants. John Keller appealed. The Appellate Court affirmed the judgment, and he has now appealed to this Court.

It is argued that the appellee is not a person entitled to bring suit under the Act. . . .

So far as the question whether or not the appellee received support from her brother is concerned, it is concluded by the judgment of the Appellate Court. It is contended, however, that the appellee had no legal right to the support she received, and therefore no claim for damages on account of being deprived of it. The declaration averred, and as the record is presented in this Court it is to be taken as true, that the appellee had been for thirty years infirm and of delicate health, and unable to earn a livelihood, and had been supported by and dependent for her support on her brother, John W. Nagle, for twenty-five years before the acts complained of; that prior to said acts said John W. Nagle was engaged in business from which he derived a substantial income, and was possessed of property, by means whereof he was able to provide a comfortable maintenance for the appellee, but that the appellant, by selling and giving him intoxicating liquors, caused him to become habitually intoxicated, and in consequence thereof he neglected his business, squandered his money, became reduced and ruined in mind, body, and estate, and failed to provide employment for himself or support for the appellee, and in further consequence of such habitual intoxication he died.

The statute gives a cause of action to any person who shall be injured in person, property, or means of support, either by an intoxicated person or in consequence of the intoxication of any person, against the person causing such intoxication. There seems to be no room for construction. It is not necessary that the person injured should sustain any business

or personal relation to the intoxicated person. Any person sustaining an injury of the kind mentioned, whether directly by the act of an intoxicated person or indirectly in consequence of his intoxication, may maintain the action. *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14. The appellee was, in fact, supported by her brother. She was dependent upon him, and he was legally liable for her support. She was wholly without means and unable to earn a livelihood. Under the circumstances disclosed by the record, the statute (Hurd's Rev. St. 1908, c. 107) imposed upon her brother the duty of supporting her. *People v. Hill*, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634; *Danley v. Hibbard*, 222 Ill. 88, 78 N. E. 39. Whether it was a legal right which appellee could have enforced against her brother or not, it was a legal liability which the law imposed upon him and provided means for enforcing, of which she was receiving the benefit, and which she was deprived of in consequence of his intoxication. The statute gives her a cause of action for such deprivation. . . .

The judgment will be affirmed.

*Judgment affirmed.*

#### Topic 6. Death, as affecting Causes of Action for Corporal Harm or for Societary Harm

##### SUB-TOPIC A. THE COMMON LAW AND THE REMEDIAL STATUTES

#### 91. *BAKER v. BOLTON*

[Printed as No. 63, ante.]

#### 92. *HAMBLY v. TROTT*

[Printed as No. 64, ante.]

93. JOSEPH CHITTY. *Treatise on Pleading*. (1808. 11th Amer. ed., 1851, from 7th Eng. ed. Vol. I, pp. 68, 89.) We have seen that the right of action for the breach of a contract upon the death of either party in general survives to and against the executor or administrator of each.<sup>1</sup> But in the case of torts, when the action must be in form *ex delicto*, for the recovery of damages, and the plea not guilty, the rule at common law was otherwise; it being a maxim that *actio personalis moritur cum persona*.<sup>2</sup> . . . We will now consider the rule as it affects actions for injuries to the person, and personal and real property.

In the case of injuries to the person, whether by assault, battery,<sup>3</sup> false imprisonment, slander, or otherwise, if either the party who received or committed the injury die, no action can be supported either by or against the ex-

<sup>1</sup> Ante, 19.

<sup>2</sup> See the observations on this rule in general, 3 Bla. Com. 302; 1 Saund. 216, 217, n. 1; Cowp. 371 to 377; 3 Woodes. Lect. 73; Vin. Ab. Executors, 123; Com. Dig. Administrator, B. 13. See per Morton, J., in *Wilbur v. Gilmore*, 21 Pick. 525.

<sup>3</sup> *Miller v. Umbehower*, 10 Serg. & Rawle, 31.

ecutors or other personal representatives;<sup>1</sup> for the statute 4 Ed. 3, c. 7, has made no alteration in the common law in that respect;<sup>2</sup> and the statute 3 & 4 Wm. IV (1833), c. 42, s. 3, only gives executors and administrators an action for torts to the personal or real estate of the party injured, and not for mere injuries to the person.

94. DEBATES IN THE PARLIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND. (Hansard's Parliamentary Debates, 3d series, Vol. 87, col. 1365.) 1846, July 22. On the Order of the Day being read for the House to go into Committee on the Death by Accident Compensation Bill,

Sir *F. Thesiger* said, . . . He was desirous that the law should be improved to the utmost extent; but he wished, at the same time, that no sudden changes should be made without regard to the consequence that might result from them. . . . The House, he believed, was perfectly aware of the state of the law on this subject. When a person had received any injury arising from the carelessness or negligence of another, he was entitled to maintain an action to recover damages for that injury; and supposing the person who committed the injury was the servant of another, he was entitled then to maintain an action against the master of that servant; but if death ensued from the accident, all parties were exempted from civil responsibility; and, most unquestionably, the distinction appeared to be very inconsistent and very unreasonable; and for his own part he should be quite prepared to support any measure which would have the effect of relieving the law from the anomaly which existed in this respect. He thought there would be no difficulty in introducing a measure of that description. Many hon. Members were aware that the old common law on the subject of personal action was, that it died with the person; but the statutes had introduced a relaxation of the law in that respect; and the executor or administrator was entitled to maintain an action for any damage that had arisen to the personal property, and in many instances, by a recent statute, to the real property of the deceased. He should have no objection at all to continue and enlarge that principle, and apply it to this particular subject, and to say that the executor or administrator of a party who had received an injury that occasioned his death, should be entitled to maintain an action, precisely in the same way as the person himself would have been entitled had he lived. He saw no difficulty at all in introducing a measure of that kind. He should, in the next place, refer to the provisions of the Bill, which presented some instances of the careless and hasty way in which the Bill had been prepared. It appeared that it was to be applied not merely to cases of negligence; but that if a person, by an act of violence, should destroy the life of another, under such circumstances, when it only amounted to manslaughter, an action might be maintained by the executor or administrator. Why, he asked, should they stop short there, and say, where the act of violence only amounted to manslaughter there should be an action, but where it amounted to murder there should be no action? What possible distinction as to loss could they make between the two cases? If their objection should be, that, with regard to murder, a party would be liable to forfeiture of all his goods and chattels, and therefore incapable of paying damages, the same argument would apply to manslaughter, of forfeiture of goods and chattels on conviction. . . . He would next call the attention of the House to the clause under

<sup>1</sup> 3 Bla. Com. 203; 2 M. & Sel. 408.

<sup>2</sup> 1 Saund. 217, n. 1; Sir W. Jones, 174.

which damages were to be given. He observed that the only persons who were regarded by the provision were the next of kin; but that might be altered in Committee. And he would call their attention to another point. If an action were brought, and damages given according to the loss which a widow sustained by the death of her husband, the widow whose case was the subject of consideration (in case there were children) was to receive only one-third of the damages, and the children were to receive two-thirds of the damages; though the children were independent of the father, and though the damages were estimated on the loss of the widow. He mentioned that as an instance of the hasty and careless way in which the Bill was prepared. . . . It was proposed under this Bill, that all the damages should go to the widow and next of kin; whereas all the persons who were injured by the death of the party ought to be entitled to compensation in respect of that injury; and the damages when recovered should be assets distributable under the Statute of Distribution. . . . Viscount *Sandon* wished to know how it was proposed to secure to the children of a deceased person the advantages which the present Bill proposed to give them. In the event of a jury awarding compensation to them for the death of a parent, would it be made in a gross sum or in an annuity? Mr. *Bouverie*: In a gross sum. . . . Sir *J. Graham* observed, . . . that the question would arise, who was the next of kin? He might be resident in some distant part of the world; and was that next of kin, having really sustained no damage by the death of his relation, to be entitled to damages against all the proprietors of a colliery, though he had really received no damage? The principle of the measure was right; but the practical working of it, and giving effect to it, appeared to him to be surcharged with difficulty. . . . The *Lord Advocate* said, . . . that the question was, who the parties were that were entitled to sue and recover? . . . A person looking for damages must properly qualify himself, and he conceived that a jury would never listen to an action for damages by some distant relation. A person living abroad, totally removed from the person whose death was caused, could not, he conceived, expect the remedy. At the same time he thought, as they were going to legislate on the subject, that perhaps the expression "next of kin" was extremely indefinite; and it would not be objectionable that the particular relations whom the Legislature thought should be entitled to seek damages should be directly specified. It was only a near relation that ever should recover damages, and practically they had found no difficulty in Scotland on that subject. He might mention a railway case in which lately the widow and children had brought an action. He happened to be employed for the railway, and his advice was to compromise it, giving the children 1,000*l.*, and the widow a large sum. The objection of the noble Lord (Lord *Sandon*) might easily be met, by allowing the jury to apportion the damages. . . . He thought that much might be done to improve the Bill, which was open to some serious objections at present. . . . Mr. *Wakley* thought the . . . House had manifested a strong disposition to legislate not only extensively but correctly on this subject. He must say, however, that the Bill was an extremely crude measure; he had scarcely ever seen a Bill more carelessly drawn; and, in his opinion, it must have been drawn by some legal gentleman who was practising as an amateur. . . . Sir *G. Grey* thought that the necessity for some alteration in the law had been shown. . . . There was at present a gross anomaly in the law on this subject. If a man, through the gross carelessness of a railway company, met with an accident, by which he sustained serious injury, or lost a limb, he might bring an action against the company, or the parties liable in law, to recover damages for the

expenses of medical attendance and the loss he might sustain from inability to attend to his profession; but if, while such action was pending, the injured man died, the proceedings were at once stopped, and his family, besides sustaining the loss of perhaps their most important member, were not only subjected to the cost of medical advice, but to the costs of the action which had been commenced.

95. STATUTES OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND. (Statutes at Large, Vol. 86.) 9 & 10 Victoria, 1846, cap. XCIII. An Act for compensating the Families of Persons killed by Accidents. Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same,

I. That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought; and the Amount so recovered, after deducting the Costs not recovered from the Defendant, shall be divided amongst the before-mentioned Parties in such Shares as the Jury by their Verdict shall find and direct.

III. Provided always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of Complaint, and that every such Action shall be commenced within Twelve Calendar Months after the Death of such deceased Person. . . .

96. REVISED STATUTES OF THE STATE OF NEW YORK, 1830. *Actions for Wrongs, by or against Executors and Administrators.* (Part III, Chap. VIII, Tit. III, Art. 1, p. 447, §§ 1, 21, as amended by Laws 1909; now Consolidated Laws 1909, Decedent Estate Law, § 120, Vol. I, p. 520.)

For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or after his death, by his executors or administrators, against such wrongdoer, and after his death against his executors or administrators, in the same manner and with the like effect in all respects, as actions founded upon contracts. [St. 1909.] This section shall not extend to an action for personal injuries, as such action is defined in section thirty-three hundred and forty-three of the code of civil procedure; except that nothing herein con-



tained shall affect the right of action now existing to recover damages for injuries resulting in death.

97. LAWS OF THE STATE OF NEW YORK. *Action for Causing Death.* (St. 1847, c. 450, and St. 1849, c. 256; now Code of Civil Procedure, 1877, §§ 1902-4, as amended by Laws 1895, c. 946.) The executor or administrator of a decedent, who has left, him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death. . . . The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper. . . .

The damages awarded to the plaintiff may be such a sum as the jury, the Court, or the referee deems to be a fair and just compensation for the pecuniary injuries, resulting, from the decedent's death, to the person or persons for whose benefit the action is brought.

98. CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1894. (Record, Vol. II, Nos. 37, 57, pp. 593, 595, 582, 954, 961; July 31, Aug. 16.) The secretary read the minority report of the committee on preamble, as follows:

"The undersigned, a minority of the committee on preamble, recommend to the Convention the following proposed constitutional amendment. To amend article one of the Constitution as to damages for the loss of human life. Article one of the Constitution is hereby amended by inserting the following as a new section: No statutory limitation shall be placed upon the amount of damages recoverable or upon the right to recover in a civil action for the loss of human life or for injury to the person.

"GIDEON J. TUCKER, W. D. VEEDER, ANDREW H. GREEN." . . .

Mr. Veeder. I ask leave of the Convention to amend the minority report before it is printed, so that it shall read as follows:

"Article one of the Constitution is hereby amended by inserting the following as a new section :

"The right of action is hereby given for loss of life and for injury to the person, and no statutory limitation shall be placed upon the amount of damages recoverable or upon the right to recover by civil action for the loss of human life or for injury to the person."

The President. Is that form assented to by your associates on the minority of the committee?

Mr. Veeder. Yes, sir; I have just consulted them.

The President. Then it will take that form, and will be so printed. . . .

Mr. Tekulsky. Mr. President, In speaking upon the amendment proposed by my colleague, Mr. Tucker, of New York, and by myself at a later time, though without any knowledge of his action, it will be understood by you that by no



possible construction can this be made to appear other than a measure for the common good. It is in no sense other than it appears, a proposition in the interest of humanity. It undertakes to stand between the existence of the home and family and the almost absolute taking away of its supporter and head. It leaves with an intelligent company of one's fellow citizens, before a dispassionate bar, the verdict of the monetary loss, to the family interested, of a human life. Nothing is more arbitrary or absurd than the law, as it now stands. That leaves no discretion and no difference in productive values. The man in mid-life, rising in some high calling, until his abilities find a recognition and reward of the highest and most substantial character, cut off, say, in some accident, in the midst of his honors and usefulness, leaves his family and dependants precisely where the ignorant or depraved, with small abilities and few earning powers, would leave his. To say that the destruction of every man's life is recompensed by the payment to his survivors or dependents of a poor \$5,000, is to put a low estimate upon human endeavor and ability, is to sell that which no earthly power can ever restore, at a price both paltry and mean. Too long has this low estimate and valuation been permitted to remain. . . .

Gentlemen, the time has come for you to say that at least real safeguards shall be thrown around human life, and that such safeguards shall be imbedded in our Constitution.

The careful and accurate New York Sun of July 22, in commenting upon this amendment says, in its editorial columns, "It is a good constitutional amendment." Then it goes on to say: "In suits for wrongfully or negligently causing the death of a person, no more than \$5,000 can be recovered in the courts of this State under the law as it now exists. Repeated efforts have been made of late years to get the Legislature to enlarge this sum to \$10,000, but they have always failed. Now it looks very much as though the people would abolish the limitation altogether.

And it ought to be abolished. In many cases \$5,000 is grossly inadequate compensation for the direct pecuniary injury done to a man's family by wrongfully causing his death. Juries should be allowed to make good the actual loss, in cases of death, just as they are allowed to make good the actual loss in cases of injury not resulting in death. Under the present statute, however, a railroad accident which kills five persons may be better for the company, in a pecuniary sense, than in a like disaster in which the five are only maimed. In the former case, the corporation cannot lose more than \$25,000; in the latter it may have to pay \$100,000 or more.

Under the common law of England and the American colonies, there was no such a thing as civil suit for wrongfully causing the death of another. In 1846, however, through the influence of Lord Campbell, Parliament passed a statute permitting such actions to be maintained for the benefit of the wife, husband, parent, or child of the person killed. It was entitled "An Act for compensating the families of persons killed by accidents," and has always been known as Lord Campbell's Act. It contained no limitation as to the amount which might be recovered, but provided that the amount should be divided among the parties for whom the suit was prosecuted in such shares as the jury by their verdict should direct.

New York quickly imitated the example of England, and in 1847 the Legislature enacted a law similar to Lord Campbell's Act, which was the basis of all subsequent legislation in this State on the subject. In this first statute, however, there was no restriction as to the sum recoverable. That was introduced two

years later by the Legislature of 1849, which amended the law by inserting the \$5,000 limitation, and this limitation has ever since been retained although the statute itself has now been made a part of the Code of Civil Procedure.

Laws framed on the general plan of Lord Campbell's Act have been adopted in New Jersey, Pennsylvania, Massachusetts, Minnesota, Iowa, Indiana, North Carolina, Georgia, Alabama, Oregon, and many other States. In Pennsylvania may be found a precedent for putting something in regard to such laws into the Constitution. The Constitution of that Commonwealth expressly declares that no act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons and property." . . . .

Mr. *Barrow*. Mr. Chairman, when this proposed amendment was reported to this Convention adversely by the committee to which it had been referred, I voted against the report. . . . I don't know from whence or from whom this proposed constitutional amendment comes. I assume that it emanates in part, if not wholly, from that element, of comparatively recent growth, which has come to hate the name and the existence of a corporation. For that class of people, whoever they may be, wherever they may exist, I have no sympathy. I believe that the corporations which have grown up in this State are beneficial institutions which should rather be fostered, than destroyed. I have no sympathy with the spirit that is constantly striking at them, and endeavoring to cripple them.

For the poor man, for the laboring classes, they should be everywhere and at all times encouraged. The more there are of them the more labor they furnish; the more there are of them the higher wages are secured; the more there are of them the greater is the competition and the lower are the prices of commodities. . . .

And yet, sir, it has grown to be the fashion for both laborers and consumers to attack corporations as if they were the enemies of the State. It is the result, sir, as I believe, of the teachings of socialism, that exotic recently implanted into our soil and which only by reason of its novelty has unfortunately taken root. It is the vanguard of that other social evil, anarchy and chaos.

To this new element in our political life I am inclined to trace this proposed constitutional amendment.

But I think, sir, that it has another source. It comes here and is supported here very largely in the interest of the most conservative of all the governing classes, the lawyers. I do not think we have far to go for the reason why this amendment found so much strength on the floor of this Convention. This is a body of lawyers, of lawyers whose business and employment has frequently been to bring actions for negligence, and who for personal reasons do not wish their recoveries limited because such limitations limit their fees. At least 50 per cent of the cases of this character, I think, are taken up by lawyers on a division of the recovery, so that when they plead for the prohibition of this limitation at least 50 per cent of their pleading is for themselves.

What they plead for they say is just, and what they want is, that there shall be no limitation. They argue that the limitation is wrong upon the poor man. . . . But this proposed amendment is in the interest of the rich rather than in the interest of the poor.

The limitation of \$5,000 on a life is the assertion practically that that is the value of a life whether it is the life of a poor man or a rich man. The poor man's relatives almost without exception get so much, and the rich man's next of kin get no more. Then, sir, you have equality.

Our friends would have this change. Let me state their case if I understand it. Take two men riding in the same railway carriage. One is a merchant who has laid by half a million dollars, and earns in his business \$100,000 per annum. The other is a laborer who earns by his labor \$300 or \$400 a year. Both are killed in the same accident, and there is no limit on the recovery. The merchant's case goes before the intelligent jury, and if the two cases are decided upon the evidence which would be offered in such cases, the jury would be bound to consider in each case the value of each life upon its respective earnings. The jury would, however, consider \$50,000 an enormous sum to be given to the rich man's next of kin, but if they applied the same measure of damage to the poor man's case, \$300 (not \$5,000) would be an enormous sum to give. The result, therefore, with honest juries under the guidance of the Court, with this limitation stricken from the statute might prove of benefit to the next of kin of the rich man, but fatal to the next of kin of the poor man. Neither railroads nor corporations of any kind would suffer from the adoption of the amendment proposed, so far as the claims of laboring men or poor men are concerned, but from the claims of rich men earning in their avocations large annual incomes. And the railroads forced to pay such sums would be compelled to recover the losses in some way. The only way that could be done would be to reduce labor. Thus the laborers would be compelled to pay in one way or another the damages which the railroads had been compelled to pay for the deaths of the money-making rich men by the verdicts of honest juries.

It has been said that the limitation in case of death, and the absence of limitation in the case of injury, presents an absurdity. I deny it. Right here comes in again the justice of the law to the poor man. Damages are awarded in such cases for pain and suffering, and the law says that a poor man's suffering from an injury is as great as the rich man's and should be paid with precisely the same liberality. And that is true, nay, it should be paid for with even greater liberality. The rich man with his means may alleviate some of the pain which the poor man must suffer. Therefore it is that in a case of injury there is no limitation by the statute of the damages which may be recovered. I assert that the limitation of \$5,000 in the case of death, and the non-limitation in the case of injury go hand in hand, and that both are in the interest of the poor man and the laborer.

The law as it stands puts the money-maker and the rich on an equality with the wage earner and poor, and there I would have it remain. . . .

*Mr. Marshall.* Mr. Chairman, I think it is pretty well settled that the opinion of this body is that limitations upon the amount of recovery, in cases which flow from injuries resulting in death, should cease. It is also, it seems to me, the idea of everybody present, who has expressed himself upon this subject in favor of such limitation, that the right of action now existing, shall be continued. The fear is felt that perhaps the right of action might at some time be abrogated by the Legislature. To cover both of these ideas I have framed a provision which I will read: "The right of action to recover damages for injuries resulting in death, now existing, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." The right of action which now exists is well defined in the statute. We all know what that is. It has been the subject of adjudication in this State for the last forty years. There is no doubt as to the meaning of this language, and, therefore, by reference to the cause of action now existing, and declaring that the right of action shall further continue, it avoids any circumlocution which has been suggested by some of

the amendments here. The concluding phrase is, that the amount recoverable can never be subject to any statutory limitation. . . .

Mr. *Cassidy*. Mr. Chairman, I am willing to withdraw my amendment and accept Mr. Marshall's amendment in its stead. . . .

Mr. *Dickey*. Mr. Chairman, I move that the committee now rise, report this amendment favorably to the Convention, and recommend its passage.

The Chairman put the question on Mr. Dickey's motion, and it was determined in the affirmative.

Whereupon the committee rose and Vice-President Alvord resumed the chair. . . .

The President pro tem. put the question on agreeing with the report of the committee, and it was determined in the affirmative.

99. ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS. *Survival of Actions*. (Rev. St. 1836, c. 93, §§ 7, 8, and St. 1842, c. 89, § 1; now Revised Laws 1902, chap. 171, § 1.) Section 1. In addition to the actions which survive by the common law, the following shall also survive: actions of replevin, tort for assault, battery, imprisonment or other damage to the person, for goods taken and carried away or converted, or for damages to real or personal property, and actions against sheriffs for the misconduct or negligence of themselves or their deputies.

100. COMMONWEALTH OF MASSACHUSETTS. *Official Report of the Debates and Proceedings in the State Convention assembled May 4, 1853, to Revise and Amend the Constitution*. (Vol. III, pp. 86, 465, July 18, 27.) The Convention next proceeded to the consideration of the resolve on the subject of legal remedies to the representatives of persons killed by negligence or misconduct of railroad corporations, as follows:

Resolved, That where death is caused through negligence or misconduct, by means of railroads, steam-boats, or public conveyances for hire, the same remedies shall be open in a suit at law, as for like injuries to the person resulting in disability and not in death.

The question being on its second reading,

Mr. *Hillard*, of Boston. I rise to ask the gentleman who is chairman of the Committee which reported this resolve, to state some of the reasons why a provision of this kind should be placed in the Constitution at all, any more than a provision as to drawbridges, or the gauges of roads? I should like to know on what principle this is to be taken from the statute Law and placed in the Constitution?

Mr. *Hallett*. In reply to the question of the gentleman from Boston, I will state, that this subject was referred by the Convention to a Special Committee, who instructed me to report this provision. . . .

And why should this be put into the Constitution? I suppose, Sir, for this reason: that the courts of law in Massachusetts have decided that, by the common law, if a man is injured on a railroad by having an arm or leg broken, he is entitled to a remedy; but, that if he is killed, no damage is done whatever. That is the rule of law. The Supreme Court are called upon to construe all your laws. I am aware that there is a law providing a penalty of four or five thousand dollars for each passenger killed, and which is recoverable by indictment. That is a penalty in the nature of a punishment for an offence; but when you

come to your civil suits, and produce your Bill of Rights, which says that every person is entitled to a remedy for injuries received, what is the principle? If a man is maimed, and he goes before a jury, that jury determines what the injury is, and award him damages accordingly. But if a man on whose labor a wife and children depend for support, is killed at a blow, and his heir or administrator apply for damages, he is told by your courts that there is no injury, because he was killed outright, and all the damages that can be recovered would be for the suffering he endured, if you can prove it, for the few minutes which intervened between the time he received the blow and the time he ceased to breathe.

Gentlemen tell us that we may go to the Legislature for the proper remedies. So you might, if your Legislature was not, in great part, composed of men who are either directors or stockholders in most of these companies; but if I judge rightly, this is a matter which is worthy of being put into your Constitution, that this great Moloch may be properly restrained. . . .

I am in favor of this proposition, considering that when your Bill of Rights declares that there shall be a remedy for all injuries, that remedy should provide for the injuries sustained by women and children who may lose their husbands and fathers, and, in that loss, their means of livelihood. In recent cases tried by the Supreme Court, the question was, whether a party who was killed lived long enough to maintain suit. If he did not, no remedy could be had, and especially where death was instantaneous. The Court would not allow such cases to go to the jury. They took it away from the jury, on the ground that there was no surviving injury on which an administrator could take action. . . .

Mr. *Cady*, of Monson. It is quite immaterial, with me, in what way, and by what means, this protection shall be afforded — whether by the organic law, the statute law, or by the common law. But that no protection in cases now before the Convention is afforded, is true; but that is not all in relation to it. I hold that the eleventh article of the Bill of Rights, in the present Constitution, which contains this same principle, has not afforded any protection, either in this or other cases. . . . The present article says: "Every subject of the Commonwealth ought to find a certain remedy, by having a recourse to the laws for all injuries or wrongs which he may receive in person, property, or character." I claim that no person has ever had a remedy for an injury which caused death, as he had for wrongs to character or property. The article farther says: "He ought to obtain right and justice freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws." . . . Now, Sir, I contend that no person has ever had the benefit of the provision here made, or intended to be made, by this article of the Bill of Rights. A man can injure and wrong his fellow-citizen, and there is no remedy against him which can be applied. . . .

Mr. *Davis*, of Plymouth. Owing to the lamentable circumstances to which the gentleman has alluded, I have hesitated to propose the motion which I shall offer before I sit down, until I could hear the gentleman for Wilbraham (Mr. Hallett) explain the reasons for his amendment. It seems to me that no good reason can be assigned why a provision providing only a simple remedy for an evil, for injuries, for trespasses, &c., should be put into the Constitution; and, especially, no good reason can be given why it should be put into the Bill of Rights. If it were proposed to put into the Constitution a provision, that for all injuries by tort, an action at law should lie, and that when such tortious injury resulted in death the action should survive, I could see some reason for the principle, but certainly none for such a provision as this. I understand that the lia-



bility, to some extent, is now perfect by the act of the legislature. And I also understand him to admit that the legislature have now full power to enact sufficient laws with regard to all remedies affecting the person, whether they result in death or not. If that be so, I see no reason why the provision should be placed in the Constitution or in the Bill of Rights. If gentlemen will look at this resolve as reported, it seems to me they will find that it is too vague and indefinite. In point of fact, nothing can be made of it whatever, and I ask gentlemen of the Convention, before they make up their minds upon this question, to read the provision. It is this: "Where death is caused through negligence or misconduct by means of railroads, steam-boats, or public conveyances for hire, the same remedies shall be open in a suit at law as for like injuries to the person resulting in disability and not in death." That is, "where death is caused," "the same remedies shall be open as for a like injury," namely, death "resulting in disability and not in death." Will gentlemen also ask themselves what that same remedy is which shall be open at suits at law for injuries resulting in disability and not in death? Does the Committee mean that the like rule of damages shall apply to injuries resulting in death, that now apply to injuries which do not result in death? Or does the Committee mean to say a jury shall be called upon, without any limit, to estimate, in broad terms, the value of life? What is the limit? It seems to me, that, if called upon as a juror, as perhaps I may be, to consider that question, I might say that the value of a man's life was a million of dollars, and this constitutional provision might require that of me; or else — for so I read this resolve — or else I should be called upon merely to decide that the party entitled to some remedy is entitled to the same remedy which he would be entitled to for an injury resulting in disability and not in death, no matter how small the damage may be. It seems to me there is this inconsistency and this vagueness. I therefore move that this resolution be laid upon the table.

The question was taken, and the motion was agreed to.

So the resolve was laid upon the table.

101. ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS. *Penalty on a Railroad Corporation for Loss of Life through Negligence.* (St. 1853, c. 414; now Revised Laws of 1902, c. 111, § 267.) Section 267. If a corporation which operates a railroad or a street railway, by reason of its negligence or by reason of the unfitness or gross negligence of its agents or servants, while engaged in its business, causes the death of a passenger, or of a person who is in the exercise of due care and who is not a passenger or in the employ of such corporation, it shall be punished by a fine of not less than five hundred nor more than five thousand dollars which shall be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, and shall be paid to the executor or administrator, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its road contrary to law or to the reasonable rules and regulations of the corporation. Such corporation shall also be liable in damages in the sum of not less than five hundred or more than five thousand dollars, which shall be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and shall be recovered in an action of tort, commenced within one year after the

injury which caused the death, by the executor or administrator of the deceased for the use of the persons hereinbefore specified in the case of an indictment.

102. ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS. (St. 1897, c. 416; now Revised Laws of 1902, c. 171, § 2.) Section 2. If a person or corporation by his or its negligence, or by the gross negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than five hundred nor more than five thousand dollars to be assessed with reference to the degree of his or its culpability or of that of his or its agents or servants, to be recovered in an action of tort, commenced within one year after the injury which caused the death, by the executor or administrator of the deceased, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin.

103. LAWS OF THE STATE OF ILLINOIS ENACTED BY THE GENERAL ASSEMBLY. *An Act requiring Compensation for causing Death by Wrongful Act, Neglect, or Default.* (Feb. 12, 1853; now Revised Statutes, 1874, c. 70, Injuries). § 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. § 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by the law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of \$5,000 :<sup>1</sup> Provided, that every such action shall be commenced within two years after the death of such person.

104. REVISED STATUTES OF THE STATE OF ILLINOIS, 1874, COMPILED AND EDITED BY HARVEY B. HURD, COMMISSIONER OF REVISION. *Administration of Estates; Actions which Survive.* (Chap. 3, § 122.) In addition to the actions which survive by the common law, the following shall also survive: Actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property, or for the detention or conversion of personal property, and actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, and all actions for fraud or deceit.

[<sup>1</sup> Increased to \$10,000 by St. May 13, 1903.]



105. CODES AND STATUTES OF CALIFORNIA. *Code of Civil Procedure*. (1873. Pomeroy's ed., 1901.) Sec. 376. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person is employed by another person who is responsible for his conduct, also against such other person. . . . Sec. 377. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person is employed by another who is responsible for his conduct, then also against such other person. In every action under this and the two preceding sections, such damages may be given as under all the circumstances of the case may be just.

106. CODES AND STATUTES OF CALIFORNIA. *Code of Civil Procedure*. (1873. Pomeroy's ed., 1901.) Sec. 1582. Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereto, or for partition of real property, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by and against their respective testators or intestates. . . . Sec. 1583. Actions for wasting, destroying, taking, carrying away, or converting any goods or chattels, or for trespass on real estate, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.<sup>1</sup>

#### SUB-TOPIC B. EFFECT OF THE STATUTES, AS CREATING A NEW CAUSE OF ACTION

- (1) FOR THE SOCIETARY HARM CAUSED BY THE DEATH TO THE FAMILY OR OTHER PERSONS RECEIVING SUPPORT, OR
- (2) FOR THE DECEASED'S PERSONAL HARM BY LOSS OF LIFE

### 107. CHICAGO & ROCK ISLAND RAILROAD v. MORRIS

SUPREME COURT OF ILLINOIS. 1861

26 Ill. 400

THIS was an action on the case by appellees against appellant under the statute, in the La Salle Circuit Court.

The declaration alleges in the first count, that the defendant, on the 28th of August, 1857, was possessed of a certain railroad, and also of a certain steam engine, drawing a train of cars thereto attached upon said railroad, and that certain servants of said defendant, in its employment,

<sup>1</sup> [CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT: see the citations in the footnote to No. 28, ante, and the following:

Henry T. Terry, "Some Leading Principles of Anglo-American Law," c. XI, § 373, p. 363.]

had the management and direction of said engine, yet the said defendant, by its said servants, took so little and so bad care of said engine, etc., that by and through the mere negligence, carelessness and mismanagement of the said defendant, by its said servants employed as aforesaid, and for want of due and proper care of the said defendant, by its said servants, that the said servants with great violence, drove the said engine against and upon the said Joseph Joder, deceased, in his lifetime, as he, the said Joseph Joder, with a certain wagon and horses, was upon said railroad of the defendant, crossing the same in a certain public highway, where said highway crossed the said railroad, at the county aforesaid, whereby the said Joseph Joder was killed.

The second count alleges, that on the 28th of August, A. D. 1857, the defendant was a corporation, owning and possessed of a certain railroad, and of a certain train of cars and of a certain engine thereto attached, drawing said train upon said railroad, of which certain servants in the employ of said railroad had the care, management and direction. That said railroad crossed a certain public highway, and that said engine and train, under the management of said servants, was approaching and crossing the same, and that said Joseph Joder, deceased, in his lifetime was, with a certain wagon and horses drawing the same, crossing said railroad in a certain public highway, where the same cross each other, and said servants, etc., having the management, etc., of said engine and train of cars as aforesaid, neglected to ring any bell upon said engine, and neglected to whistle any whistle thereon at the distance of eighty rods from said crossing, and neglected to keep any whistle whistling, or any bell ringing, while said engine and train were approaching said crossing from eighty rods therefrom and until they have crossed the same, but on the contrary thereof, having the management, etc., as aforesaid, without any bell being rung, and without any whistle being sounded at the distance of eighty rods from said crossing, and without any bell being kept ringing, and without any whistle being kept sounding, etc., by and through such neglect to ring any bell or sound any whistle, as aforesaid, drove the said engine against and upon the said Joseph Joder, in his lifetime, he then being upon said railroad crossing and in said public highway, whereby the said Joseph Joder was then and there killed; to the damage of said plaintiffs of five thousand dollars.

Plea, not guilty. Joinder by plaintiffs.

The appellees recovered a judgment of two thousand dollars in the Court below.

*Glover, Cook, and Campbell*, for appellant.

*E. S. Leland*, for appellees.

BREESE, J. This action was brought under the Act entitled "An Act requiring compensation for causing death by wrongful act, neglect, or default," approved February 12, 1853. (Scates' Comp. 422.) A full exposition of this statute, its object and purposes, was given by

this Court in the case of the *City of Chicago v. Major*, 18 Ill. 349. It is there said the action is to be brought by the executor or administrator of the deceased, and is not limited to those cases where he leaves a widow, and any money recovered in such action is not to be treated as a part of the estate of the deceased, creditors not deriving any benefit from it; that it is to be distributed among those to whom the personal estate would descend in the absence of a will, according to the statute of descents. And further, that the damages can only be for pecuniary loss, not for the bereavement.

The first objection made by the appellants is as to the sufficiency of the declaration, in this, that it is not averred that the railroad owned by the defendants and used by them, was used in the county and State in which the action was brought.

This would be a good objection if presented on demurrer, but after the verdict it cannot avail. A fact of that description will, to sustain a verdict, be considered as proved or admitted.

The next objection is, that it is nowhere alleged in the declaration, that the deceased left a widow or next of kin. The second section of the statute provides that every such action shall be brought by and in the names of the personal representatives of such deceased person; and the amount recovered in every such action, shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife or next of kin of such deceased person, not exceeding the sum of five thousand dollars. (Scates' Comp. 422.) Taking the exposition of this statute by this Court in *Major's* case as the correct view of it, we are satisfied, before a party suing for these damages can be allowed to recover, it must be alleged in the declaration, and proved, that the deceased left a widow or next of kin, to whom the damages could be distributed. The statute evidently intends to give no damages for the injury received by the deceased, but refers wholly to the pecuniary loss which his wife and next of kin may be proved to have sustained, and the damages are not assessed to be applied to the general necessities of the estate, but belong exclusively to the widow and next of kin, to whom they are to be distributed. The statute makes their pecuniary loss the sole measure of damages. The satisfaction of that loss is, therefore, the sole purpose for which an action can be instituted, there being nothing to be allowed for the bereavement, for solatium. This being so, the facts that there are persons entitled by law to claim this indemnity, and that they have sustained a loss justifying their claim, must be proved on the trial, and therefore must be averred in the declaration, as much so as the death of the party and the wrongful act or neglect of

the defendant. We are satisfied there is no right of action under this statute except upon the basis of a pecuniary damage sustained by the widow and next of kin of the deceased.

Our statute is a copy of the statute of New York, enacted in 1847, and the Courts of that State hold, as we do here, that the only correct basis for the action is the pecuniary damage sustained by the widow and next of kin, that the damages are limited to an indemnity for such loss, and that facts showing such a loss must be proved and must be averred in the complaint, or the foundation of the action fails. Per Hoffman, J., *Safford v. Drew*, 3 Duer, 635.

The statute of New York is substantially a copy of the first two sections of 9th and 10th Victoria, c. 93, enacted in August, 1846, and in the first case which arose under that Act (*Blake v. The Midland Railway Company*, 10 Law and Eq. Rep. 439), it was held that the measure of damages was not the loss or suffering of the deceased, but the injury resulting to his family from his death, and that the manner in which the pecuniary loss to the persons for whom the action is brought arose, must be alleged. We remark here, that the second section of 9th and 10th Victoria, c. 93, provides that the action shall be for the benefit of the wife, husband, parent, and child of the person whose death has been caused by neglect, etc. This case shows that the rule governing the measure of damages is the pecuniary loss to the family of the deceased, and forms the exclusive ground of the action. In examining the declaration, we find no one averment under which this proof could be made. It is, then, substantially defective, and advantage can be taken of it in this Court. On the trial the plaintiff tacitly admitted the necessity of the averment of a widow and next of kin, by proof of those facts. We may readily imagine many cases, where persons have been for years disconnected from, and isolated from their family connections, and remained unknown to their kindred, and who, in no reasonable probability, would ever return to, or afford any support to their families or relatives. In case of their death, there would be no next of kin who could sustain any pecuniary loss by their death, because they could have derived no pecuniary benefit from a continuance of their lives.

In answer to this objection, it is urged by appellee's counsel, that there were no such averments in the declaration in Major's case, and that the judgment was rendered upon that record. The reply to this is, this objection was not made in that case at any time, nor the attention of the Court called to the point. The case was decided on wholly different grounds. For want of a sufficient declaration, the judgment must be reversed, and the cause remanded, with leave to amend the declaration, and for further proceedings in the cause.

*Judgment reversed.*

108. CHICAGO & ALTON RAILROAD COMPANY *v.*

SHANNON, ADMINISTRATOR

SUPREME COURT OF ILLINOIS. 1867

43 Ill. 339

APPEAL from the Circuit Court of McLean County; the Hon. *John M. Scott*, Judge, presiding.

The facts in this case are fully stated in the opinion of the Court.

Messrs. *Williams & Burr*, for the appellant.

Mr. *W. H. Hanna*, for the appellee.

Mr. Justice LAWRENCE delivered the opinion of the Court.

This was an action on the case brought under the statute by Samuel P. Shannon, as administrator of Joseph W. Shannon, deceased, for the benefit of the next of kin, against the railway company, for wrongfully causing the death of the said Joseph, who was a brakeman upon said road. The plaintiff below recovered judgment for \$2,000, and the defendant appealed. The death was caused by the explosion of the boiler of the locomotive while the train to which the deceased belonged was in motion, on the 18th of May, 1865. The suit is brought upon the ground, that the boiler was unsafe and was known to be so to the appellant.

It is urged by the counsel for the appellant, in a very elaborate review of the testimony, that the judgment should be reversed because the verdict was against the evidence on the main point — the insecurity of the boiler. The rule of this Court has been so often announced as hardly to need repetition — that, unless the verdict is clearly against the evidence, and can be considered only as the result of passion, prejudice, or a palpable misapprehension of the facts, it is not the province of the Court, for that reason, to interfere. . . .

It is also insisted that the Court erred in refusing the following instructions: . . .

“Even if the jury should believe from the evidence that the engine was unsafe, and that the defendant’s employees, whose duty it was to know it, did know that it was unsafe, yet if they further believe from the evidence that the plaintiff’s intestate was over twenty-one years of age and that he was in no way indebted to the plaintiff or any one else, and that the deceased left no widow or children nor descendants in any degree, then there was no one who had any legal interest in his life and the plaintiff cannot recover in this case.” . . .

The question presented in the second of the foregoing instructions is one of some novelty. The statute upon this subject, 2 Purples’ Statutes, 1245, Scates’ Comp. 422, authorizes the suit to be brought for the exclusive use of the widow and next of kin. We do not perceive how the conclusion is to be avoided, that wherever there are next of kin the action will lie for the recovery of at least nominal damages.

We know of no principle by which we are authorized to say that "the next of kin" must be within certain degrees of consanguinity. Any rule or limitation of that character which we should endeavor to lay down, would be purely arbitrary, and mere judicial legislation. The phrase "next of kin," used in the statute, is a technical legal phrase, and we must suppose it to have been used by the Legislature in its technical sense. It means here what it means elsewhere.

But, while the action may be brought in any case where there are next of kin, the more important question remains — what is to be the measure of damages? This Court held in *The City of Chicago v. Major*, 18 Ill. 349, and again in *The Chicago and Rock Island Railroad Company v. Morris*, 26 Ill. 400, that the recovery can only be for the pecuniary loss and damage, and not for the bereavement. Nothing can be given as solatium. If then the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages can be given, because there has been no pecuniary injury. If, on the other hand, the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been a pecuniary loss for which compensation under the statute must be given. So, also, if the deceased was a minor and leaves a father entitled, by law, to his services.

It is said, on the authority of an unofficial report, that the Supreme Court of the United States have recently held, in a suit brought by the executors of Barron against the Illinois Central Railroad Company, and taken to that Court by a writ of error to the Federal Court of this district, that a suit cannot be brought under this statute for the benefit of the parents, brothers, and sisters of the deceased, who was of age, alleging, as a reason, that they have no pecuniary interest in his life. While we entertain great respect for that Court, we cannot agree with it in this view, if it has so held; and the construction of State laws, when they do not interfere with the Constitution or laws of the United States, belongs to the State Courts.

We hold, then, that such next of kin as have suffered pecuniary injury from the death of deceased may recover pecuniary compensatory damages under this statute. How this pecuniary damage is to be measured, — in other words, what is to be the amount of the verdict, must be largely left (within the limits of the statute) to the discretion of the jury. The Legislature has used language which seems to recognize this difficulty of exact measurement, and commits the question especially to the finding of the jury. The law provides, that "they are to give such damages as they shall deem a fair and just compensation." What the life of one person is worth, in a pecuniary sense, to another, is a question incapable, from its nature, of exact determination. Although the wealth or poverty of the deceased may be important elements,



they are not the only ones that enter into the problem. If the deceased was poor, the loss may consist in the fact, that his personal exertions can no longer support those dependent upon him. If rich, the loss may be nearly as great, in the deprivation of the care and management of his business or estate. In creating this right of action the legislature have confided to the jury a subject, that does not lie within the limits of exact proof. But, in this, as in all other action, the Court must so far supervise the verdict as to see that it is not the result of unreasoning prejudice or passion.

In the case at bar it is in proof, that the father of the deceased was fifty years old, and had little property besides his homestead; that the deceased lived at his father's when not on the road, and contributed to the support of the family, and that his father had an insurance policy on his (the father's) life, for the benefit of the mother of deceased, the premium upon which, \$118, the deceased had paid, and promised to keep paid. The verdict was for \$2,000, and we do not feel authorized to say it was too large.

The evidence offered by the defendant, that the engineer, on a previous trip, had carried more steam than the rules of the company allow, was properly excluded. It could shed no light on the issues in this case.

*Judgment affirmed.*

109. CHICAGO, PEORIA, & ST. LOUIS RAILROAD COMPANY *v.* WOOLRIDGE

SUPREME COURT OF ILLINOIS, 1898

174 Ill. 330, 51 N. E. 701

APPEAL from Appellate Court. Third District.

Action by Charlotte Woolridge, administratrix of John A. Woolridge, deceased, against the Chicago, Peoria, & St. Louis Railroad Company. Judgment for plaintiff was affirmed by the Appellate Court (72 Ill. App. 551), and defendant again appeals. Reversed.

*Bluford Wilson* and *Philip Barton Warren*, for appellant.

*S. H. Cummins*, *Clinton L. Conkling*, and *Joseph M. Grout*, for appellee.

PHILLIPS, J. This action was brought by Charlotte Woolridge, as administratrix, to recover damages, under the statute, for the death of her intestate, John A. Woolridge, occasioned, as alleged, by the negligence of the defendant in the operation of its train of cars. A summary of the main facts is: The deceased was a flagman for the Chicago & Alton Railroad Company. That road and the defendant road had constructed extra tracks from their main lines to the State fair grounds at Springfield, Ill.; both entering such grounds at the southeast corner. . . . The business of the deceased was to flag the Chicago & Alton

trains, and to assist in guarding such highway crossings. . . . As the Chicago & Alton train approached deceased, leaving the grounds, he stepped backward on the track of the defendant, when its train, backing down, with trainmen on the rear end, running at a speed of from probably eight to twelve miles an hour, struck him, and thereby caused his death. The plaintiff obtained a verdict and judgment, which were affirmed by the Appellate Court.

The deceased left surviving him the plaintiff, his widow, and seven children, three of whom lived with their father, and four had their own homes. All of the children were of age. Clarence Woolridge, who lived with his father, was so crippled by rheumatism that he was unable to work. The admission of proof of this fact, and of his dependence on his father for support, over the objection of the defendant, is one of the errors assigned, and of which serious complaint is made. . . .

The most serious question is that relating to the admission of the following evidence of Clarence Woolridge:

"Q. If you have any bodily infirmity, tell the jury what it is. (The objection by defendant to this question was sustained, but the Court remarked: 'You may ask him if he was dependent on his father for support.') Q. Now, Clarence, if you were dependent upon your father for support, you may tell the jury. (This question was objected to, overruled, and exceptions taken.) A. Yes; I am not able to do no hard work, — no work of any kind. Q. If you are crippled, tell the jury how. A. I am crippled here, — rheumatism in my right hip. (To which objection was made by defendant, overruled by the Court, and exceptions taken.) Q. Unable to work, are you, and earn a living? A. Yes, sir."

That such evidence would have a very strong tendency to enlist the sympathy of the jury, and thereby tend to affect not only the amount of the verdict, but also to affect the judgment of the jurors as to a liability, is very clear. This evidence was admitted on the theory that under the law this crippled son was in need of help on account of his helpless condition, and therefore had been supported, and was legally entitled to be supported, by his father, because of such condition.

It is said in support of this position that in order to recover more than nominal damages the proof must show the next of kin were supported in whole or in part by the deceased, or that the deceased was bound by law to support them because they were in a state of dependence. As to Clarence Woolridge, it is further said, without this state of dependency his father would not have been bound by law to support him, as he was over twenty-one years of age, and therefore this evidence is said to be material to enhance the damages. This view of the law is not in accord with the rule laid down by this Court in relation to a recovery by lineal next of kin. This action is based on chapter 70 of the Revised Statutes. Section 1 gives an action for a wrongful act causing death, while section 2 prescribes in whose name the action shall be brought, and for whose benefit, and limits the damages "to the pecu-

niary injuries resulting from such death to the wife and next of kin of such deceased person." The personal representative brings the action as trustee for those who have such pecuniary interest in the continuance of the life of the deceased, and not in right of the estate (*City of Chicago v. Major*, 18 Ill. 349; *Holton v. Daly*, 106 Ill. 131); and, as provided by section 2,

"the amount recovered . . . shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate."

This act has been construed: (1) That "next of kin" means those standing in that relation in a technical sense. *Railroad Co. v. Shannon*, 43 Ill. 338. (2) That, if the next of kin are collateral, it is a material question whether they were in the habit of claiming and receiving pecuniary assistance from the deceased. If they were not, they can only recover nominal damages. If they were lineal, the law presumes pecuniary loss from the fact of death. *City of Chicago v. Scholten*, 75 Ill. 468; *Railroad Co. v. Swett*, 45 Ill. 197. (3) That the amount of the recovery is limited to the "pecuniary loss." *Railroad Co. v. Brodie*, 156 Ill. 317, 40 N. E. 942, where cases on this point are reviewed, and where, on page 320, 156 Ill., and page 943, 40 N. E., quoting from *Conant v. Griffin*, 48 Ill. 410, it is said:

"This action is the creature of the statutes, . . . and, as they only provide for compensation for the pecuniary loss, the evidence should be confined exclusively to that."

(4) "Pecuniary loss" is held, as to lineal kindred, to mean what the life of the deceased was worth, in a pecuniary sense, to them (*Railroad Co. v. Shannon*, supra; *Coal Co. v. Hood*, 77 Ill. 68), which pecuniary loss, it is said in the *Brodie* case, "can be easily determined," in case of lineal kindred, as said in *City of Chicago v. Scholten*, supra, "by proof of the personal characteristics of the deceased," his mental and physical capacity, his habits of industry and sobriety, the amount of his usual earnings, by proof of "what he might in all probability earn for the future support of his wife and children. In this consists essentially the loss to the family" (*Railroad Co. v. Weldon*, 52 Ill. 290, at p. 296),— or, as put in *Jury v. Ogden*, 56 Ill. App. 100, on page 104:

"The amount to be recovered is what the statute regards as the pecuniary value of the addition to such estate left as the deceased, in reasonable probability, would have made to it, and left, if his death had not been so wrongfully caused. It is to be estimated by the jury from all the facts and circumstances proved, — his prospect of life, and his means, opportunities, ability, and habits with reference to the making and saving of money or money's worth."

The poverty, wealth, helplessness, or dependence of the lineal next of kin is immaterial on the question of the amount of the recovery,

under this statute. That feature is not at all to be considered in measuring or estimating the loss sustained, or in determining the liability, in case of lineal kindred, when there is death caused by a wrongful act. In *Railroad Co. v. Moranda*, 93 Ill. 302, it is said (page 304):

"It was wholly immaterial whether such next of kin had or had not other pecuniary resources after his death. Such evidence was held incompetent in *O'Brennan's case*, 65 Ill. 160, and in *Powers' case*, 74 Ill. 343."

In the *O'Brennan case*, *supra*, it will be found that *O'Brennan* was seeking to recover damages for a personal injury, and he was permitted to testify that he was a supporter of his family as a lecturer. This was held to be immaterial, and the Court, in commenting on such evidence, say (page 163):

"If it was admissible, then it would have been competent to have gone further, and shown all the circumstances of the family, — such as that the mother was an invalid, that one of the daughters was blind, that one son had accidentally lost a leg, etc., if such had been the case, so as to present a most pitiable picture of a helpless family dependent upon appellee for support as a lecturer; for, as the evidence had no place in the case but as a stimulant to the sympathy of the jury, it would be just as competent to make the stimulant strong as weak."

See also *Railway Co. v. Powers*, *supra*. In *Railroad Co. v. Baches*, 55 Ill. 379, it is said:

"The feelings of the widow and next of kin, their wealth or poverty, or any other fact than the pecuniary injury, cannot be considered in assessing the damages."

The number and ages of the family are not material, as has been held, where the relation is lineal, as the sole measure of damages is pecuniary loss; that is, how much would the deceased, in all probability, have added to the estate, had he lived, which amount would not be affected by the number or ages of such kindred, as each would only get his proportionate share as provided by law for the distribution of the personal property of an intestate, without being increased or diminished, as to any one of them, on account of poverty, age, or physical condition. As to lineal heirs, as in this case, the authorities above clearly show the injury for the wrongful death is limited to the pecuniary or property interest of such kin in the life destroyed. It cannot be enhanced or diminished by showing the poverty, wealth, or physical helplessness of any of such kindred. To permit that to be done would be to make this defendant, for illustration, assume the burden of such conditions, if unfortunate, which is not contemplated by the statute. *Railway Co. v. Powers*, *supra*, cited in *Moranda case*, *supra*. For these reasons it was material error to admit evidence that *Clarence Woolridge* was a cripple, unable to work, and that he depended on his father for support. The question is not, under this statute, as to lineal kindred, how many there were, or their mental or physical con-

dition, but is solely how much would the deceased have been worth to them, in all reasonable probability, had he continued to live, which fact, as said in the Brodie case, *supra*, is easily ascertainable by proof as above indicated. . . .

For the errors indicated the judgments of the Circuit and Appellate Courts are reversed, and the cause remanded.

*Reversed and remanded.*

110. CARTER, J., in *BRENNAN v. CHICAGO & CARTERVILLE COAL COMPANY*. (1909, 241 Ill. 610, 89 N. E. 756.) The evidence objected to simply showed that the deceased supported his family with his earnings. This Court held in *Pennsylvania Co. v. Keane*, 143 Ill. 172, 175, 32 N. E. 260, 261, that it was competent to show that the wife, children, or next of kin were dependent upon the deceased for support before and at the time of his death, stating that: "This view is in consonance with the statute that gives the action, and which provides that such damages shall be given as are a fair and just compensation for the pecuniary injury resulting from the death to the wife and next of kin of the deceased person. It cannot well be said that proof that the wife or next of kin of the deceased were, at and before the time of his decease, dependent upon him for support, or that he was her or their sole support, is wholly immaterial and irrelevant to any point at issue in the case." This doctrine has been quoted with approval in *Swift & Co. v. Foster*, 163 Ill. 50, 44 N. E. 837; *St. Louis, Peoria, & Northern Railway Co. v. Dorsey*, 189 Ill. 251, 59 N. E. 593; *Pittsburg, Cincinnati, Chicago, & St. Louis Railway Co. v. Kinnare*, 203 Ill. 388, 67 N. E. 826. These authorities are not in conflict with *Chicago & Northwestern Railroad Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Chicago, Burlington, & Quincy Railroad Co. v. Johnson*, 103 Ill. 512; *Chicago & Alton Railroad Co. v. May*, 108 Ill. 288; *Chicago, Peoria, & St. Louis Railroad Co. v. Woolridge*, *supra*, as contended by counsel for appellant. These last authorities lay down the rule that it is not competent to show the pecuniary circumstances of the widow, family, or next of kin at the time of or since the decease of the intestate, and are reviewed and distinguished by this Court in *St. Louis, Peoria, & Northern Railway Co. v. Dorsey*, *supra*. While it is erroneous to admit evidence of the resources of the widow or next of kin or their financial condition, it is not error to allow questions concerning the earnings of the deceased, and whether the wife and children were supported by him.

# 111. PERHAM v. PORTLAND GENERAL ELECTRIC COMPANY

SUPREME COURT OF OREGON. 1898

33 Or. 451, 53 Pac. 14

[Point (2) of the opinion as set forth in No. 117, post.]

112. SAN ANTONIO & ARANSAS PASS RAILROAD  
COMPANY *v.* LONG

SUPREME COURT OF TEXAS. 1894

87 *Tex.* 148, 27 *S. W.* 113

ERROR from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Fannie Long and others against the San Antonio & Aransas Pass Railway Company. There was a judgment of the Court of Civil Appeals (26 *S. W.* 114) affirming a judgment for plaintiffs, and defendant brings error. Reversed.

*Houston Bros.*, for plaintiff in error.

*Denman and Franklin*, for defendants in error.

GAINES, J. The plaintiffs in the trial Court (the defendants in error in this Court) are the sons and daughters of Mrs. M. C. Long. They brought this suit, under the statute, to recover damages for injuries resulting to them from the death of their mother, which was alleged to have been caused by the negligence of the defendant, the San Antonio & Aransas Pass Railway Company. The petition alleged that the youngest of plaintiffs was twenty-four years old on the day of the accident which resulted in Mrs. Long's death. The allegations of the petition with reference to the damages were as follows:

"Plaintiffs aver that said M. C. Long, during her lifetime, aided in the support and maintenance of each one of plaintiffs, cared for them in time of sickness, and at other times, and that her house was their home whenever they desired to make it such, and that each had every reasonable expectation that if said M. C. Long had lived she would have continued to aid and assist in the support and maintenance of each of them, as aforesaid; and they aver that by her death each of them has been deprived of her motherly care and assistance, and her said support and maintenance, all in their damage in the sum of fifteen thousand dollars (\$15,000)."

These allegations were specially excepted to, substantially upon the ground that they were vague and indefinite. The Court overruled the exceptions, and we think there was no error in that ruling. It is contended that the petition should have averred specially the nature of the aid extended by Mrs. Long, in her lifetime, to each of the plaintiffs. The fact that the deceased, during her life, contributed to the support of her children, is evidence to be considered by the jury in determining the pecuniary loss sustained by them by reason of her death; and it may be that in a case like this, in which the children are all adults, and no longer abide under the parental roof, some evidence of a like character or effect is necessary in order to justify a recovery of damages. Such facts are not in themselves substantive facts which justify a judgment,



and, being mere matters of evidence, are not required to be pleaded either in detail, or with any great degree of particularity. . . .

The only witness who testified as to the family relations of the plaintiffs and the deceased, and as to the facts affecting the amount of damages, was Miss Fannie Long. In addition to the portions of her testimony which have already been set out, she deposed, in substance, that the deceased left surviving her neither father nor mother, and that the plaintiffs (two sons and four daughters) were her only children; the deceased mother, at the time of her death, had property amounting in value to \$18,500; and that the income of her property was about \$1,850. All of this except about \$250, which was used in her own support, she devoted to the assistance of her children. She was cross-examined on that subject, but was unable to give either the date or amount of any donation, or the amount in the aggregate, that any one received in any one year. One received remittances of money, the children of another were given clothing, and others occasionally lived with her at her expense. All the children were of full age at the time of their mother's death. Three of them only resided permanently with her. Such was the substance of the testimony upon the question of damages. Such being the evidence adduced by the plaintiffs upon the question of the amount of damages, the defendant offered in evidence the will of Mrs. M. C. Long, duly probated, in which she devised and bequeathed all of her estate to her four daughters. To the reading of the will in evidence, the plaintiffs objected, and their objection was sustained, and the evidence excluded.

This action of the Court raises the serious question in this case, and it is one which is of first impression in this Court. In an action for injuries resulting in death, can the defendant show, for the purpose of reducing the damages, that the plaintiffs have received, by devise or descent, property from the estate of the deceased? If such evidence be admissible in any case of like character, it was certainly admissible in this case. The authorities are not numerous, and the expressions of the Courts are in an apparent conflict upon the question. Among the cases relied upon in support of the negative is that of *Railroad Co. v. Barron*, 5 Wall. 90. The defendant asked the Court to charge the jury

"that if the persons for whose benefit this action is brought have received, in consequence of the death of said Barron, and out of his estate inherited by them from him, a pecuniary benefit greater than the amount of damages which could, under any circumstances, be recovered in this action, then, as a matter of law, they have, by the death of said Barron, sustained no actual injury for which compensation can be recovered in this action."

Upon error to the Supreme Court of the United States, that Court held, in effect, that the charge was properly refused. The trial Court had, however, charged the jury, among other things, as follows:

"In this case the next of kin are the parties who are interested in the life of the deceased. They were interested in the further accumulations which he

might have added to his estate, and which might hereafter descend to them. The jury have the right, in estimating the pecuniary injury, to take into consideration all the circumstances attending the death of Barron, — the relations between him and his next of kin, the amount of his property, the character of his business, the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had. There is a possibility, in chances of business, that Barron's estate might have decreased, rather than increased, and this possibility the jury may consider. The jury may also take into consideration that he might have married, and his property descended in another channel. And there may be other circumstances which might affect the question of pecuniary loss, which it is difficult for the Court to particularize, but which will occur to you. The intention of the statute was to give a compensation which the widow, if any, or the next of kin, might sustain by the death of the party; and the jury are to determine, as men of experience and observation, from the proof, what that loss is."

It is apparent, we think, that evidence had been admitted of property received by inheritances by the beneficiaries from the estate of the deceased, and the case cannot be considered as a decision upon the question of the admissibility of such evidence. The Court do not even discuss the charges given and refused, but in course of their opinion say, in a general way:

"The statute in respect to this measure of damages seems to have been enacted upon the idea that as a general fact the personal assets of the deceased would take the direction given them by law, and hence the amount recovered is to be distributed to the wife and next of kin in proportion provided for in the distribution of personal property left by a person dying intestate. If the person injured had survived, and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed to his wife and next of kin. In case of death by the injury the equivalent is given by a suit in the name of his representative."

The suit was brought under the statute of Illinois which made the widow and next of kin the beneficiaries of the recovery, and directed that the amount recovered should be divided among them "in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate." The Court seems to proceed — in part, at least — upon the theory that the damage which the statute is intended to compensate is the loss which accrues to the widow and next of kin of the deceased, as distributees of his estate, by reason of his premature death; such loss being the difference between what the deceased actually left and what he would have left, had not his life been cut short by the wrong of the defendant. That difference would seem to be his probable future savings, had he lived. The proportion in which the recovery is to be distributed tends to indicate that this was the leading consideration in providing the right of action; for if the loss of any individual benefits, capable of pecuniary estimation, which would probably have accrued to any beneficiary during the life of the deceased, was to be compensated

it would seem that the statute would have provided that such beneficiary should recover such compensation for himself alone. It must, however, be conceded that the decisions of some of the Courts upon similar statutes recognize the rights of minor children, at least, to recover for the loss of individual pecuniary benefits which would probably have inured to them by the continuance of the life of their parent. *Tilley v. Railroad Co.* 24 N. Y. 471, 29 N. Y. 252; *Terry v. Jewett*, 78 N. Y. 338. Under the statutes of New York, the recovery is for the benefit of the next of kin, and is to be there also apportioned as under the statute of descent and distribution. It is worthy of remark that under such a statute the recovery may go to remote collateral kindred, who have no interest whatever in the life of their relative, except the prospective shares they may receive, as distributees of his estate, upon his dying intestate. Where such is the loss to be recompensed, it is no answer to the plaintiff's demand to say to him that he has not been damaged, because he has received a pecuniary benefit from the death of the deceased. His ground of complaint is not that he has been deprived of receiving anything, but that the amount which has come to him is less than it would have been if the life of the deceased had been prolonged.

There would seem to be an important difference between statutes which give the right of action to the next of kin, as such, and the statute of this State which undertakes to confer compensation upon the husband or wife and the children and parents of the deceased only, and which requires that the jury shall determine separately the amount to be recovered by each of the beneficiaries. Where the right of action is given for the benefit of the next of kin, and the sum recovered is to be apportioned as under the statute of descent and distribution, it would seem that the leading purpose is to give compensation for some loss suffered by them all in common; that is to say, the damage which has accrued to them, as next of kin, by reason of the loss of a prospective increase in the amount of the estate to be distributed. Our statute excludes from its benefits the collateral kindred, and its leading purpose seems to be to compensate only such near relatives of the deceased as may be dependent upon him for support, or other aid of pecuniary value, or such as may have been the recipients of such aid or support. It may be that, in statutes of the one class, special injury to one beneficiary may be considered and compensated, though it is difficult to see why the recovery for such loss should be distributed in a fixed proportion among all; and it may be, also, that under our statute the loss of a prospective increase of inheritance may be an element of damages. But, under the latter, each beneficiary recovers for his own special injury. The damages must be actual, and for loss of a pecuniary nature. Nothing is given by way of solace. Under such a law, we cannot see how it can be maintained that one has been damaged by the death when he has received from the estate of the deceased property exceeding in value all the prospective benefits which would have accrued to him, had

the death not ensued. Let us suppose that a wealthy son contributes to his aged parent a fixed sum, say \$100, annually, and that, from the wrongful act of another he dies, leaving such parent, by his will, a legacy of \$10,000. Can it be reasonably asserted that the parent has suffered any pecuniary loss by the death of the son? But we need not go outside of this case for an illustration. If there was any great disparity in the aid extended by Mrs. Long in her lifetime to each of her children, the evidence does not disclose it. By her will she left her property, amounting to nearly \$20,000 in value, to her daughters, and gave her sons nothing. If the sons shared equally in her bounty with her daughters during her life, can it be said that their loss is no greater than that of the daughters? It seems to us absurd to say so. It will not do to say, as some of the Courts have said, that to permit a defendant, in a case of this character, to show that the plaintiff had received a pecuniary benefit resulting from the death of the deceased, would enable a wrongdoer to protect himself against the consequences of his wrong. Except for wilful misconduct or gross negligence, exemplary damages are not allowed by the statute. In other cases, actual damages only are given, and the recovery is free from any element whatever of a penal nature. The argument is a legitimate application of the principle that a wrongdoer cannot take advantage of his own wrong. Its main support rests upon a sentiment, — a consideration which should not be resorted to in order to change the provisions of the written law. The statute is intended, in case of mere ordinary negligence, to give compensation for a pecuniary loss; and the question is, what is the amount of this loss, if any? This is a practical question, and it should, in every such case, be tried and determined in a reasonable and practical manner.

The English statute known as "Lord Campbell's Act," upon which most, if not all, of the statutes of a like character in this country have been modelled, is, in respect to the beneficiaries, very nearly the same as the statute in this State. The action is for the benefit of "the husband, wife, parent and child" of the deceased, and the jury are to apportion the damages among the beneficiaries. The only substantial difference is that Lord Campbell's Act provides that under the term "parents" shall be included "grandparents." In an action brought under that Act, Lord Campbell himself, who presided at the trial, instructed the jury that in assessing the damages they should take into consideration the amount received by the beneficiaries on an accident insurance policy held by the deceased. *Hicks v. Railway Co.*, cited in note to *Pym v. Railway Co.*, 4 Best & S. 403. . . . Statutes giving damages for injuries resulting in death necessarily deal with probabilities; so that where there is a policy on the life of the deceased, payable to the beneficiaries under the statute, the probability is, or may be, that, if the deceased had continued to live, beneficiaries would ultimately have received the insurance money. Hence, they have gained nothing by the premature death, except an acceleration of the payment. Perhaps sound principles would require the

jury to take into consideration the use of the money during the period of acceleration. *Railway Co. v. Jennings*, supra. But, however that may be, the case is very different where the only aid which the beneficiaries have received from the deceased, during his life, has been a part of the income of his property, and where, upon his death, the title to the corpus of such property absolutely vests in them; and we are therefore of the opinion that, in a case involving similar facts, they should be admitted in evidence, to be considered by the jury. We conclude that the Court erred in excluding the will of Mrs. Long, and that for this error the judgment must be reversed. . . .

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113. HEDRICK *v.* ILWACO RAILWAY & NAVIGATION  
COMPANY

SUPREME COURT OF WASHINGTON. 1892

4 *Wash.* 400, 30 *Pac.* 714

APPEAL from Superior Court, Pacific County; *Edward F. Hunter*, Judge.

Action by Gideon T. Hedrick against the Ilwaco Railway & Navigation Company. Judgment for defendant, and plaintiff appeals. Reversed.

*Watson, Hume & Watson*, for appellant.

*Fulton Bros.*, for respondent.

ANDERS, C. J. Appellant brought this action against the respondent to recover damages for loss of services, during minority, of his son, Franklin G. Hedrick, aged five years and seven months, whose death it is alleged was caused by the negligence of respondent. The sufficiency of the complaint was not questioned, but the defendant, as a defence to the action, pleaded that the plaintiff, as administrator of the estate of the deceased, had previously recovered a judgment of \$2,000 against the defendant for the death of his child, and that the same had been paid. A demurrer was interposed to this defence, which the Court overruled, and, the plaintiff declining to reply, a judgment dismissing the action was entered, from which the plaintiff appealed.

The action was brought under section 9 of the Code of 1881 (St. 1873), which reads as follows:

"Sec. 9. A father, or, in case of the death or desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward."

Section 8 (Code 1881) provides that

"the widow, or widow and her children, or child or children, if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds, and all aiders and abettors. (St. 1875.) When the death of a person is caused by the wrongful act or neglect of another, his heirs

or personal representatives may maintain an action for damages against the person causing the death; or, when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as, under all circumstances of the case, may to them seem just."

That portion of section 8 relating to damages for the death of a person killed in a duel, as well as sections 9 and 717 of the Code of 1881, were originally adopted as parts of the Practice Act of 1873, and were designated, respectively, as sections 8, 9, and 656 of that Act. But the remaining portion of section 8 was not enacted until 1875, and was then designed by the Legislature to follow section 8, as a new and distinct section. See Act Nov. 12, 1875, § 4. Subsequently this "new section" was consolidated with the previous section 8, and with it now constitutes section 8 of the Code of 1881, as above set forth. . . . The only question, therefore, to be determined on this appeal, is whether a parent has a right, to recover damages for the death of a child, separate and distinct from that conferred upon the heirs or personal representatives by section 8 of the Code of 1881.

It is settled beyond controversy that, at common law, no civil action could be maintained for damages resulting from the death of a human being. But that defect of the common law has been obviated by statute in the several States, analogous to the English statute commonly known as Lord Campbell's Act (9 & 10 Vict. c. 93), though often varying more or less from its provisions, especially as to the party entitled to maintain the action. The object and purpose of these statutes is to provide a remedy whereby the family or relatives of the deceased, who might naturally have expected maintenance or assistance from the deceased had he lived, may recover compensation from the wrongdoer commensurate with the loss sustained. Usually the right of action, as in Lord Campbell's Act, is given to the executor or administrator, and the sum recovered inures to the benefit of the particular individuals designated by the statute. In this State, as has been seen, under section 8, the heirs or personal representatives may maintain the action; and unless section 9 was, as respondent contends, repealed by the amendatory Act of 1875, a parent may also maintain an action as plaintiff for the injury or death of a child. . . .

To our minds, these two sections are not necessarily inconsistent, and we do not think it was the intention of the Legislature to repeal either section 8 or 9 of the Act of 1873 by the Act of 1875. . . . A parent, at common law, could maintain an action for damages for loss of services of his minor child from the time of the injury until death, where death did not immediately follow the injury; and the object of the statute is to create a new and independent right of action for the loss of services



subsequent to the decease of the child, which did not exist at common law. And this right is separate and distinct from that of the heirs or personal representatives. Two actions may thus spring from the same wrongful act, because two distinct injuries are thereby inflicted. But the actions are prosecuted in different rights, and the damages are given upon different principles. The damages recovered by a parent for loss of services of a child belong to the parent in his own right, and are not distributable among the heirs, and do not become a part of the estate of the deceased. The measure of damages in such cases is the value of the child's services from the time of the injury until he would have attained the age of majority, taken in connection with his prospects in life, less the cost of his support and maintenance. To this may be added in proper cases the expense of nursing and medical treatment, and in some jurisdictions even funeral expenses. See *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. Rep. 793; *Railroad Co. v. Goodykoontz* (Ind. Sup.), 21 N. E. Rep. 472; *Rains v. Railway Co.*, 71 Mo. 164; 2 Thomp. Neg. 1292. Under the California statutes, which are almost identical with ours, the father, and, under certain contingencies, the mother, may maintain an action for the injury or death of a minor child. See *Durkee v. Railroad Co.*, 56 Cal. 388. And in Iowa and Indiana, under statutes but slightly variant from our own, the same rule obtains. See *Walters v. Railroad Co.*, 36 Iowa, 458; *Mayhew v. Burns*, supra; *Railroad Co. v. Goodykoontz*, supra; . . . We conclude, therefore, that the judgment in the action brought by the plaintiff, as administrator, is no bar to this action. The judgment of the Court below is reversed, and the cause remanded, with directions to sustain the demurrer.

STILES and DUNBAR, JJ., concur.

#### 114. CHALOUX *v.* INTERNATIONAL PAPER COMPANY

SUPREME COURT OF NEW HAMPSHIRE. 1909

75 N. H. —, 73 Atl. 301

TRANSFERRED from Superior Court, Coos County; *Pike*, Judge.

Action by Theodore Chaloux against the International Paper Company. There was a demurrer to the declaration, and the cause was transferred from the Superior Court. Demurrer sustained.

The declaration alleged that the plaintiff's minor son on December 17, 1907, during his employment by the defendants, and while in the exercise of due care, was instantly killed by the defendants' negligence.

*Henry F. Hollis*, for plaintiff.

*Rich & Marble* and *Sullivan & Daley*, for defendants.

BINGHAM, J. The question here presented is whether the plaintiff, whose son was instantly killed through the negligence of the defendants, can maintain an action for damages for the loss of the son's services from the time of his death until he would have attained his majority. It is con-

ceded that there is no statute giving a right of action in such case. The plaintiff's contention is: 'That recent decisions in this State recognize the existence of a right of action for damages for loss of service between death and majority; that at common law a father has an absolute legal right to the services and earnings of his minor son; that by reason of the defendants' negligence the plaintiff has been deprived of this right; that, as the party possessing the right and the one who has infringed upon it are both in existence, the question of the survival of actions, urged as a reason for the conclusion reached in *Wyatt v. Williams*, 43 N. H. 102, does not arise; and that what is there said inconsistent with this contention is obiter dicta and not material to the decision of the case.

The recent cases upon which the plaintiff relies are *Carney v. Railway*, 72 N. H. 364, 57 Atl. 218, and *Warren v. Railway*, 70 N. H. 362, 47 Atl. 735; but neither of them can be said to support the plaintiff's contention. In the former the Court was considering the question of damages recoverable under our statute (Pub. St. 1901, c. 191, § 12) by an administrator of an estate of a minor child killed through the defendants' negligence, and it was held that the administrator could not recover for the child's "earning capacity" from the time of his death until he attained his majority, although he might from that time on, for the reason that under the statute "damages are to be assessed on the basis of the loss suffered by the deceased party and his estate," and that, if the son had lived, his earnings during minority, unless emancipated, would have belonged to his father, or in case of the father's death to the mother. It cannot be inferred from this holding that the Court understood, or undertook to intimate, that the father could have maintained a suit for the loss of the son's services from the time of his death until he reached his majority. In the latter case the death of the child was not shown to have been instantaneous. This appears from the charge of the Court to the jury. 209 Briefs and Cases, 609, 611. The statement in the opinion: "Had the child survived, the action would have been brought in its own name. The father's cause of action would have been what it is now, case for the loss of the child's services" — must be read with this fact in view, and, when so read, it has reference to the father's right of action for loss of services prior to death. In *Wyatt v. Williams*, *supra*, the Court said:

"At common law, for the killing of a human being, no civil action could be maintained against the person who caused it, . . . by a person standing in the relation of . . . father or master to the person killed, and the law was the same, whether the act which caused the death was felonious or not."

And after discussing the various reasons assigned for the holding, it says that the rule is founded upon public policy, and if the reasons assigned

"are various and not altogether consistent, yet the rule has been too long established, and too generally recognized as a settled principle of the common law, to be now shaken by anything short of a legislative Act."

This case was decided in 1861, and from that day to this no action has been brought in which the parent has been allowed damages for loss of services after the child's death — a fact reasonably conclusive as to the law in this State and of the understanding of the profession upon the subject. *State v. Railroad*, 52 N. H. 528, 548; *Bedore v. Newton*, 54 N. H. 117; *Whitaker v. Warren*, 60 N. H. 20, 49 Am. Rep. 302; *Poff v. Telephone Co.*, 72 N. H. 164, 55 Atl. 891.

But there seem to be other substantial reasons why this action cannot be maintained. . . .

Because of these reasons, the decision in *Wyatt v. Williams*, and the fact that no action of this nature has ever been maintained in this State, we are of the opinion that the demurrer should be sustained.

*Demurrer sustained. All concur.*

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### 115. MOONEY v. CHICAGO

SUPREME COURT OF ILLINOIS. 1909

239 Ill. 414, 88 N. E. 194

APPEAL from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; *A. H. Chetlain*, Judge.

Action by Vincent C. Mooney, administrator of the estate of Edward Dillon, deceased, against the City of Chicago. From a judgment for plaintiff, defendant appealed to the Appellate Court, where the judgment was affirmed, and an appeal taken to the Supreme Court. Reversed and remanded to the Superior Court.

*Edward J. Brundage*, Corp. Counsel, and *John R. Caverly*, City Atty. (*Edward C. Fitch*, of counsel), for appellant.

*Frank V. Campe* (*A. L. Gettys*, of counsel), for appellee.

*Clarence A. Knight* and *William G. Adams*, amici curiæ.

CARTWRIGHT, C. J. Appellee, who sued as administrator of the estate of Edward Dillon, deceased, recovered a judgment in the Superior Court of Cook County against appellant for \$3,500 damages for causing the death of said Edward Dillon, and the Branch Appellate Court for the First District affirmed the judgment.

The declaration in two counts charged the defendant with negligence in permitting Harrison Street, at the intersection of Clark Street, in the city of Chicago, to remain in a dangerous and unsafe condition by allowing several of the paving stones to be removed and remain absent and missing from the street, and allowing a large and deep hole and depression to exist in said street at said place. It was alleged that, while Edward Dillon was driving a team of horses attached to a wagon loaded with barrels, a wheel of the wagon ran into the hole and depression, by means whereof the wagon was broken, and he was thrown upon

the pavement and received injuries which resulted in his death. The plea was the general issue. The declaration was amended on the trial by changing the name of the deceased to William Edward Dillon. . . .

Counsel for appellant, in stating the leading facts which the evidence proved or tended to prove, say . . . that Dillon was in the employ of James McKay; that after the accident he executed an instrument of release, in satisfaction for the damages resulting from the accident, acknowledging full satisfaction of any and all claims against McKay on account of the injuries sustained; and that McKay made the payments, specified in the release, to Dillon in his lifetime, and the balance to his widow. Counsel for appellee in their brief do not point out any inaccuracy in this statement so far as the evidence was concerned, and under the rule the statement will be taken as accurate and sufficient to present the question raised on the instructions.

Instruction No. 6, given at the instance of the plaintiff, explained to the jury the rule of law. . . . The instruction also omitted all reference to an affirmative defence which, if established, would have defeated a recovery, and it is error to give an instruction ignoring matter of defence which there is evidence fairly tending to prove. *Miller v. Cinnamon*, 168 Ill. 447, 48 N. E. 45; *Gorrell v. Payson*, 170 Ill. 213, 48 N. E. 433. If the release executed by Dillon to McKay operated as a bar to the action, a verdict of guilty could not be found upon the facts stated in the instruction. Both parties asked, and the Court gave instructions concerning the effect of the release. On the part of the plaintiff the Court told the jury that, if the defendant alone was liable for the injury, the release would not be material in the case, and at the request of the defendant the jury were advised that, if Dillon executed the instrument, and the injury was due to the joint negligence of McKay and the defendant, the instrument operated as a bar to the action, and they should find the defendant not guilty. It was a question whether the accident would have resulted, even if the street was in a defective condition, if the skein of the axle had not been worn through and the axle thereby weakened. If a defective condition and a worn axle concurred, and both the defendant and McKay were guilty of negligence, they would both be liable, and a release of one would release the other.

The Appellate Court, in dealing with the question, expressed the opinion that the cause of action released or satisfied by the instrument was an entirely different one from the statutory cause of action; that the release had no relation to the case, and was erroneously admitted in evidence, and was therefore properly ignored in the instructions. This view of the law is erroneous, and not in accord with the authorities. There was but one cause of action, and there could be but one recovery or satisfaction. A cause of action in suits for damages arising from negligence is the act done, or omitted to be done, by the defendant affecting the plaintiff which causes a grievance for which the law gives a remedy. *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979. In suits

like this, the cause of action is the wrongful act, neglect, or default causing death, and not merely the death itself. *Holton v. Daly*, 106 Ill. 131; *Crane v. Chicago & Western Indiana Railroad Co.*, 233 Ill. 259, 84 N. E. 222. The statute gives a right unknown to the common law in cases where the wrongful act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages. One condition upon which the statutory liability depends is that the deceased had a right of recovery for the injuries at the time of his death, and there is no right in the administrator to maintain an action unless the deceased had the right to sue at the time of his death. There being but one cause of action, there can be but one recovery; and, if Dillon had released the cause of action, the statute does not confer upon his administrator any right to sue. *Holton v. Daly*, supra; *Southern Telephone Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694; *Read v. Great Eastern Railway Co.*, L. R. 3 Q. B. 555; 8 Am. & Eng. Ency. of Law (2d ed.) 870; 13 Cyc. 325; 6 Thompson on Negligence, § 7028; 3 Elliott on Railroads, § 1376; *Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016; *Strode v. Transit Co.*, 197 Mo. 616, 95 S. W. 851; *Littlewood v. Mayor of New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Hill v. Pennsylvania Railroad Co.*, 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754; *Brown v. Chattanooga Electric Railway Co.*, 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666. . . .

Instruction No. 6 was erroneous in ignoring the defence of a release.

The judgments of the Appellate Court and Superior Court are reversed, and the cause is remanded to the Superior Court.

*Reversed and remanded.*<sup>1</sup>

#### SUB-TOPIC C. EFFECT OF THE STATUTES AS SURVIVING A CAUSE OF ACTION ALREADY ACCRUED BEFORE THE DEATH

- (1) FOR THE DECEASED'S CORPORAL INJURY, OR
- (2) FOR THE SOCIETY HARM TO THE FAMILY, ETC.

### 116. HOLLENBECK, ADMINISTRATOR *v.* BERKSHIRE RAILROAD COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1852

9 Cush. 478

THIS was an action on the case, brought in this Court by the plaintiff, as administrator of Mrs. Hollenbeck, for damage sustained by her, through the negligence of the defendant's agents, by means of which she lost her life. The writ was dated February 8, 1851, and the following facts were admitted, namely:

That the plaintiff's intestate was, on the 18th day of October, 1850,

[<sup>1</sup> For problems under this topic, see the notes to No. 121, post.]

between five and six o'clock in the afternoon, riding in an open buggy wagon, upon the highway in Great Barrington, at a point where it is crossed by the railroad of the defendants; that she was driving the horse, and was then and there in the exercise of ordinary care; that the horse and wagon then and there came in collision with the cars of the defendants, and the plaintiff's intestate thereby received such injuries, that by reason thereof she subsequently died; that the accident or collision was caused solely by the negligence and want of care and skill of the defendants; that the plaintiff was appointed administrator of the estate of the deceased, February 5, 1851, and that, at the time of the accident, she was a married woman, and the wife of the plaintiff. And if the administrator can maintain an action for the above injuries, all other facts necessary to sustain such action are to be considered as proved, except so far as relates to the time of the death of the intestate, and her mental or physical condition after the injury, which are to be determined by the Court from the evidence introduced, from which evidence the Court are to draw such inferences, and come to such conclusions of fact, as a jury would be authorized to do. At the suggestion of the presiding judge, it is further provided that, if the Court deem it a case that they require to be sent to the jury, then all matters of law are to be settled that are presented upon the evidence. . . .

If, upon the agreed statement of facts and testimony, the Court shall be of opinion that a claim for damages for the injuries received can be maintained by the plaintiff, in this or any other form of action, the defendants are to be defaulted and judgment rendered for five hundred dollars damages, and costs. If the Court shall be of opinion that no such action can be maintained, the plaintiff is to become nonsuit.

*G. N. Briggs*, for the plaintiff. 1. The plaintiff's intestate survived the injury. 2. Hence the cause of action accrued, and survived to the administrator, and the mental or physical condition of the party injured is not material to the question in this case. 3. The mental and physical condition of the intestate, after the injury, was such, in fact, that it was not impossible for her to have directed the institution of an action after her decease.

*F. Chamberlin* (with whom was *W. Porter*), for the defendants. Mrs. Hollenbeck could not have instituted or maintained an action after the collision; consequently this action cannot be maintained by the plaintiff as her administrator. . . .

SHAW, C. J. This is an action on the case, by an administrator, for damage sustained by Mrs. Hollenbeck, the plaintiff's intestate, by the negligence of the engineers, conductors, and managers of the defendants, by means of which she lost her life.

The question presented for the consideration of the Court, in the present case, is, whether the facts, stated in the report, show a cause of action which accrued to the intestate in her lifetime, and which survived to her administrator, by force of the St. 1842, c. 98, § 1.



That statute provides, that the action of trespass on the case, for damage to the person, shall hereafter survive; so that, in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were living.

In the two cases cited in the argument — *Kearney v. The Boston & Worcester Railroad Corporation*, and *Mann v. The Same*, ante, 108 — an attempt was made by the Court to put a practical construction upon this statute. In doing so, it was necessary to consider what was the law before the statute. It is perfectly well settled, as a rule of the common law, that all rights of action for injury to the person die with the person; and it follows, therefore, that if either the plaintiff or defendant should die before judgment, any existing action, brought to recover such damage, must abate; and if none had been brought by the party injured, none could be commenced by his personal representative. It was the obvious purpose of the statute to reverse this rule of law; to provide that the right of action should survive, as in cases of damage to property, and, of course, be liable to be prosecuted by or against an executor.

The question, in deciding whether any case is within the statute, is, whether the sufferer survived; that is, lived after the act was done which constitutes the cause of action. Life or death, that is the test. If the death was instantaneous, and, of course, simultaneous with the injury, no right of action accrues to the person killed; and, of course, none to which the statute can apply. But if the party survives, lives after it, the right of action accrues to him, as a person in esse, and his subsequent death does not defeat it, but, by operation of the statute, vests it in the personal representative.

As in case of inheritance and descent cast, the law contemplates a punctum, or precise moment of time, which separates life from death; and that is the precise time at which the inheritance passes, and vests in the heir. And although it is a fact sometimes difficult to be ascertained by physical indications, and still more difficult to prove satisfactorily by evidence, yet, like other facts of the like kind, upon which important and valuable rights depend, it must be ascertained and proved by the best evidence which the nature of the case will admit.

We think the accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind, on the part of the sufferer. A right may accrue, by operation of law, to one in extremis, when it requires no act, or assent, or even consciousness on his part. Should a person, who is heir to his father, be in the lowest condition, but still heir at the moment of the death of his father, the descent would be cast on him, although he might never know it.

On examination of the evidence, a statement of which in writing is exhibited, it seems placed beyond doubt that Mrs. Hollenbeck lived from fifteen to twenty hours after the accident by which she lost her

life; during which time she breathed, swallowed, the blood circulated, and she uttered sounds and manifested signs of life. There is evidence, perhaps not so decisive and satisfactory, that during a considerable part of that time, she manifested intelligence and consciousness, made voluntary motions, and attempted to speak. But, independently of this evidence, we think the evidence conclusive that life remained, and that, within the meaning of the statute, the cause of action accrued to her during her life, and the action may be commenced and maintained by the plaintiff, as her administrator.

*Judgment for the plaintiff.*

117. PERHAM *v.* PORTLAND GENERAL ELECTRIC  
COMPANY

SUPREME COURT OF OREGON. 1898

33 Or. 451, 53 Pac. 14

APPEAL from Circuit Court, Multnomah County; *E. D. Shattuck*, Judge.

Action by W. T. Perham, administrator, against the Portland General Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action brought under section 371 of the Code to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant company. The facts, which are practically undisputed, are that on September 27, 1893, the plaintiff's intestate, an employee of the East Side Railway Company, a corporation owning and operating a suburban railway between Portland and Oregon City, was killed while engaged in repairing its bridge across the Clackamas River, by coming in contact with wires owned and used by the defendant company for the transmission of electricity from its station in Oregon City to its customers in the city of Portland, and which were suspended over and horizontal with such bridge. . . .

Along in the afternoon, the deceased and his fellow workmen, having completed the work at the north end of the bridge, proceeded to the south end for the purpose of tightening the rods on that end, but, being unable to place the wheel wrench on the nuts because of the standard which supported the cross bar to which the wires of the defendant company were attached, they were directed by the foreman to move it out of the way. At this time the two wires on the west side of the bridge were live wires, but this fact was unknown to the workmen. They proceeded to detach a sufficient number of the wires. . . . The deceased was directed by the foreman to cross over to the west side of the bridge to a hand line and draw up the tools necessary to be used in fastening the standard out of the way of the wrench. In obedience

to this order, he started to walk over on one of the top lateral braces, stepping over the wires and steadying himself by touching them with his hands, and when he reached the two west wires, which were carrying at the time 5,000 volts of electricity, he accidentally took hold of both wires at the same time, and the entire force of the current passed through his body, killing him instantly.

The complainant alleges: That at the time the defendant so placed its wires over the bridge of the railway company it well knew it would be necessary from time to time for such company to cause the bridge to be repaired, and for persons to work upon the top chords and braces thereof; but, notwithstanding such knowledge, it carelessly and negligently strung its wires only  $2\frac{1}{2}$  feet above such chords and braces, . . . and that it carelessly and negligently permitted the covering used thereon to become worn, defective, and wholly insufficient to render them safe to persons coming in contact therewith. . . . The complaint then alleges the appointment of the plaintiff as administrator of the estate of deceased, and upon the question of damages avers: "That said Nathaniel Carl Perham at the time of his death was twenty-five years and six months old, unmarried, strong, healthy, temperate, industrious and frugal, of good intelligence and business capacity, and was a skilful carpenter and bridge carpenter and contractor, and was earning and receiving wages at the rate of three dollars per day, and would, if he had continued to live during the ordinary period of life, have continued to earn and receive the same, and even greater, wages for his services, and would have accumulated property and estate of the present value of twenty thousand dollars; and that by reason of his death, occasioned by the negligence and wrongful acts and omissions of the defendant, as hereinbefore set forth, plaintiff, as administrator of said estate, has been injured and damaged in the sum of twenty thousand dollars"; and prays for judgment against defendant for the sum of \$5,000, being the limit of a recovery permitted by the statute. . . . A trial resulting in a verdict and judgment in favor of the plaintiff, the defendant appeals, alleging as error: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that the Court erred in overruling its motion for a nonsuit; and, third, that the Court erred in the giving and refusal of certain instructions to the jury.

*Richard Williams and Fred V. Holman*, for appellant.

*W. W. Thayer and H. W. Hogue*, for respondent.

BEAN, J. (after stating the facts). It is claimed at the outset that the action cannot be maintained, because the statute under which it is brought is a survival statute, and, as the complaint alleges and the evidence shows, that the death of plaintiff's intestate was instantaneous. There was no interval of time between the injury and the death within which the deceased could have brought an action for the injury, and therefore there was no right of action to survive to his personal representatives.

The statute provides that a cause of action arising out of an injury to the person dies with the person, except that,

"when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

Hill's Ann. Code, §§ 369, 371. It is agreed that at common law there was no remedy by way of a civil action for the death of a human being, and that a cause of action arising out of an injury to the person died with the person. But the practical impossibility of securing the punishment of mere carelessness by means of a criminal action induced the British parliament in 1846 to pass what is known as "Lord Campbell's Act," by which a civil remedy is given to the personal representative of one whose death is caused by the wrongful act or omission of another for the benefit of the widow, husband, parent, or child of such person. This statute has been in substance, in one form or another, incorporated into the legislation of most of the States of the Union, and the holding is quite universal that it creates a new right of action for the wrongful death, which may be maintained whether it was instantaneous or consequential. 1 Shear. & R. Neg. § 139; Cooley, Torts, 264; and *Seward v. Vera Cruz*, 10 App. Cas. 59.

(1) But the contention for the defendant is that the statute of this State, unlike Lord Campbell's Act and the statutes modelled after it, does not create a new right of action for the death, but is a survival statute under which the personal representatives of a deceased person may bring an action to recover damages for the injury which caused the death in cases where the party injured was entitled to bring such action, but died before exercising such right; and in support of this view we are referred to *Belding v. Railroad Co.*, 3 S. D. 369, 53 N. W. 750; *Kearney v. Railroad Corp.*, 9 Cush. 108; *Bancroft v. Railroad Corp.*, 11 Allen, 34; *Corcoran v. Railroad Co.*, 134 Mass. 507; *Riley v. Railroad Co.*, 135 Mass. 292; *Mulchahey v. Wheel Co.*, 145 Mass. 281, 14 N. E. 106; *Maher v. Railroad Co.*, 158 Mass. 36, 32 N. E. 950; *Railroad Co. v. Pendergrass*, 69 Miss. 425, 12 South. 954. But the statutes under which these decisions were made are essentially different from ours. The statute under which the Massachusetts decisions were made provides that . . .

"the action of trespass on the case, for damages to the person, shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were living" (St. 1842, c. 89, § 1);

and, as Mr. Chief Justice Shaw says in *Kearney v. Railroad Corp.*, *supra*,

“supposes the party deceased to have been once entitled to bring an action for damages for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising that right.”

It is therefore held in that State, under what Judge Cooley characterizes (Cooley, Torts, 264) as “a somewhat nice and technical construction of the statute,” that the action will not lie when the death is instantaneous, but, if there is the slightest interval between the accident and the death, it can be maintained; and that the right does not depend upon intelligence, consciousness, or mental capacity of any kind on the part of the deceased after he is injured and before his death. The Mississippi statute declares that

“executors, administrators and collectors shall have full power and authority to commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted,” and that “executors and administrators shall have an action for any trespass done to the person . . . of their testator or intestate against the trespasser, and recover damages in like manner as the testator or intestate would have had if living, and the money so recovered shall be assets and accounted for as such.”

Code, §§ 2078, 2079. The Court held that the purpose of the statute is

“to save to personal representatives the right to begin and carry on such personal actions as the deceased might have begun and carried on if he had not died,”

and that the personal representative can have no standing in Court where the death is simultaneous with the injury, but in such cases all recoverable damages must be sought by the kindred who have sustained the loss. It thus appears that the statutes construed by the decisions relied upon by the defendant were, as interpreted by the Courts, in each instance designed to prevent a cause of action accruing to the deceased in his lifetime for an injury to his person from being defeated by his subsequent death, and not to create a new cause of action for the death.

But such is manifestly not the purpose or effect of our statute. It provides that when the death of a person is caused by the wrongful act or omission of another, his personal representative may maintain an action therefor, — that is, for the death, — if the deceased might have maintained an action had he lived for the injury which caused the death. The language of the statute is plain, and its meaning obvious. It clearly creates a new right of action in favor of the personal representatives for the death itself, and not an action founded on survivorship, or on any cause of action in favor of the deceased. The death, and not the injury from which the death results, is the cause of action under

the statute, and the personal representatives are entitled to recover damages for the wrongful taking away of the life itself; and therefore it makes no difference whether the injured party was killed instantly or not. Nor does it matter that the damages recovered become assets of the estate, to be administered upon as other personal property of the deceased, and do not go to certain designated persons as provided in Lord Campbell's Act, and in many States of this country. This is but a statutory direction as to the disposition to be made of the damages to be recovered, and does not determine the question as to whether the statute creates a new right of action or is only a survival statute. In the absence of the statute, no right of action for the death exists in favor of any person, and it was clearly competent for the Legislature, in creating this new right, to make such provision as to the disposition of the damages recovered thereunder as it might see proper.

The statutes of the various States which have in substance adopted Lord Campbell's Act differ widely in this respect, and it has never been suggested, so far as we are aware, that for this reason they do not give a cause of action for the death. . . . The statutes of Kansas and Indiana are identical with ours, except that damages are allowed to the extent of \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin. Mr. Justice Brewer, in *Hulbert v. City of Topeka*, 34 Fed. 510, referring to the Kansas statute, says it

"gives a new right of action; one not existing before; an action which is not founded on survivorship; an action which takes no account of the wrong done to the decedent, but one which gives to the widow or next of kin damages which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly or lived months, whether he suffered lingering pain or not, whether or not he was put to any expense for medical attendance and nursing. None of these matters are to be considered in an action under section 422; and the single question is, how much has the wrongful taking away of his life injured his widow or next of kin? It is an action to recover damages for the death, and in no sense a survival of an action which accrued to the decedent before his death."

. . . The questions determined in the adjudged cases on the right of the personal representatives of one whose death was caused by the wrongful act or omission of another to maintain an action for damages against the latter arose under such dissimilar statutes that the decisions afford but little light upon the interpretation of any particular statute at variance with the one under consideration in the given case, and hence it is useless to attempt any further examination of them at this time. . . .

(2) It is next claimed that the complaint is defective because it does not show that the deceased left surviving him any heirs, legatees, next of kin, or creditors. Under the provisions of Lord Campbell's Act, and statutes which, like it, give a right of action for the death of a person caused by the wrongful act of another for the benefit of certain designated relatives, no action can be maintained at all unless the de-



ceased left at least one surviving relative of the class specified, and the complaint must necessarily show that fact. 1 Shear. & R. Neg. § 135; *Stewart v. Railroad Co.*, 103 Ind. 44, 2 N. E. 208. In such case the executor or administrator, in prosecuting the action, is a mere nominal party, who sues for the benefit of the real party in interest; and such damages as he may recover do not go to the estate of the deceased, nor belong to him in his representative capacity, but to the person for whose benefit the right of action is given by the statute. *Blake v. Railway Co.*, 18 Q. B. 93; *Bradshaw v. Railway Co.*, L. R. 10 C. P. 189. The theory is that those entitled to the benefit of the statute have a pecuniary interest in the life of the deceased, and the recovery is to compensate them for the pecuniary loss they have sustained. In short, a new right of action is created for the benefit of certain designated persons, and consequently can be maintained only when the deceased left surviving him some one entitled to its benefit. Thus, where a statute gives a right of action for the benefit of the widow and next of kin, a husband, not being the next of kin to his wife, is not within its terms, and an action cannot be maintained if the deceased leave a husband only. *Lucas v. Railroad Co.*, 21 Barb. 245; *Railroad Co. v. Dixon*, 42 Ga. 327. So, also, where the statute is for the benefit of the widow and children, no recovery can be had when the deceased left no widow or children. *Com. v. Boston & A. R. Co.*, 121 Mass. 36.

But it will be observed that the right of action created by our statute is not for the benefit of any particular person, but the damages recovered become assets of the estate, to be applied by the administrator to the payment of debts, or distributed as the exigencies of the estate and the laws governing the distribution of personal property may direct. Under Lord Campbell's Act, and similar statutes, the damages recovered belong to the designated beneficiary, and are measured by the value of the life taken to the particular person entitled to the benefit of the statute; while under our statute they belong to the estate, and are co-extensive with the value of the life lost, without regard to its value to any particular person. In the one case the object of the action is to recover the pecuniary loss sustained by the designated relatives, and in the other the value of the life lost, measured, as near as can be, by the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life. *Carlson v. Railway Co.*, 21 Or. 450, 28 Pac. 497. It follows, therefore, that, so far as the right to maintain the action is concerned, it is immaterial whether the deceased left surviving him any relatives or creditors whatever. The right of action is given by the statute to the administrator or executor in his representative capacity, and is in the nature of an asset of the estate. The heirs, creditors, or distributees have no interest in the recovery on account of any right of action for the pecuniary injury sustained by them, but only by virtue of being creditors or of kinship; and, if the expense of

the administration and debts of the deceased equal or exceed the assets, including the amount of the recovery, the next of kin would receive no benefit whatever from the right of action.

It is ingeniously argued, however, that an estate of a deceased person can in no way be damaged by his death, and this is probably true if the word "estate" is to be taken in the technical sense of meaning the property left by him. But it is not so used when speaking of the measure of damages for the wrongful death of a person. It is thus used as a convenient term to distinguish the rule as to the measure of damages under our statute from the one prevailing under statutes similar to Lord Campbell's Act, and in which the recovery is for the benefit of some designated individual. . . .

Finding no error in the record, the judgment must be affirmed, and it is so ordered.

# 118. DOLSON *v.* LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY

SUPREME COURT OF MICHIGAN. 1901

128 *Mich.* 444, 87 *N. W.* 629

ERROR to Circuit Court, Jackson County; *Erastus Peck*, Judge.

Action by David Dolson, administrator of the estate of Daniel Dolson, Jr., against the Lake Shore & Michigan Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed in part.

*C. W. Weaver* (*Geo. C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellant.

*Wilson & Cobb*, for appellee.

MONTGOMERY, C. J. This action is brought by Daniel Dolson, Sr., as administrator of the estate of his deceased son, Daniel Dolson, Jr., whose death occurred on the 3d day of October, A. D. 1898, under the following circumstances: Deceased and his half-brother, James Davis, were engaged in unloading crushed stone from gondola cars standing on defendant's team track in the yards in the city of Jackson. The stone was owned by one Robert Lake, a business man of Jackson, and was being unloaded into wagons for him by Davis and deceased. There were three cars of this stone standing upon the track at the north end of the yard, at the usual place of unloading into wagons. Standing on the track next north of the stone cars was a box car loaded with granite, and north of that a short distance, on the same track, was a car loaded with hoops. At the time of the accident Davis and Dolson had unloaded the north car of stone, and about one-half of the middle car, beginning at the south end. . . . The cars came together when the south end of the half-unloaded car was just opposite the cattle chute. It is claimed on the part of plaintiff that the stone cars had come to a full stop, and that

the engine and the four cars struck the south stone car with such great and unnecessary force that Dolson, who was standing back about six feet from the south end of the car, leaning up against and having hold of the side of the car with both hands, bracing himself, was thrown over the south end of the car between the two stone cars, and was run over by the south stone car. He was run over by the trucks under the north end of the south stone car, and, to all appearances, drew himself from under the car before the south trucks reached him. His injuries were such as to leave no hope of his surviving them, and he died about midnight of the same day, being a part of the time conscious. The declaration contained two counts: the one under the Survivor Act, so called, and the other under the Death Act. A recovery was had under each count, in the sums of \$800 and \$1,200, respectively. The two principal questions argued are: First, whether plaintiff can recover at all; and, second, whether, if entitled to recover, he is entitled to maintain an action under both the Survivor Statute and the Death Act, and, if not, under which one he is entitled to recover. . . .

Upon the question whether plaintiff is entitled to recover under both the Death Act and the Survivor Act, my views have undergone no change since writing the opinion in *Sweetland v. Railway Co.*, 117 Mich. 350, 75 N. W. 1066, 43 L. R. A. 568. On the contrary, my views have been fortified by a re-examination of the cases. Since that case was decided, the Supreme Court of Wisconsin, in an able opinion, written by Mr. Justice Marshall, and concurred in by the entire Court, has held that under statutes similar to ours the two remedies are given. *Brown v. Railroad Co.*, 77 N. W. 748, 44 L. R. A. 579. In addition to the case of *Hurst v. Railway Co.*, 84 Mich. 539, 48 N. W. 44, cited in the *Sweetland Case*, our attention has been directed to the case of *Hyatt v. Adams*, 16 Mich. 180, the reasoning of which, in my judgment, supports the contention of plaintiff. The able opinion of Mr. Justice Christiancy cannot well be epitomized without detracting from the force of that able justice's convincing reasoning, but deserves a careful reading. It is suggested that the *Sweetland case* decides that two remedies do not exist, and that all that now remains for decision is which remedy is open. I do not so read the *Sweetland case*. In that case an action was brought with a count under the Survival Act and a count under the Death Act. On the trial the defendant had a verdict under the count on the Death Act. The plaintiff recovered under the Survival Act, and defendant alone appealed. The judgment was reversed. The holding, therefore, was that no recovery could be had under the Survival Act, under the facts of that case. . . . It will be seen that the abstract question whether two remedies were given was not before the Court for determination. The question is now not different than it would be if two separate cases were here. In such an event, the question whether a remedy existed under the statute invoked would be presented for decision. If a majority of the Court were of the opinion that such a remedy was intended, would it

not be applied? There can be but one answer to the question. True it is that in determining this question it would be proper to take into account the question whether another remedy was given by another statute, which was intended to exclude the one invoked; and, in deciding this question, any presumption, more or less strong, that the Legislature did not intend two remedies, would be proper to be considered. . . .

I do not understand that any one contends that it is incompetent for the Legislature to give remedies to two parties for the same wrongful act of another. There is no declaration in either of the statutes that two remedies shall not exist. The question which must be presented whenever either remedy is sought is whether a statute which in its terms gives such remedy is rendered inoperative by the provision of the other statute. The Survival Act was first passed. What logic is there in the position of one who asserts that the Death Act did not repeal the Survival Act, but that the Survival Act alone applies to a particular case, and who, notwithstanding this view, holds the exact reverse, i. e., that the Death Act did repeal the Survival Act, and that the Death Act alone applies to the case? It is impossible for me to find that this Court has decided that two remedies do not exist, or that it should so decide until a majority of the Court say that one or the other of the remedies sought is excluded by the other. This has not yet been done. I understand, however, that a majority of the Court are of the opinion that it should be held that in a case where the death is not instantaneous there can be no recovery under the Death Act, so called (Comp. Laws 1897, § 10,427). . . .

I think the judgment should be affirmed.

HOOKER, J. In the case of *Sweetland v. Railway Co.*, 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568, a majority of the Court expressed the opinion that the law does not permit recovery by an administrator under both of the statutes which are there called respectively the "Death" and "Survival" Acts. While we entertained different views upon these statutes, the result was that the judgment was reversed. The question is now before us again in a case where recovery has been had upon both statutes. It has always been the policy of the common law not to permit recovery for causing death, nor to permit the survival of actions for personal injuries. While Michigan was still a Territory, the rule as to the survival of actions for personal injuries was abrogated by the passage of the Survival Act, which covered assault and batteries. Under it one receiving a mortal wound had a cause of action which would survive. As yet no action was given for causing instantaneous death, though death following as a consequence was practically covered in assault and battery cases by the Survival Act, as stated. In 1848 the Death Act was passed, and it gave to the administrator a right to recover for the benefit of the widow and next of kin in certain cases. This was not an absolute right to the widow and child to recover, each for herself or himself, the damages actually suffered, which would have been a simple provision to make. It was hedged about by limitations. Apparently the Legislature

was not yet prepared to permit an administrator to recover for the death of the intestate such sum as could be wrung from a jury. It was only when it could be shown that the widow and next of kin had suffered pecuniary injury. Again, they were not permitted to bring several suits. All must be recovered through the administrator. This implies, to my mind, that it was intended that all damages should be recoverable in one action. As the law then stood, that was the only recovery that could be had, after death, where the death was caused by negligence, because the right of action for such did not survive. But under the plaintiff's theory a double recovery might be had when death resulted from assault and battery. Aside from the improbability that the Legislature would intentionally give the double remedy in one class of cases and not in the other, or that it repealed the Survival Act as to assault and batteries by implication, we find the language of the Act limiting the right of action to a certain class of cases, viz., cases where the act, neglect, or default would, if death had not ensued, have entitled the injured party to maintain an action. We find, then, that where death prevented an action from accruing to the deceased, this Act gave a remedy, and in no other case; in other words, where the action was not prevented from accruing it did not give a remedy. This section plainly proceeds upon the theory that death has prevented a right of action from vesting. Such would not be the case where a person lived after the injury, and it would be the case where the death was instantaneous. If this was not the legislative intent, why was this language inserted in the statute? It seems clear to me that this Act was designed to cover cases of instantaneous death, where there was no other remedy, and that it was not designed to give a double remedy in cases where assault and battery caused death, in which cases the Survival Act already furnished a complete remedy, giving to the next of kin all of the redress which the deceased would have been entitled to, and not making it dependent upon or limited to an amount of actual contribution to his or her support. It may be said that this view left no redress to the widow and next of kin for negligent homicides not instantaneous, because such did not survive under section 7397, How. Ann. St. and would not be covered by this construction of section 8313, as originally passed. This is true, but it does not justify our disregarding a plain condition upon which the right of action was made to rest, viz., that the death prevents a right of action accruing to the deceased. Subsequently this omission was supplied by the insertion in the Survival Act of the words "for negligent injuries to the person." So as the law now stands, the right of action is readily determinable. If the death be not instantaneous, the administrator recovers under the Survival Act the full measure of damages for the benefit of the next of kin. If it be instantaneous, he recovers under the Death Act, for the same persons, a limited amount of damages, viz., for such pecuniary injury only as they can be shown to have suffered. There has never been a time when the common law has deemed it wise public policy to

permit speculation out of homicides, and the States have been conservative in permitting recovery for the death of a person. In New York a limit is placed upon the amount recoverable under the Death Act. I feel convinced that in our own State the policy has been to carefully limit recovery to actual pecuniary injury, and to one action, and not to permit it in those cases where the Survival Act is available. . . .

The judgment should be reversed as to the count upon the Death Act, and no new trial ordered, and affirmed to the extent of the recovery upon the count based on the Survival Act. We feel justified in denying costs to either party.

LONG and GRANT, JJ. We concur with Mr. Justice HOOKER in holding that a double remedy does not exist in this class of cases. These views were foreshadowed by us in the Sweetland case, 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568. Inasmuch, however, as the majority of the Court has determined in the present case, under the circumstances stated, that the recovery may be had under the Survival Act, we concur in that conclusion, as the testimony shows that the decedent survived for a space of time after the injury. If the injury had occasioned immediate death, no one questions but that the action must have been brought under the Death Act, and no other action would lie. While we expressed somewhat different views in the Sweetland case upon those statutes, the majority of the Court now having held that the Survival Act applies under the circumstances here, we feel constrained to follow the rule laid down by the majority of the Court; and hence concur in the opinion written by Mr. Justice HOOKER, so that a rule may be established for the guidance of the Circuit Courts and parties in future cases.

MOORE, J. The troublesome question in this case is whether a recovery can be had under both of two Acts, which, for convenience, may be called the "Death Act" and the "Survival Act." The question involved here was discussed in the case of Sweetland v. Railway Co., 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568. Justice Montgomery was of the opinion a recovery could be had under both Acts; Justice Hooker was of the opinion recovery could be had under the Survival Act, and not under the Death Act; Justices LONG and GRANT were of the opinion recovery could be had only under the Death Act; while I was of the opinion there was no evidence to show the deceased endured pain and suffering after her injury, and therefore, under the record as made, there could be no recovery, and it was not necessary to pass upon the other question. The result of the discussion in that case is that three of the judges held there could be a recovery under the Death Act, two of the judges held there could be a recovery under the Survival Act, one of the judges held there could be a recovery under both Acts, and one of the judges expressed no opinion as to whether a recovery could be had under either or both of these Acts; so that it cannot be said the question is concluded in this Court. No legal question has been brought to my attention recently in which there is more conflict in the decisions



of the Courts. The opinions are contradictory, and it would be difficult to reconcile them with each other. In 1889 a series of articles appeared in 28 Am. Law Reg. (N. S.) 385, 513, 577, wherein the writer undertakes to call attention to the decisions both in England and this country under the title of "Statutory Liability for Causing Death." In this discussion there is a review and analysis of nearly all the cases which had been decided up to the time the articles were written. A reference to this series of articles will show how conflicting have been the decisions. As a result of the discussion, the learned author reaches the following conclusion, which I think is fully justified by the authorities:

"With this review of the authorities, including all of importance which have come to our notice, bearing upon the question of construction which we proposed at the outset, let us return to a consideration of that question upon its merits. We have no hesitation in declaring a preference for the view which regards the right of action given by Lord Campbell's Act and those of our American statutes which do not differ widely from it in form, as a new right of action, and not a revival or continuation of a common-law right possessed by the deceased. When we consider (1) that the purpose of the action is to compensate certain persons for the indirect injury to them, involved in causing the death of another; (2) that the right of action thus given is not conditional upon a right of action having vested in the deceased, but arises, as well in cases of instantaneous death as others, the remedy being in fact particularly called for in cases of sudden death; and (3) that the damages given in the action entirely exclude such as the deceased himself could have recovered, — we find it impossible to reach any other conclusion. It is frequently said that the scope of the original right of action which the deceased would have had is merely enlarged so as to embrace the injury resulting from the death (see Cooley, Torts, 264), but this attempted explanation of the different rule of damages applied in the action under the statute will not serve its purpose, since not only are new damages included in the new action, but the old damages are entirely excluded. The remedy is not enlarged to embrace the death, but is, under the statute, confined to the death. It is sometimes said that it is impossible to draw a line severing with accuracy the damages to the person injured from those to his relatives. See, for example, *Holton v. Daly* (1882), 106 Ill. 131 (page 140 of opinion). But it is a sufficient answer to this objection that both the language of the statute and all the decisions construing it require such a line to be drawn. Then, again, it is said that, although the measure of damages is different from what it would be in an action by the injured person in his lifetime, the cause of action is in both cases the same; that is, the wrongful act, neglect, or default. The simple answer to this statement is that the two actions are brought for different consequences of the same act, and are certainly as distinct from each other as is the action brought by a husband or father for an injury to his wife or child from the personal action of the wife or child for the same injury. The view that the right of action given by the statute is merely a continuance of the common-law right of action was first broached, as we have seen, when the question of permitting two recoveries arose. In our view, the courts, in their anxiety to prevent what was deemed a most undesirable result, overshot the mark, and advanced a theory of the statute which they could not successfully defend, and which was, perhaps, not necessary to accomplish the desired end. . . . As to the right to maintain two actions

after the death of the injured person (supposing him not to have recovered damages in his lifetime), where there is, in addition to the special act, a general provision of law making rights of action for injury to the person survive, it seems that such right should be ordinarily recognized, in the absence of an express provision to the contrary. The opposite and inconsistent courses adopted by different courts in the attempt to escape from this result seem to convict them all of being without warrant. If this is the correct view, it will sometimes happen that two actions will be maintainable after death, one representing the injured person's cause of action, the other the family's cause of action, when, at the same time, a recovery upon the former, before death, would have precluded any further recovery whatever; and it may be urged as an objection to the view, therefore, that it involves an inconsistency. There is seeming force in this objection, but the charge of inconsistency should be laid at the door of the Legislature, which enacts the statutes. From the fact that the special statute only provides for an action after death when none has been brought in the lifetime, it cannot properly be inferred that there is to be only a single action after death, when there has been none during the lifetime, because, if for no other reason, there is nothing to indicate under which statute such action shall be brought, which right of action, which liability is to have the preference. It should be said that the phraseology of the first section of the English Act cannot be used with any propriety where the general law provides for the survival of causes of action for injury to the person, as it assumes that such causes of action do not survive; and, if so used, the circumstance of its origin should be taken into account in the attempt to construe the statute in competition with the Survival Act. The language in such case must be recognized as merely containing an erroneous assumption with reference to the law of the State where it is adopted, and should not be deemed to have been used with the intent either of cutting down the Survival Act, or of restricting the natural meaning and operation of the statute itself." 28 Am. Law Reg. (N. S.) 580-584.

After the case of *Sweetland v. Railway Co.* was before this Court, the question involved here was before the Court in *Brown v. Railroad Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579, where there is a very full and able discussion, in which, referring to the provisions of the statute, the following language appears:

"They refer to entirely distinct losses, recoverable in different rights, — the one in the right of the deceased for the loss occasioned to him; the other in the right of the surviving relatives for the loss to them. Both are dependent on the injury, but only one dependent on the death with surviving relatives to take under the statute. The language of one provision is that 'actions for personal injuries shall survive,' and of the other, 'in case of the death of a person by the wrongful act of another,' under certain circumstances named, the wrongdoer 'shall be liable to an action for damages, notwithstanding the death of the person injured, if the death be caused in this State.' The only condition of the right of action in the former case is the existence of the actionable claim for damages at the time of the death of the injured party. The statute creates no new liability, but prevents the lapsing by death of an old one. The only condition of liability under the other provision is the existence of an actionable claim in the right of the injured party at the time of his death and the existence of the beneficiaries mentioned in the statute. The liability of the

wrongdoer, while dependent on the condition named, is not on the actionable claim called for to satisfy such condition, but on a new right created by the statute, — the right of the surviving relatives to compensation for the loss which falls upon them. The language of the statutes, when viewed in the light of the evident legislative purpose, is too plain to justify Courts in interpolating into them language not there by necessary implication from the context, in order to make them accord with the ideas of judges as to the best legislative policy. The judicial function, we need not say here, does not extend so far. It calls for a firm adherence to the law as written, if valid, without regard to individual opinions as to its being good or bad. In this we do not intend to suggest that the law in question, as construed here, is a bad law. On the contrary, there appears to be much wisdom in providing that a person who wrongfully causes a personal injury to another shall not profit by that other's death, so far as actual damages go, either to the deceased person, or to the wife, husband, or lineal descendants or ancestors of such person. True, as claimed by the learned counsel for respondent, and before indicated, several Courts, for whose judgment we entertain high regard, in construing similar statutes, have decided that the right of action to surviving relatives is exclusive, and that the personal injury action that survives under section 4253, Rev. St. Wis., does not include those where death ensues from the injury. A good example, among others cited in counsel's brief, is *Holton v. Daly*, 106 Ill. 131. That learned Court reasons that there is but one ground of liability, — the wrongful act, — and, as all claims for damages grow out of the one wrong, it is unreasonable to say the Legislature intended there shall be two causes of action based upon it; that the more reasonable view is that the Act making causes of action for personal injuries survive should be considered as referring to a special class of actions, not included in those named in the general provision giving a right of action to surviving relatives; that without that construction there would be a repugnance between the two provisions. The fallacy of that reasoning is easily apparent. True, in the circumstances named, there is but one wrongful act, but that is not the sole ground of action in the right of the deceased or the survivor. It takes the wrongful act and the loss to make the complete cause of action, and, as the loss to the person upon whom the injury is inflicted must be recovered by or in his right, and the loss to the surviving relatives by or in their right, the causes of action are clearly distinct. It does not require, apparently, much clearness of mental perception to discover that, if several persons are made to suffer pecuniary loss by one wrongful act, each may very properly have his independent cause of action and remedy for the loss resulting to him; and that, generally, in order to do complete justice, in the absence of some provision for a recovery for the benefit of all and a distribution of the proceeds, separate causes of action must necessarily exist. The views of the Illinois Court accord with the judgment of the Supreme Court of Kansas. *McCarthy v. Railroad Co.*, 18 Kan. 46, 26 Am. Rep. 742; *City of Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113; *Martin v. Railway Co.*, 58 Kan. 475, 49 Pac. 605. It is significant that the former treats the act for the survivorship of the right to recover damages to the deceased for the benefit of his estate as a special provision, and that for the benefit of surviving relatives as a general act, and that, giving them a literal interpretation, they are repugnant to each other in part; while the latter reverses the situation, treating the act of the claim for damages to the deceased as general, and that for the benefit of surviving relatives as special, the latter being intended to take away the right of survivorship for the benefit of the estate, which would otherwise be given by a literal reading

of the former provision. The fallacy of both processes of reasoning grows out of a failure to observe the distinction between the wrong and the resulting loss; that, though there be but one wrongful act and one physical injury, there may be several persons that suffer distinct losses, some of which are actionable at common law and some actionable dependent on the statute. Justice Brewer, who was a member of the Kansas Court at the time the first decision there was rendered, and concurred in it, referring to the subject when he was later called upon to consider the matter as a member of the federal bench, in the case of *Hulbert v. City of Topeka* (C. C.) reported in 34 Fed. 510, said, substantially, that he doubted the correctness of his former opinion, and followed it only in deference to the settled judicial policy of Kansas, the cause being one that arose there; that the basis of recovery under the two provisions of law under consideration, the one for the benefit of the estate of the decedent, and the other for the benefit of his surviving relatives, are entirely distinct, the former being based upon survivorship of the claim of the deceased, taking no note of the pecuniary loss to relatives, and the other on survivorship of relatives mentioned in the statute, taking no note of damages to the decedent; that the latter proceed regardless of whether the death was instantaneous or followed after months of pain and suffering, being damages to relatives by death, to be measured by their pecuniary loss caused thereby, while the former is for loss that would otherwise be a permanent injury to the estate itself. For further illustrations of the distinction, the following in Mr. Justice Wilson's opinion in *Needham v. Railway Co.*, 38 Vt. 294, is quoted by Justice Brewer: 'The principles on which the intestate's cause of action rested at common law are the same, irrespective of the cause of his death.' It 'died with his person, but is revived by the statute in favor of his administrator.' It includes 'nothing more than his intestate's cause of action. The statute simply revives, but does not enlarge, the common-law right of the intestate.' The provision for surviving relatives 'introduced principles wholly unknown to the common law, namely, that the value of a man's life to his wife and next of kin constitutes a part of his estate.' 'Such damages to the widow and next of kin begin where the damage of the intestate ended, viz., with his death.' The weakness of the theory that the action for injuries to the person which survive includes only those not covered by the statute for the benefit of surviving relatives is further illustrated by the fact that Courts adhering to that view uniformly refer to *Read v. Railway Co.*, L. R. 3 Q. B. 555. The decision there is only to the effect that, if an injured person have satisfaction of his claim before death, the subsequent death from the injuries does not confer a right of action upon surviving relatives; that such right exists only where there is an injury to a person, and there is an existing claim for damages therefor at the time of his death. Justice Blackburn, who delivered the opinion, said, in substance, that the proper construction of the statute is that it gives a right of action to certain surviving relatives of a person when death was caused by the wrongful act of another, where he had not received satisfaction in his lifetime, and that to go further would be straining the language of the law. That seems plain. The language of our statute is that liability of the wrongdoer exists where the deceased could have recovered if death had not ensued. That clearly excludes the idea that, where the decedent receives satisfaction for his injuries, the conditions requisite to the right of surviving relatives may exist notwithstanding. There is nothing in *Read v. Railway Co.* in conflict with *Blake v. Railway Co.*, 10 Eng. Law & Eq. 443, where, in a very instructive opinion by Coleridge, J., it is said that Lord Campbell's Act does not transfer to the surviving relatives

mentioned the claim for damages previously possessed by the deceased, but gives to them an independent cause of action for damages peculiarly incident to their relation to the deceased. The two cases are often cited to opposite views, but are in fact, when correctly understood, in perfect harmony. The one holds that the right of the relatives named in the statutes is separate and distinct from that possessed by the deceased; the other, that the right of the relatives is contingent on the death of the injured person without having satisfied his claim for damages."

I can see no fault in the reasoning contained in these excerpts, and think it entirely in harmony with the suggestions contained in *Hyatt v. Adams*, 16 Mich. 180, and *Hurst v. Railway Co.*, 84 Mich. 539, 48 N. W. 44. The language of the two Acts is not ambiguous. There is nothing, to my mind, in the language of the Death Act which indicates it was intended to repeal the Survival Act; or in the language of either Act which precludes the representative of the estate of the deceased from recovering for the benefit of the estate under the Survival Act, and for the benefit of the persons entitled to the personal property of the deceased under the Death Act. I agree with the Chief Justice that the judgment should be affirmed.

119. MAHONING VALLEY RAILWAY COMPANY *v.* VAN  
ALSTINE

SUPREME COURT OF OHIO. 1908

77 *Oh. St.* 395, 83 *N. E.* 601

ERROR to Circuit Court, Mahoning County.

Action by Thomas B. Van Alstine against the Mahoning Valley Railway Company. Judgment for defendant was reversed in the Circuit Court, and defendant brings error. Affirmed.

Action was brought in the Common Pleas of Mahoning by defendant in error as administrator of the estate of Alice M. Baird, deceased, in the interest of the next of kin of said deceased, against the plaintiff in error, the Mahoning Valley Railway Company, a street railway corporation, to recover for the alleged wrongful and negligent killing of said deceased, who was at the time of the accident, April 11, 1901, a passenger on a car of the said company and who died October 3d thereafter. As a defence to such action, it was pleaded by the company in its answer, in substance, that said deceased, during her life, to wit, August 3, 1901, commenced an action against the company to recover compensation for all the injuries she received and all damages sustained on account of the same alleged negligent acts of the company which are described and complained of by the plaintiff herein; that while said action was pending said Alice M. Baird deceased, and thereupon, on December 17, 1901, her said civil action was, on the motion of her administrator, Thomas



B. Van Alstine, duly revived by order of Court, and was thereafter prosecuted in the name of said administrator to final judgment against said defendant company, which said judgment and all costs of the action have been fully paid and satisfied by the said company. The wrongful and negligent acts averred and stated in the petition filed by said Alice M. Baird in her said action are precisely and identically the same wrongful and negligent acts of defendant averred and stated by plaintiff herein, and the cause of action upon which said Alice M. Baird sought to recover and upon which said final judgment was rendered is precisely and identically the same cause of action upon which recovery is sought against defendant in this action, and by the record of said final judgment rendered the said administrator is concluded and estopped from the further prosecution of this action. To that answer the administrator replied, in substance admitting that the wrongful and negligent acts of the company averred and stated in the action on which final judgment was rendered are the same wrongful and negligent acts of the company averred and stated by this plaintiff in his pleading herein, but, in substance, denied that the cause of action upon which said Alice M. Baird sought to recover and upon which final judgment was rendered is precisely and identically the same cause of action stated and averred in the pleading herein and upon which recovery is sought against defendant in this action, denying, also, that by the record of said final judgment he is concluded and estopped from the further prosecution of this action; and for further reply averred, in substance, that by an amendment filed by said administrator December 28, 1901, to the original petition of Alice M. Baird in her action, and by a disclaimer filed by said administrator June 3, 1902 (said dates being prior to the time of trial of said case), said administrator dismissed all claims for damages made by Alice M. Baird during her lifetime, in the petition by her filed, except for compensation for the pain and suffering endured by her from the time of injury complained of in her petition to the time of her death, the period of 160 days, and that said judgment so recovered by said administrator against said company in said action represented only compensation for the pain and suffering endured by said Alice M. Baird for the period of 160 days, and was not recovered for, or paid to, the individuals for whose benefit this action has been brought. In the Common Pleas a general demurrer to the reply was filed, which being sustained, the plaintiff not desiring to further plead, judgment was rendered against the plaintiff and for costs. On error to the Circuit Court that judgment was reversed, and the cause ordered remanded to the Common Pleas for further proceedings. The company brings error.

*Arrel, Wilson & Harrington*, for plaintiff in error.

*Murray & Koonce* and *Mark M. Gunlefinger*, for defendant in error.

SPEAR, J. (after stating the facts as above). It will be observed that the question of difference is not whether or not the acts of negligence



alleged and relied upon in the two actions were identically the same, but rather whether or not the cause of action in the case upon trial was the identical cause of action set up in the first suit and adjudicated by the final judgment therein. It is the contention of counsel for the plaintiff in error that not only were the negligent acts identically the same, but that the causes of action were also identically the same, and that, this being so, the prosecuting of the deceased woman's cause by her administrator in the revived action, and the final judgment and satisfaction thereof, must have precisely the same legal effect as though Mrs. Baird had lived and had herself prosecuted her action to final judgment, because the administrator, being her personal representative, must be held to have succeeded to all rights which she had, and to stand in all respects regarding that action as she did before suit had she herself recovered judgment in the case. Nor, say the learned counsel, could the administrator, by disclaimer, or by any attempt to waive his right to recover any item of damages which he was entitled to recover in that action, limit the effect of the final judgment as a bar to a second action, the causes of action being, as before stated, identically the same. So that the disclaimer by the administrator before trial of all claims for damages made by the deceased in her petition except for pain and suffering endured by her from the time of the accident until her death cannot have the effect of permitting any omitted grounds of damage to be tried in another action, for a party must unite all his claims for damage arising from the same transaction in one suit against the party, and cannot split them up, and try some in one case and others in a subsequent case. And this view was sustained by the Court of Common Pleas in its holding in sustaining the demurrer to the reply and rendering judgment against the plaintiff.

It is, however, the contention of defendant in error that Alice M. Baird had a common-law cause of action existing at the time of her decease, which by the statute survived and might be prosecuted as it was prosecuted after revivor by her administrator to recover such damages, and such only, as she herself had sustained by reason of the injury for the benefit only of her estate, while the second action, although by the same administrator, was not in any sense for the injury she had sustained, not for pain or suffering, not for the benefit of her estate, but solely and only for the benefit of her next of kin, whose loss was caused by her death, and whose damages were to be measured by the pecuniary loss which they had sustained by reason of such death. And this contention was sustained by the Circuit Court in its judgment of reversal. Which of these contentions is the law of the case is the question presented to this Court. By the rules of the common law the action pending at the time of Mrs. Baird's death, and her cause of action, would have abated by reason of her death, but the provisions of sections 4975, 5144, Rev. St. 1906, changed the common-law rule in those respects. Those sections are as follows:

"Sec. 4975. In addition to the causes of action which survive at common law, causes of action for mesne profits, or for injuries to the person or property, or for deceit or fraud, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same."

"Sec. 5144. Except as otherwise provided, no action or proceeding pending in any Court shall abate by the death of either or both of the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance, or against a justice of the peace for misconduct in office, which shall abate by the death of either party."

The right of the administrator, therefore, to recover in the revised action, rested upon the common-law right of action inhering in the injured person, and the preservation of that right in the administrator by virtue of the sections above quoted. The right to maintain the action brought by the administrator in the interest of the next of kin rests upon sections 6134, 6135, Rev. St. 1906, the pertinent parts of which are as follows:

"Sec. 6134. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the corporation which, or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter; and when the action is against such administrator or executor the damages recovered shall be a valid claim against the estate of such deceased person."

"Sec. 6135. Every such action shall be for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person; and in every action the jury may give such damages, not exceeding in any case ten thousand dollars, as they may think proportioned to the pecuniary injury resulting from such death, to the persons respectively for whose benefit such action shall be brought. Every such action shall be commenced within two years after the death of such deceased person; . . . the amount received by such personal representative, whether by settlement or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves, by the Court making the appointment in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates, left by persons dying intestate."

The question in our case, therefore, centres around the construction to be placed upon and the effect to be given to the foregoing sections of the statute. Did the lawmakers, by this legislation, intend to preserve from abatement the right of the administrator to recover damages for the benefit of the estate where the party injured died from the effect of the wrongful act and as a consequence of it, and also to create a new and

independent right of action to be enforced by the administrator for the benefit of the next of kin with the right to recover damages for their pecuniary loss sustained by the decease of the injured person? It is the insistence of counsel that such was not the intention. The sections quoted, it is urged, do not at least in language undertake to preserve from abatement causes of action for injuries to the person where the injured person dies directly in consequence of the injuries inflicted, and, when it is remembered that in the same Act provision is made for a right of recovery for the benefit of those named in section 6135, it becomes apparent that the General Assembly only intended to preserve causes of action where the injured person died from a cause other than that of the injuries inflicted. If the intention had been otherwise, the addition of a very few words would have made that intention clear. It results from this that, taking the sections all together, the real purpose was to provide that, where a party is injured by such wrongful act and dies directly in consequence thereof, his cause of action abates, and that eo instanti a cause of action arises and vests in the persons named in the statute to be prosecuted by the administrator for their sole benefit; and, if the injured party has commenced an action upon his cause of action, and pending that dies in consequence of his injuries, his action abates, and, if the injured party dies from a cause other than his injury, his cause of action survives, and may be prosecuted by his administrator, or, if he has commenced an action upon his cause of action and dies pending the action from a cause other than his injury, his action may be revived in the name of and be prosecuted to final judgment by his administrator, and that, if he dies and his administrator commences and prosecutes to final judgment an action upon his cause of action, and receives payment of such judgment, or if he dies pending an action which he has brought against the wrongdoer, and the action is revived by order of the Court in the name of the administrator and prosecuted to final judgment which is fully paid, then and in that event, the record of such action is conclusive upon the administrator in an action brought by him against the wrongdoer under favor of sections 6134, 6135, Rev. St. 1906, upon all questions necessarily involved in that action, and, among others, upon the question that he, the decedent, did not die in consequence of the wrongful act, neglect, or default of the wrongdoer.

These propositions are urged by an ingenious and persuasive argument, and a number of authorities are called to our attention which, to a greater or less extent, tend to support the claims of counsel, some of which will be here referred to. It is presumed that in the main the statutes involved giving a right of action for the benefit of the next of kin are similar to the statutes of this State. *Legg, Adm'r, v. Britton*, 64 Vt. 652, 24 Atl. 1016, was an action for the benefit of the widow and next of kin for the wrongful act of defendant resulting in the death of plaintiff's intestate. The defendant pleaded that the intestate in his lifetime began suit for the same neglect and deceased while the suit was

pending, and that the administrator prosecuted the same to judgment which was paid. The plaintiff replied that the damages recovered and paid in that suit were for the injuries done the intestate during his lifetime, and did not include the damages occasioned by his widow and next of kin by his death. The Court sustained a demurrer to this reply, and held such judgment a bar to a second suit, although the damages awarded in the first suit were solely for the injuries to the deceased person in his lifetime. In *Littlewood, Adm'x, v. Mayor, etc.*, 89 N. Y. 24, 42 Am. Rep. 271, it is held that when one injured by the wrongful act of another brings suit and recovers damages, in case death subsequently results from the injury, his personal representative cannot maintain an action; the object of the statute being not to impose a double liability, but simply to give a right of action where a party, having a good cause of action, was prevented by death resulting from the injury from enforcing his right or omitted in his lifetime so to do. In *Lubrano, Adm'r, v. Atlantic Mills*, 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797, it is held that the actions for damages to the person which survive are such only as are for injuries not resulting in death, and in cases where death results from the injury the only remedy is an action for damages for such injuries as might have been maintained at common law had death not ensued. In *Hill v. Pennsylvania Ry. Co.*, 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754, it is held that under the statutes of Pennsylvania a widow has no independent right of action for the death of her husband caused by the negligence of another which the husband could not release in his lifetime after the injury. In *Holton v. Daly, Adm'x*, 106 Ill. 131, it is held that, under the statute of Illinois of 1853, which gives an action to the legal representative of a deceased person to recover damages in case the death of the intestate was caused by the wrongful act of another, the cause of action is the wrongful act causing the death, and not merely the death itself. In such case the declaration must aver and the proof show a wrongful act causing the death under such circumstances as would entitle him to maintain an action if death had not ensued. No damages can be allowed for the pain and suffering the deceased underwent, and his inability to attend to his affairs and for medical attendance and nursing, but only such as arise from pecuniary loss to the widow and next of kin. An action brought by the party injured, where injury results in his subsequent death before judgment, does not survive to his personal representative, but will survive if his death is from some other and different cause. In *Martin, Ex'r, v. Railway Co.*, 58 Kan. 475, 49 Pac. 605, it is held that for an injury resulting in death an action can be maintained only for the next of kin. If death results from the injury, an action cannot be maintained for the benefit of the estate; but, where the injured person dies from other causes, an action for personal injury survives to the personal representative.

The foregoing conclusions of counsel seem reasonable deductions, providing it is assumed that the legislation of this State has not given

two distinct grounds of action where death results from the injuries. But that is the very question involved in this case. In support of the proposition that two rights of action are given, even though death results from the injuries, a number of authorities are called to our attention by the learned counsel for defendant in error, some of which will be here noticed. It is conceded that our death statute, so called (sections 6134-6135), is a substantial reproduction of the English statute known as Lord Campbell's Act. That Act has received construction by a number of adjudications by the Courts of that country. *Leggott, Adm'r, v. G. N. Ry. Co.*, 1 Q. B. Div. 599, was an action to recover for negligence on account of inability to attend to business, loss of time, and expense incident to the injuries. Defence that after the death plaintiff as L.'s administrator, for the benefit of the wife and children, sued defendant in respect of the injury caused to them by his death, and recovered. Held, that the second action was not barred by the judgment; that, although the administrator nominally is the plaintiff, yet is not suing in the two actions in the same right, the present one being for the benefit of the estate of the deceased, while the former action was under the statute and for the benefit of the persons therein named. . . . In *Robinson v. C. P. Ry. Co.* (1892), A. C. 481, the House of Lords held that the action authorized by Lord Campbell's Act is a different action from that which might have been maintained by the deceased if he had survived, and is a new action given by the statute. Without citing further cases, it may be safely assumed that the settled law of England to-day is in consonance with these adjudications. Coming now to adjudications in our own country, we find many which in substance are of like import. In *Whitford v. P. Ry. Co.*, 23 N. Y. 465, it is held that the statutes are not simply remedial, but create a new cause of action in favor of the personal representative which is wholly distinct from and not a revivor of the cause of action which, if he had survived, he would have for his bodily injury. In *V. & M. R. Co. v. Phillips, Adm'r*, 64 Miss. 693, 2 South. 537, it is held that an administrator may maintain any personal action which the decedent might have prosecuted; including damages for an injury inflicted by a railroad company which resulted in the death of such decedent, and such right of action is distinct from and independent of the right given by statute to the next of kin to recover for the death of the person caused by the wrong of another. . . . In *Hedrick v. I. R. & N. Co.*, 4 Wash. 400, 30 Pac. 714, it is held that under the statute of Washington a father may maintain an action for the death of his child, although the administrator of the child's estate may have theretofore recovered judgment against the same defendant for causing the child's death by wrongful act or neglect. In *Bowes v. Boston*, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365, it is held that an administrator of a person injured by defect in the highway, who after an interval dies of his injuries, may maintain an action to recover for the injuries for the benefit of the estate, and at the same time a second ac-



tion for the loss of life for the benefit of the widow and children or next of kin. In *Brown, Adm'r, v. C. & W. Ry. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579, it is held that the liability created by the statutes of Wisconsin in the case of the death of a person by an actionable injury for which such person could have recovered damages if death had not ensued is for the benefit of certain relatives named in the statute. Actions for injuries to the person survive, although death ensue from the injury. Such action is separate and distinct from the loss to surviving relatives; and, if a person die from the effects of an actionable personal injury, not having received satisfaction for his damages, action therefor for the benefit of his estate may be prosecuted to satisfaction after his death. Without quoting from or citing other cases, it is safe to say that the preponderance of judicial decision in this country favors the proposition of two independent rights of action.

Coming to our own State, we find that questions analogous to those involved in this controversy have been before this Court in a number of cases. The general nature of the action authorized by sections 6134 and 6135, and the character of the compensation justified, are quite fully and intelligently set forth in *Steel, Adm'r, v. Kurtz*, 28 Ohio St. 191. The same phases are emphasized in *Russell v. Sunbury*, 37 Ohio St. 372, 41 Am. Rep. 523, and the distinction between the ground of recovery where action is brought by the injured person and an action by a representative for the benefit of the next of kin is clearly set forth, and the plain inference would seem to be that the action by the representative for the next of kin is an independent right given by statute, and not affected by an action by the same representative in the interest of the estate. The Court held in that case that the action abated by the death of the defendant. That decision was rendered in 1881. Coming to amend the statute respecting the survival of pending actions and of causes of action a few years after this decision, the General Assembly then provided (90 Ohio Laws, p. 139) that causes of action for injuries to the person should survive, and further provided that, where a deceased defendant would have been liable had he lived, his executor or administrator shall be liable, and any judgment recovered shall be a valid claim against the estate. Had the opinion in the above-cited case not been in accord with the intent of the law-making body as already expressed in the statutes, it would have been a most natural thing to amend the statute also in that particular. No such amendment appears. On the contrary, the right of the administrator is made more ample. But, beyond this, the above-mentioned Act, entitled "An Act to amend sections 4075, 5144, and 6134 of the Revised Statutes," is a re-enactment of those sections, except as hereinbefore stated, and except that the words "assault, or assault and battery" are left out of section 5144. The Act comes to us, therefore, as the last expression of the legislative will. In one section, recognizing the common-law right of action for wrongful injuries to person, it extends the remedy, and in another section accords a sepa-



rate and independent right in favor of the persons named in the statute. Is it not reasonable to conclude that had it been the intention to cause a recovery in one case to be a bar to a recovery in the later case some expression of that purpose would have been given? . . .

It is manifest from the foregoing that the revived action and the later action are not the same. They rest primarily upon the same alleged negligence of the defendant and the same absence of contributory negligence of the injured person; but in the revived action the damages are for personal injuries to the injured person for which an action would lie if death had not ensued, and such damages to inure when recovered to the benefit of the estate, while in the later action the suit is prosecuted in the interest of other parties and the measure of damages is the pecuniary loss they have sustained by the death. In the latter case death *gives* the right of action under the statute; while, had the pending action not been susceptible of being revived, the death would have *terminated* the right to recover in the interest of the estate. Another significant distinction should be observed. In a suit by the injured party there is no limit by statute to the amount of recovery, and as to the time for commencement of suit the action is controlled by the general statute of limitations, while in the suit for those named in section 6135 the damages cannot exceed \$10,000, and the action must be commenced within two years after the death of the deceased person. It is insisted that these sections of the statute are innovations upon the principles of the common law, and should be strictly construed. This is true and the rule is recognized, but the policy and purpose of the statute are not to be ignored, and if they can be gathered, as we think they can, from the language used, it is the duty of Courts to uphold and enforce them. It may be readily conceded that the sections, taken as a whole, are not free from ambiguity. But if one expects to find the statute laws perfect and harmonious, and free from all ambiguity, that person will be sadly disappointed. . . .

It is insisted, further, that the theory of two causes of action will necessarily result in the assessment of double damages, at least in part, and this is emphasized by the learned judge who delivered the opinion in *Holton v. Daly*, 106 Ill. 131, *supra*. We are not able to perceive that this in practice would prove a very serious situation. At least, the eminent jurist who presided in the Common Pleas at the trial of the revived action seemed to have no difficulty in giving to the jury a rule as to damages, which, as it seems to us, would not embarrass the question of a proper rule of damages to be given the jury upon the trial of the second action. The objection is a plausible one. We are not impressed that it is sound. At least, it cannot avail if the right to a second action where death results from the injuries is given by the statute.

After much reflection and an extended examination of authorities, we are reasonably satisfied that, under the sections of the statute quoted, the personal representative is given the right to maintain an action for the benefit of the persons enumerated in section 6135, commonly denom-

inated the next of kin, based upon the negligent acts which caused the injury, subject to the condition expressed in section 6134, viz., that the circumstances of the injury were such as would, if death had not ensued, have entitled the party injured to maintain an action, although the injury was the sole and direct cause of the death, and although the same personal representative had prosecuted to final judgment and satisfaction a suit begun by the deceased in her lifetime to recover in the interest of her estate.

Finding no error in the judgment of the Circuit Court, the same will be affirmed.

SHAUCK, C. J., and PRICE, CREW, SUMMERS, and DAVIS, JJ., concur.

### 120. YUNDT *v.* HARTRUNFT

SUPREME COURT OF ILLINOIS. 1866

41 *Ill.* 9, at 12

[The facts are stated ante, in No. 84.]

WALKER, C. J. . . . It was again insisted, that, even if appellant was guilty, the suit should have been brought during the lifetime of appellee's wife, to enable him to recover; that, by delaying to bring the suit until after death, a recovery was thereby barred. If appellant seduced the wife of appellee, his right of recovery became complete at the time the injury was inflicted; and, the right to recover damages commensurate to the injury having then vested, we are aware of no principle of law which divested the right by the death of his wife. Had he or appellant died, then the suit could not have been sustained by or against their representatives; but we are aware of no case which holds, that the death of the wife defeats a recovery by the husband for damages he has sustained by debauching her, or that a father or a master is barred from recovering for debauching a daughter or servant because they had subsequently died but before a recovery was had. This suit is not for the injury to the wife, like a battery or slander of the wife.

### 121. HEY *v.* PRIME

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1908

197 *Mass.* 474, 84 *N. E.* 141

TORT against the executor of the will of James F. Ginn for loss of the services and society of the plaintiff's wife, Marion Hey, by reason of injuries sustained by her on February 13, 1905, from falling on an accumulation of ice in the cellar of a building numbered 129 on Boylston Street in Boston, which at the time of the injuries was owned and con-

trolled by the defendant's testator. Writ in the Municipal Court of the City of Boston dated August 4, 1906.

It appeared by the writ and the declaration that James F. Ginn, the defendant's testator, was dead when the action was brought. The answer contained a general denial, and alleged payment and the payment of all expenses for medicine and medical attendance.

On appeal to the Superior Court the case came on to be tried before *Pierce, J.* After the jury were empanelled and after the plaintiff had read the pleadings and had made his opening, the defendant filed the following motion to dismiss the action: "Now comes the defendant and moves to dismiss this action because in the declaration and the opening statement of counsel for the plaintiff the cause of action, as set forth, if any, does not survive." . . .

The judge ruled that the defendant was entitled to have the action dismissed on the ground that the cause of action did not survive. He allowed the motion and made an order that the action be dismissed. The plaintiff alleged exceptions.

*E. W. Crawford*, for the plaintiff.

*W. W. Kennard* (*W. F. Prime* and *W. J. Drew* with him), for the defendant.

BRALEY, J. . . . By the common law, the right of the husband to recover damages for an injury to his wife, whereby either her services or consortium became lost, perished with the death of the wrongdoer. The injury inflicted, being the act of the tortfeasor who escaped by death, his executor or administrator, could not be held, because in their personal capacity having committed no wrong, the plea, which must have been not guilty, raised only the issue of the decedent's guilt. *Wilbur v. Gilmore*, 21 Pick. 250, 252. But this rule having been modified by statute, the question is, whether such an action survives under Rev. Laws, c. 171, § 1. This section, which follows previous revisions, provides, that

" . . . actions of . . . tort for assault, battery, imprisonment, or other damage to the person . . . shall not abate by death."

Gen. St. 1860, c. 127, § 1; Pub. St. 1882, c. 165, § 1. Unless the case comes within the last clause, the plaintiff is not relieved. It has uniformly been held since the enactment of St. 1842, p. 539, c. 89, § 1, to which this clause runs back for its origin, that the nature of the damages sued for, rather than the form of remedy, is the test. By his construction, the language, "or other damages to the person," includes such damages only as result from direct bodily injury, but excludes consequential damages suffered by those who are injured from a wrongful interference with their rights, arising from the negligence of the decedent. *Smith v. Sherman*, 4 Cush. 408, 413; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; *Wilkins v. Wainwright*, 173 Mass. 212, 53 N. E. 397, and cases cited; *Dixon v.*

Amerman, 181 Mass. 430, 63 N. E. 1057. If the common-law doctrine of unity of husband and wife, by which she was deemed a part of his person, has been almost wholly abrogated by legislation, yet the right to her exclusive conjugal fellowship still remains, and he may recover damages for its impairment by the wrongful acts of strangers. *Nolin v. Pearson*, 191 Mass. 283, 285, 286, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605. But while this right has been preserved, if during coverture she suffers personal injury, whether it results from the direct act of the decedent by the use of force, or is caused by his negligence, she alone by reason of our statutes conferring upon her absolute control over her person, and the right to sue as if sole, can maintain an action for damages, which upon recovery become her separate property. *Nolin v. Pearson*, *ubi supra*; *Duffee v. Boston Elev. R. R.*, 191 Mass. 563, 564, 77 N. E. 1036. But where the husband also brings suit, because the disability arising from the tort has deprived him of either her services, or matrimonial companionship, his right to recover rests upon the ground, that the wrong suffered by him while personal in effect, is regarded as purely consequential in character. *Barnes et ux. v. Hurd*, 11 Mass. 59; *Kelley v. New York, New Haven, & Hartford R. R.*, 168 Mass. 308, 311, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397.

It is plain that, under the statute, such an injury cannot be classed as damages to the person, and the motion to dismiss was properly granted.

*Exceptions overruled.*<sup>1</sup>

#### SUB-TOPIC D. EFFECT OF THE STATUTES AS SURVIVING A DECEASED TORTFEASOR'S LIABILITY

#### 122. DEVINE *v.* HEALY

UPREME COURT OF ILLINOIS. 1909

241 Ill. 34, 89 N. E. 251

ERROR to Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; *Axel Chytraus*, Judge.

Action by John F. Devine, administrator, against Mary E. Healy, executrix. Judgment for defendant was affirmed by the Appellate

#### <sup>1</sup> [PROBLEMS:

By the judicial decisions of Pennsylvania the non-resident alien relatives of a person killed in that State have no claim under the statute. A Federal treaty with Italy guarantees to its subjects in the United States the same rights as natives in respect to "protection and security for their persons and property." Is the claim under death statutes a claim of the deceased, falling within the treaty, or a claim of the non-resident relatives, falling without it? (1909, *Maiorano v. Baltimore & O. R. Co.*, 213 U. S. 268, 29 Sup. 424.)

Under a death-statute providing that "the jury may give such damages as they shall deem fair and just not exceeding \$10,000," may the jury be instructed that by reason of the deceased's tender age, four years, and his want of earning

Court (141 Ill. App. 290), and plaintiff brings error. Reversed and remanded, with directions.

This was an action brought on April 12, 1907, by James Reddick, administrator of the estate of Frank Riggs, deceased, in the Superior Court of Cook County, against defendant in error, Mary E. Healy, executrix of the will of John M. Healy, deceased, to recover damages capacity, only nominal damages could be recovered by the administrator? (1909, *Chesapeake & O. R. Co. v. Hawkins*, 4th C. C. A., 174 Fed. 597.)

Ryley was one of the crew on a barge towed down the Delaware River from Philadelphia; by the negligence of the tug's master, the tow-hawser parted and the end struck Ryley in the abdomen. He was taken ashore to a hospital in Philadelphia, and there died the next morning. His widow sues the tug in the Federal Court under its admiralty jurisdiction over torts done on navigable waters. By admiralty law, a tort falls within its jurisdiction only when the wrongful result occurs on the water, and not merely the originating act. Has the admiralty Court jurisdiction here? (1909, *Ryley v. Philadelphia & Reading Railway Co.*, D. Ct. So. Dist. N. Y., 173 Fed. 839.)

The father of a family was killed in an affray caused by the defendant's unlawful sale of liquor to the father and C.; two months after his death the plaintiff child was born; may he recover? (1905, *State v. Soule*, 36 Ind. App. 73, 74 N. E. 1111.)

#### ESSAYS:

*Charles R. Darling*, "Statutory Liability for causing Death." (A. L. Reg. n. s. XXVIII, 385, 513, 577.)

*C. A. Lightner* and others, "The Abuse of Personal Injury Litigation." (Green Bag, XVIII, 193.)

*Williamson, R. M.*, "'Actio Personalis moritur cum Persona' in the Law of Scotland." (L. Q. R., X, 182.)

*Gustavus Hay, Jr.*, "Death as a Civil Cause of Action in Massachusetts." (Harvard Law Rev., 1893-94, VII, 170.)

*A. J. Hirschl* and *S. S. Page*, "Personal Injury Actions: A. The Plaintiff's Standpoint. B. The Defendant's Standpoint." (I. L. R., I, 16, 27.)

#### NOTES:

"Death of a minor: right of action." (C. L. R., I, 413.)

"Action for personal injuries; Survival of." (C. L. R., VIII, 328.)

"Action for death by wrongful act." (H. L. R., II, 189; XI, 271; XII, 140, 433; XV, 313.)

"Construction of statutes as affected by statutes for the survival of actions." (H. L. R., IV, 145; IX, 224; XV, 854.)

"Release by deceased as a bar to the statutory action." (H. L. R., XIII, 309; XIV, 290.)

"Damages in statutory action: Loss of parental care." (H. L. R., XIX, 381.)

"Action for death: Liability of carrier to administrator after deceased has waived his rights." (H. L. R., XX, 66.)

"Measure of damages in action for death of child." (M. L. R., II, 318.)

"Infants, unborn: right when born to sue for injury sustained en ventre sa mère." (C. L. R., VIII, 670.)

"Unborn children: actions under statutes for death by injury to mother." (H. L. R., VIII, 365; XV, 313.)

"Action by posthumous child after recovery by mother." (H. L. R., XVII, 59.)

"Right of posthumous child to sue for death of father." (M. L. R., II, 236.)

for the death of the said Riggs, alleged to have been caused through the negligence of said John M. Healy. Later John F. Devine succeeded Reddick as administrator and was substituted in this suit. The declaration as finally amended alleges, in substance: That on April 20, 1906, John M. Healy was a general contractor engaged in laying a water main in the city of Libertyville, in Lake County, Ill.; that on that date Frank Riggs was in the employ of Healy as a caulker, and while working at the bottom of a ditch which had been dug by the employees of Healy, and while he was in the exercise of due care, his death was occasioned by the negligence of Healy. The alleged acts of negligence were set out with sufficient particularity. It was further averred: That Riggs left surviving him his father, his mother, and certain brothers and sisters, all of whom were dependent upon him, in whole or in part, for their support, and that they had been deprived of their support by reason of his death; that said John M. Healy died on July 16, 1906; that prior to the commencement of this suit defendant in error was duly appointed and qualified as executrix of his last will; and that she was acting in that capacity at the time the suit was begun. To the declaration, as amended, defendant in error interposed a general demurrer, which was sustained. Thereupon plaintiff in error elected to stand by his pleading, and judgment was entered against him for costs, and the suit dismissed. That judgment has been affirmed by the Branch Appellate Court, and the case has been brought to this Court by a writ of error. It is contended by plaintiff in error that the Superior Court erred in sustaining the demurrer and in entering judgment against him.

*Runnells, Burry and Johnstone (G. M. Petters, of counsel), for plaintiff in error.*

*Gorham and Wales, for defendant in error.*

SCOTT, J. (after stating the facts as above). The only question presented for determination is whether this action, brought exclusively for the benefit of the next of kin pursuant to section 2, c. 70, Hurd's Rev. St. 1908, can be maintained against the executor of the alleged wrongdoer. At common law an action for a wrong of the character here charged abated upon the death of the person aggrieved or upon the death of the tortfeasor. A change was effected in England by the passage of Lord Campbell's Act. St. 9 & 10 Victoria, c. 93. Thereafter, in 1853, our statute requiring compensation for causing death by wrongful act, neglect, or default was enacted. The first section of our statute is identical with the first section of Lord Campbell's Act, and is in these words:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to



an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." Hurd's Rev. St. 1908, c. 70, § 1.

The second section of our statute provides that the action given by the first section shall be brought in the name of the personal representative of the deceased, for the exclusive benefit of the widow and next of kin of the deceased. It will be observed that this Act did not affect the common law where the wrongdoer died before judgment, and in that event there could be no further prosecution of any action for the wrong. Nor did the Act provide for bringing an action where the death of the party injured resulted from some cause other than that which occasioned the injury. With the law in this condition the Legislature, in 1872, enacted section 122, c. 3, Hurd's Rev. St. 1908, which reads:

"In addition to the actions which survive by the common law, the following shall also survive: Actions of replevin, actions to recover damages for an injury to the person, (except slander and libel,) actions to recover damages for an injury to real or personal property, or for the detention or conversion of personal property, and actions against officers for misfeasance, malfeasance or nonfeasance of themselves or their deputies, and all actions for fraud or deceit."

This section provides for the survival of any action therein designated if the party aggrieved, or the wrongdoer, or both, should die. *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553. Under this section, if the party injured survives and the wrongdoer dies, the party injured may in his lifetime maintain the action, and plaintiff in error herein contends that, this being true, upon the person injured dying as the result of the wrongful act, neglect, or default, his legal representative can maintain the action against the legal representative of the deceased under the provisions of section 1, supra, for the reason that an action is given by that section against "the person who or company or corporation which would have been liable if death had not ensued." The position of defendant in error is that the two statutes are wholly independent, and that section 122, supra, not having been enacted until 1872, the language last quoted from the Act of 1853 means the person who at common law "would have been liable." Defendant in error relies principally upon the following cases: *Hegerich v. Keddie*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25; *Norton v. Wiswall*, 14 How. Prac. (N. Y.) 42; *Hamilton v. Jones*, 125 Ind. 176, 25 N. E. 192; *Moe v. Smiley*, 125 Pa. 136, 17 Atl. 228, 3 L. R. A. 341; *Russell v. Sunbury*, 37 Ohio St. 372, 41 Am. Rep. 523; *Davis v. Nichols*, 54 Ark. 358, 15 S. W. 880. All these cases arise under statutes which, in substance, are as the first section of Lord Campbell's Act; but neither of the first five seems to have been affected by a statute such as section 122, supra, and for that reason we do not deem them in point. In Arkansas, however, in addition to a statute substantially in the same terms as the

first section of Lord Campbell's Act, there was a statute which provided that for wrongs done to the person or property of another an action might be maintained by the person injured, or his administrator, against the wrongdoer or his administrator. In the Arkansas case the person injured died from his injuries. An action was prosecuted by his administratrix against the wrongdoer. Pending the suit the wrongdoer died, and the question was whether the cause could be revived against his administrator. The Court held that whatever cause of action the person injured had in his lifetime against the wrongdoer survived against the administrator of the wrongdoer by virtue of the statute last mentioned, but that the cause of action which may be asserted against the administrator of the wrongdoer by the administrator of one who has received a wrongful injury and died therefrom does not inure to the benefit of the widow and next of kin; that the action which is prosecuted for their benefit is not founded on survivorship, but is a new cause of action which the death itself originates, and which begins when the action which could have been asserted by the injured man would end if it was not saved by the survival statute. Placing this construction on the statute of that State, the Court in an able opinion reaches the conclusion that the suit, in so far as it was brought for the benefit of the widow and next of kin — that being the right of action given by Lord Campbell's Act — could not be maintained against the administrator of the wrongdoer, as it was not within the terms of the statute providing for the survival of actions, but that the administrator of the person injured could maintain an action against the administrator of the wrongdoer for the cause of action which was originally in the injured person himself, as that cause of action, by virtue of the statute, did survive to his administratrix.

Contrary to this view we have already held, notwithstanding section 122, *supra*, that after the death of the person injured no action can be maintained for the damages which he could have recovered had he not departed this life, and that the only action which his administrator can maintain is the action for the benefit of the widow and next of kin which is given by the statute of 1853. *Holton v. Daly*, 106 Ill. 131. While it is held in the Arkansas case that the action which is prosecuted for the benefit of the widow and next of kin is upon a new cause of action which the death itself originates, we have held that the cause of action is the same, viz., the wrongful act, neglect, or default, whether the action be brought by the person injured in his lifetime, or by his administrator after his death has been occasioned by the tort; the only difference, according to our view, being that the measure of recovery is not the same. *Holton v. Daly*, *supra*. Having held, contrary to the view of the Arkansas Court, that the right to recover which was in the person injured does not survive, if we should now hold with that Court that the right of action given by section 1, *supra*, could not be asserted against the administrator of the deceased wrongdoer, it is

manifest that section 122 would leave the administrator of the person wrongfully injured, who dies from his injuries, without any right to proceed against the administrator of the wrongdoer, precisely as was the situation at common law. No such result is warranted by the opinion in *Davis v. Nichols*, supra. We have heretofore held that this statute (section 122, supra) is remedial in its character and is to be liberally construed. That being true, the construction contended for by defendant in error should not be adopted.

In *Holton v. Daly* it was said that the section in question "was not intended to apply to cases embraced by the Act of February 12, 1853," and this statement is regarded by defendant in error as decisive of the present controversy. In that case the Court gave no consideration whatever to any question in reference to what actions would survive or might be brought against the legal representative of the wrongdoer. The only thing under consideration was the right of the administrator of the injured person against the wrongdoer himself. The quoted words were not used with reference to the question now under consideration, and they are therefore without significance in this case. If an injured person dies from some cause other than the injury, the cause of action for damages to the time of his death survives under section 122. *Holton v. Daly*, supra; *Savage v. Chicago & Joliet Railway Co.*, 238 Ill. 392, 87 N. E. 377. . . .

We are of opinion that since the enactment of section 122 of the Act of 1872 the legal representative of the deceased wrongdoer is, within the meaning of section 1 of the Act of 1853, "the person who . . . would have been liable" if the death of the party injured had not been occasioned by the injuries.

The judgment of the Branch Appellate Court and the judgment of the Superior Court will be reversed, and the cause will be remanded to the latter Court, with directions to overrule the demurrer.

Reversed and remanded, with directions.<sup>1</sup>

#### SUB-TOPIC E. EFFECT OF STATUTES CONCERNING EMPLOYER'S LIABILITY

123. REVISED LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 1902. *Employment of Labor ; Liability of Employers to Employees ; Injury followed by Death.* Section 72. If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provision of the preceding section, recover damages for the death in addition to those for the in-

<sup>1</sup> [NOTES:

"Death by Wrongful Act; Survival of Liability upon the Tortfeasor's Death."  
(I. L. R., IV, 425.)]

jury; and in the same action under a count at common law may recover damages for the conscious suffering caused by the same injury. (St. 1906, c. 370.)

Section 73. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section seventy-one, an employee is instantly killed, or dies without conscious suffering, his widow or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

Section 74. If under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

The amount of damages which may be awarded in an action under the provisions of section seventy-one for a personal injury to an employee, in which no damages for his death are awarded under the provision of section seventy-two, shall not exceed four thousand dollars.

The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of section seventy-two, shall not exceed five thousand dollars for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of section seventy-three, to bring an action for his death if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of section seventy-three shall not be less than five hundred nor more than five thousand dollars.

124. PUBLIC LAWS OF THE UNITED STATES OF AMERICA. *An Act relating to the Liability of Common Carriers by Railroad to their Employees in certain cases.* (St. 1908, April 22; Stats. at Large, vol. 35, c. 149, p. 65.) Section 1. Every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, etc.

## 125. JORDAN v. NEW ENGLAND STRUCTURAL COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1908

197 Mass. 43, 83 N. E. 332

TWO ACTIONS OF TORT, both brought under the Employers' Liability Act as stated in the first paragraph of the opinion. Writs dated respectively December 31, 1904, and January 18, 1905.

In the Superior Court the cases were tried together before *Richardson, J.* The evidence is described in the opinion. . . .

The judge refused to make any of these rulings and submitted the cases to the jury, who returned a verdict for the plaintiff in the first case in the sum of \$3,000 and a verdict for the plaintiff in the second case in the sum of \$300. The defendant alleged exceptions.

*W. H. Hitchcock* (*G. A. Drury* with him), for the defendant.

*S. R. Jones*, for the plaintiffs.

KNOWLTON, C. J. These two cases were brought under the Employers' Liability Act, the first by a minor, to recover damages for personal injuries received through the negligence of the defendant's superintendent, and the second by the minor's father, to recover for loss of service of the son, and for the expenses of his medical attendance rendered necessary by the accident.

In the defendant's shop there was a large crane, estimated to weigh about twenty tons, which passed in and out upon an iron track nearly twenty feet above the ground, which track was supported by girders. . . . The minor plaintiff was an iron worker. . . . His companion went away temporarily, and one Flynn, a foreman who directed the work, came up to take his place, standing in a similar way, with one of his hands holding the rail of the track. The crane came along over the track and cut off the ends of two of the plaintiff's fingers. . . .

The case of the father presents a different question. This, like the other, is brought under the Employers' Liability Act, and no negligence is charged except that of the superintendent. At common law neither of the plaintiffs could recover, as the only negligence complained of was that of a fellow servant. The Employers' Liability Act cannot be availed of by the father to recover for loss of service or for expenses, inasmuch as this statute gives a right of action only to the employee or his legal representatives, or, if he is instantly killed or dies without conscious suffering, to his widow or next of kin. R. L. c. 106, §§ 71, 73.

"The employee or his legal representatives shall . . . have the same rights to compensation and of action against the employer as if he had not been an employee," etc.

If he is a minor, this enlargement of his rights at common law does not extend to his father, suing in his own right.

The same construction is put upon the statute giving damages to persons injured by defects in highways, existing through the negligence of cities and towns. *Harwood v. Lowell*, 4 Cush. 310; *Nestor v. Fall River*, 183 Mass. 265.

It has also been given to a similar Employers' Liability Act by the Supreme Court of Alabama. *Lovell v. DeBardelaben Coal & Iron Co.*, 90 Ala. 13; *Woodward Iron Co. v. Cook*, 124 Ala. 349. In this action the exceptions must be sustained. *Ordered accordingly.*

126. FULGHAM *v.* MIDLAND VALLEY RAILROAD  
COMPANYUNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF ARKANSAS,  
1909

167 Fed. 660

AT LAW.

The questions discussed and decided in this case arose upon an argument based upon two motions, the one to strike out certain portions of the complaint which looked to the recovery of damages by the plaintiff as administrator of the estate of E. C. Pogue, deceased, for the benefit of said estate, growing out of pain and suffering and loss of time and expenses incurred by the deceased before his death; and in the other motion it was insisted that the complaint contained in one count two separate and distinct causes of action, and defendant moved the Court to require plaintiff to elect whether he would stand upon the cause of action which related to damages for the benefit of the widow and children of the deceased, or whether he would stand on the cause of action looking to recover damages for pain and suffering and loss of time and expenses incurred by the deceased before his death. Both motions, by consent, were argued and submitted together. The opinion sufficiently indicates the views of the Court on those motions. The views expressed by the Court were acquiesced in by counsel, and an amended complaint filed, confining the right of recovery to the injury to the widow and children of the deceased, because of his death.

*Oscar L. Miles*, for plaintiff.

*Ira D. Oglesby*, for defendant.

ROGERS, District Judge. On April 22, 1908, Congress passed what is known as the "Railroad Company Employer's Liability Act." . . .

The complaint in this case is in two counts. The first is for the benefit of the estate of the deceased, and involves the right of the administrator to recover for pain and suffering, mental and physical (including wanton and negligent treatment of the deceased after his injury), up to the period of his death. The second count is for the benefit of the surviving widow and children of the deceased, and involves damages for his wrongful death, etc.

It is apparent that these two separate and distinct causes of action are modelled upon the legislation of the State of Arkansas (Kirby's Digest, §§ 6285-6290), which were interpreted in the case of *Davis v. Railway*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283. In that case one cause of action was given under section 6285, and the other under sections 6289 and 6290. The former was for the benefit of the estate; the latter for the benefit of the widow and next of kin. Section 6285 expressly provides for the survival of the right of action for the injury



in case of death as the result therefrom, and vests the right of action in the personal representatives of the deceased, for the benefit of his estate. The other two sections give a right of action for a death caused by negligence, and also vests the right of action in the personal representative of the deceased for the benefit of the widow and children. The Court in *Davis v. Railway*, *supra*, held that the statutes creating these two causes of action were not in conflict, were in their natures separate and distinct, and both vested in the personal representative, and might proceed *pari passu* in one suit.

What of the Federal statute quoted above? First, can plaintiff avail himself of the Arkansas statutes in this character of case for any purpose? It is admitted the suit was brought under the Federal statute quoted. . . .

Until Congress has acted with reference to the regulation of interstate commerce, State statutes regulating the relations of master and servant and incidentally affecting interstate commerce, but not regulating or obstructing it, may be given effect; but when Congress has acted upon a given subject, State legislation must yield. In *Gulf Colorado, etc., Railroad Co. v. Hefley*, 158 U. S. 99, 15 Sup. Ct. 804, 39 L. Ed. 910, the Court said:

“When a State statute and a Federal statute operate upon the same subject-matter, and prescribe different rules concerning it, the State statute must give way.”

I come now to examine the Act under consideration. It is in derogation of the common law, and must be strictly construed, but not so strictly as “to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning.” *Johnson v. Southern Pacific Railroad Company*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. I think this Act is in harmony with the purposes and recommendations of the President in at least two messages, and also in harmony with what it is claimed is the strong trend of the public mind in nearly all civilized countries at this time. It proceeds on the theory that the railroad corporations are quasi public corporations, and that the railroad company in the first place, and the public in its final analysis, should be insurers of the lives and persons of its employees while engaged in interstate commerce, for if the railroad companies are to be the insurers of their employees they must in the end be reimbursed also by their customers for whom they do the carrying business, and in its last analysis their customers are simply the public. . . . These changes are all distinctive advantages to the employee, and all in derogation of the common law, and some of them far in advance of this statutes of this State in like cases.

But it will be observed on the other hand that the Act makes no provisions for the survival of that action, so given, for an injury sustained, in the event of the death of the injured employee. In *Ward v. Blackwood*, Ad., 41 Ark. 298, 48 Am. Rep. 41, the Court said:

"At common law no action for a tort survived the death either of him who inflicted or of him who received it. 'No action,' said Lord Mansfield, 'where in form the declaration must be *quare vi et armis et contra pacem*, or where the plea must be that the testator was not guilty, could lie against the executor; upon the face of the record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crime, are buried with the offender.' *Hambly v. Trott*, Cowper, 375.

"So an action would not lie for the personal representative. 'Executors and administrators are the representatives of the temporal property — that is, the debts and goods — of the deceased, but not of their wrongs, except when those wrongs operate to the temporal injury of their personal estate.' *Chamberlain's Adm'r v. Williamson*, 2 Maule & S. 408, per Lord Ellenborough.

"But our statute has changed the common law. Section 4760 of Gantt's Digest provides: 'For wrongs done to the person or property of another, an action may be maintained against the wrongdoers, and such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, or, after his death, against his executor or administrator, in the same manner and with the like effect in all respects as actions founded on contracts.'"

But it will be seen that the statute of Arkansas did precisely what the statute under consideration did not do — it provided expressly for the survival of the action, and vested the right of action in the personal representative in the event the injured person died. It cannot be that legislation so much discussed in and out of Congress, and which had to be so carefully matured and drawn in order to meet the views of the Courts, legislation, too, which inherently shows the skill of the lawyer evidently familiar with the settled principles of the common law, which it modifies in the interest of justice and humanity, is not expressive of the will of Congress, or omits anything which Congress intended to do by it. It would have been so easy for Congress to have said, as the legislation of so many States had previously provided, that in the event the employee injured should die from the injury his cause of action should survive to his personal representative, that it can scarcely be conceived that the provision would have been omitted had Congress so intended. But whatever Congress may have intended, it has not done so, and the Courts must confine themselves to the administration of the law, and neither add nor take from a statute where its language is clear and unambiguous. In the opinion of the Court the right of action given to the injured employee by the Act of April 22, 1908, does not survive to his personal representative in the event of his death, but, as at common law, perishes with the injured person. I might add that this conclusion is in harmony with the known purposes of the Act, which was intended to make some provision for the unfortunate family of the deceased employee, and not to make provision for the creditors of his estate. Can it be supposed that Congress would make a railroad company the insurer of an employee, killed in its service, for the purpose of paying the debts the employee had incurred in his lifetime?

And yet that would be the inevitable result if the contention of plaintiff's counsel is sound, for whatever is recovered on account of injuries sustained and for which the injured employee had a cause of action in his lifetime must go to his estate. Indeed, such is the prayer of the complainant in this very case.

## SUB-TITLE (II): HARMS TO SUNDRY PROFITABLE RELATIONS

127. L. C. J. HOLT, in *Keeble v. Hickeringill*. (1706. Queen's Bench, 11 East 574, note.) He that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not affect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; as to say a merchant is broken, or that he is failing, or is not able to pay his debts, 1 Roll. 60, 1; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the King. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases.<sup>1</sup>

### Topic 1. Destruction of the Relation by Violence, Nuisance, or similar Act

128. REGISTRUM BREVIUM (1595). *Breve de clauso fracto et servientibus verberatis* (fol. 93 b). Quare vi & armis clausum ipsius A. apud N. fregerunt, & arbores suas ibidem nuper crescentes succiderunt, & in viuarijs suis ibidem piscati fuerunt, & piscem inde ac arbores praedictas, nec non alia bona & catalla sua ad valentiam decem librarum ibidem inuenta ceperunt & asportauerunt, & in C. seruientem suum, vel seruientem suam, vel tenentem, vel natium vel natiam (Et si plures fuerint, dicatur sic; & in homines & seruientes suos) ibidem insultum fecerunt, & ipsum, vel ipsam (vel ipsos) verberauerunt, vulnerauerunt & male tractauerunt: per quod idem A. seruitium seruientis sui praedicti, vel seruientis suae praedictae, vel natiui vel natiae predicti vel praedictae, per magnum tempus amisit. Vel sic: seruitium seruientium suorum praedictorum per magnum &c. Vel sic: seruitium eorundem hominum & seruientium suorum praedictorum per magnum tempus amisit, & alia enormia ei intulit ad graue damnum &c.

129. REGISTRUM BREVIUM (1595). *Breve de clauso fracto et tenentibus et servientibus comminatis* (fol. 111 a). Ostensurus quare vi &c. clausum et

<sup>1</sup> [CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:  
Henry Sidgwick, "Elements of Politics," c. IV, § 4, par. II, par. IV.  
Henry T. Terry, "Some Leading Principles of Anglo-American Law," c. XI,  
§§ 350-355, p. 343, § 369, p. 361.  
Thomas E. Holland, "Elements of Jurisprudence," 9th ed., c. XI, par. IV,  
p. 175.]

domum ipsius W. apud B. fregit, et tenentibus et seruiantibus suis de vita et mutilatione membrorum suorum ibidem intantum comminatus fuit, & eos tantis iniuriis et grauaminibus ibidem affecit, quod iidem tenentes tenuram ipsius Walteri ibidem reliquerunt, dictique seruiantes a seruitio suo recesserunt, sic que idem Walterus seruitium seruiantium suorum praedictorum, ac reditus et seruitia tenentium suorum praedictorum, per magnum tempus amisit, et alia enormia, &c.

130. GARRET *v.* TAYLOR. *King's Bench*. 1621. (Cro. Jac. 567.) Action on the case. Whereas he was a free mason, and used to sell stones, and to make stone-buildings, and was possessed of a lease for divers years to come of a stone-pit in Hedington, in the county of Oxford, and digged divers stones there, as well to sell as to build withal; that the defendant, to discredit and to deprive him of the commodity of the said mine, imposed so many and so great threats upon his workmen, and all comers disturbed, threatening to mayhem and vex them with suits if they bought any stones; whereupon they all desisted from buying, and the others from working, &c.

After judgment by nihil dicit for the plaintiff, and damages found by inquisition to fifteen pounds, it was moved in arrest of judgment, that this action lay not; for nothing is alleged but only words, and no act or insult: and causeless suits on fear are no cause of action.

Sed non allocatur: for the threatening to mayhem, and suits, whereby they durst not work or buy, is a great damage to the plaintiff, and his losing the benefit of his quarries a good cause of action: and although it be not shewn how he was possessed for years, by what title, &c. yet that being but a conveyance to this action, was held to be well enough. And adjudged for the plaintiff.

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### 131. ALLISON *v.* CHANDLER

SUPREME COURT OF MICHIGAN. 1863

11 *Mich.* 542

ERROR to Wayne Circuit, where Allison brought suit against Chandler for trespass in breaking into a store occupied by plaintiff in Detroit, and tearing off the roof, and committing other injuries by which it was rendered untenable. The case was once before in the Supreme Court, and a full statement of the pleadings will be found in 10 *Mich. Rep.* 460. The prior judgment having been reversed, the following proceedings took place on the new trial.

The plaintiff being sworn as a witness, gave testimony tending to show that in August, 1860, the plaintiff was the tenant of the defendant, in store number 176 Jefferson Avenue, Detroit, and had been for several years, and as such tenant was rightfully in the possession of said store, and entitled to the peaceable and quiet enjoyment thereof, until May 1st, 1861, under an agreement made February 1st, 1860; that about August 15th, 1860, the defendant caused the roof of said store to be torn off; that plaintiff repaired said roof; that a few days

afterwards defendant again caused the roof to be torn off, and the gable end to be forced away and thrown down, and thus rendered the store entirely untenable, and the plaintiff was in consequence forced to leave said store, and thereupon hired another store, the best he could obtain, but not nearly as good for his business, which consisted largely in repairing watches, making gold pens, and selling jewelry.

The counsel for the plaintiff then asked the witness how much the watch-repairing business was worth a year? To which question the defendant objected as incompetent, and the Court sustained said objection, and excluded said testimony, and plaintiff excepted.

The counsel for the plaintiff then asked the witness what was the extent or value of his whole business? This question was in like manner objected to and excluded, as were also the further questions, whether his business, during the year prior to the time when said store was torn down, was a profitable one? And whether, after his removal to the new store, his business fell off, and if so, how much?

The witness then further testified, that the reasons why his new place of business, which he obtained, was not as good a place for business as the store from which he was ejected, were that his customers did not come to the new store, there was not so much of a thoroughfare by it, not one quarter of the travel, and he relied very much on chance custom, especially in the watch-repairing and other mechanical business. . . .

The Circuit Judge charged the jury, upon the question of damages, as follows:

1st. If the plaintiff is entitled to recover, he can only recover his actual damages if the jury find that the defendant, in doing the acts complained of, acted without malice and in good faith, under the belief that he had a legal right to the possession of the store, and to tear it down, and that, in determining the question of damages, they should not take into consideration the value of the good will of the place, or the plaintiff's probable profits.

2d. That if the jury find for the plaintiff, and find that the defendant, in tearing down the store, acted in good faith, and under an honest belief that he had a legal right to do so, that then the plaintiff can only recover his actual damages; and in determining them, the jury must confine themselves to the expenses of repairs after the first tearing off the roof, his loss of time and expense of moving, with the loss occasioned by the interruption of his business during the time of his removal, together with the difference, if any, between the rent paid and the fair rental value of the store for the year. And in determining this, the jury will take into consideration all the facts and circumstances of the case.

To this charge the plaintiff excepted, and judgment having been rendered in his favor for \$100 only, the case came up for review upon the several exceptions thus taken. . . .

CHRISTIANCY, J. When this cause was formerly before us (Chand-



ler v. Allison, 10 Mich. 460), one of the questions involved was, whether Allison, the plaintiff, was rightfully in possession of the store at the time the trespass was committed, or whether his right of possession was dependent upon Chandler's election to rebuild, and ceased when that election was made; and one of the grounds upon which the judgment in that case was reversed, was, the rejection of evidence tending to show that Allison's right of possession was thus qualified. But as the case now appears before us upon exceptions taken on the new trial, the finding of the jury, whether right or wrong — no exception having been taken to the evidence or the charge upon this point — requires us to treat this question, so far as we are now to consider the case, as settled in favor of the plaintiff; and the defendant must be considered as a trespasser, entering upon the premises and tearing down the store while in the rightful possession of the plaintiff, under a lease for a term which would not expire till the first day of May following. . . .

Whether the rulings of the Court, upon the admission of evidence, and in the charge to the jury, did not lay down too narrow a rule for the estimation of actual damages, is the main question for our consideration.

. . . The principle of compensation for the loss or injury sustained, is, we think, that which lies at the basis of the whole question of damages in most actions at common law, whether of contract or tort. We do not here speak of those actions in which punitive or exemplary damages may be given, nor of those whose principle is the establishment of a right, where merely nominal damages are proper. But, with these exceptions, the only just theory of an action for damages to be recovered should compensate the loss or injury sustained. We concur entirely with the Court of Appeals in New York in *Griffin v. Colver*, 10 N. Y. 492, in repudiating the doctrine adopted by Mr. Sedgwick, from Domat (*Sedgw. on Dam.* 3, 37, 38, etc.), that "the law aims not at the satisfaction, but the division, of the loss." Such, it is true, is often the result of an action, but never the object of the law. The law may, and often does, fail of doing complete justice, from the imperfection of its means of ascertaining truth, and tracing and apportioning effects to their various causes; but it is not liable to the reproach of doing positive injustice by design. Such a doctrine would tend not only to make the law itself odious, but to corrupt its administration, by fostering a disregard of the just rights of parties. In actions upon contract, especially, and those nominally in tort, but substantially upon contract, Courts have thought it generally safer, upon the whole, to adopt certain definite rules for the government of the jury by which the damages could be estimated, at the risk of falling somewhat short of the actual damages, by rejecting such as could not be estimated by a fixed rule, than to leave the whole matter entirely at large with the jury, without any rule to govern their discretion, or to detect or correct errors or corruption in the verdict. In such cases, therefore, there has been a strong inclination to seize upon such elements of certainty as the case might happen

to present, and as might approximate compensation, and to frame thereon rules of law for the measurement of damages, though it might be evident that further damages must have been suffered, which, however, could only be estimated as matter of opinion, and must therefore be excluded under the rules thus adopted. And it is not to be denied that this course of decision has sometimes been extended to actions purely of tort.

But whatever plausibility there may be in the theory of Mr. Sedgwick when applied to actions upon contract — a plausibility which arises from mistaking the result for the object — the injustice of such a principle, when applied to cases of actual, positive tort, like that here in question, would be so gross as to shock all sense of justice. . . .

There are some important considerations which tend to limit damages in an action upon contract, which have no application to those purely of tort. Contracts are made only by the mutual consent of the respective parties; and each party, for a consideration, thereby consents that the other shall have certain rights as against him, which he would not otherwise possess. In entering into the contract the parties are supposed to understand its legal effect, and, consequently, the limitations which the law, for the sake of certainty, has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose, the parties may decline to enter into the contract, or may fix their own rule of damages when, in their nature, the amount must be uncertain. Hence, when suit is brought upon such contract, and it is found that the entire damages actually sustained cannot be recovered without a violation of such rules, the deficiency is a loss, the risk of which the party voluntarily assumed on entering into the contract, for the chance of benefit or advantage which the contract would have given him in case of performance. . . .

None of these several considerations have any bearing in an action purely of tort. The injured party has consented to enter into no relation with the wrongdoer by which any hazard of loss should be incurred; nor has he received any consideration, or chance of benefit or advantage, for the assumption of such hazard; nor has the wrongdoer given any consideration, nor assumed any risk, in consequence of any act or consent of his.

The injured has had no opportunity to protect himself by contract against any uncertainty in the estimate of damages; no act of his has contributed to the injury; he has yielded nothing by consent; and, least of all, has he consented that the wrongdoer might take or injure his property or deprive him of his rights, for such sum as, by the strict rules which the law has established for the measurement of damages in actions upon contract, he may be able to show, with certainty, he has sustained by such taking or injury. Especially would it be unjust to presume such consent, and to hold him to the recovery of such damages only as may be measured with certainty by fixed and definite rules,

when the case is one which, from its very nature, affords no elements of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible. Is he to blame because the case happens to be one of this character? He has had no choice, no selection. The nature of the case is such that the wrongdoer has chosen to make it, and upon every principle of justice, he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case, and the difficulty of accurately estimating the results of his own wrongful act. Upon what principle of right can courts of justice assume — not simply to divide this risk, which would be thus far unjust — but to relieve the wrongdoer from it entirely, and throw the whole upon the innocent and injured party? Must not such a course of decision tend to encourage trespasses, and operate as an inducement for parties to right themselves by violence, in cases like the present?

Since, from the nature of the case, the damages cannot be estimated with certainty, and there is a risk of giving by one course of trial less, and by the other more than a fair compensation — to say nothing of justice — does not sound policy require that the risk should be thrown upon the wrongdoer instead of the injured party? However this question may be answered, we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation, than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injury, though the amount thus excluded cannot be estimated with accuracy by a fixed and certain rule. . . .

The justice of the principles we have endeavored to explain will, we think, be sufficiently manifest in their application to the present case. The evidence strongly tended to show an ouster of the plaintiff for the balance of the term, by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. . . .

To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of one thousand dollars per year; and he is ousted from the premises and this business entirely broken up for the balance of the term; can he be allowed to recover nothing but six cents damages for his loss? To ask such a question is to answer it. The rule which would confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for his busi-

ness, and that for the same rent; and to justify such a rule of damages this assumption must be taken as a conclusive presumption of law. However such a presumption might be likely to accord with the fact in the city of New York, in most western cities and towns it would be so obviously contrary to the common experience of the facts, as to make the injustice of the rule gross and palpable. But we need not further discuss this point, as a denial of any such presumption was clearly involved in our former decision.

The plaintiff in this case did hire another store, "the best he could obtain, but not nearly so good for his business" — "his customers did not come to the new store, and there was not so much of a thoroughfare by it — not one quarter of the travel — and he relied much upon chance custom, especially in the watch-repairing and other mechanical business." This injury to the plaintiff's business was as clearly a part of his damages as the loss of the term itself. This point, also, was decided in the former case, and we there further held that the declaration was sufficient to admit the proof of this species of loss.

Now, if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary consequence, that the value of that business before the injury, as well as after, not only might, but should be shown, as an indispensable means of showing the amount of loss from the injury. If the business were a losing one to the plaintiff before, his loss from its being broken up or diminished (if anything) would certainly be less than if it were a profitable one. It is not the amount of business done, but the gain or profit arising from it, which constitutes its value.

But it is insisted that loss of profits constitutes no proper ground or element of damages. If there be any such rule of law it is certainly not a universal, and can hardly be called a general rule. Decisions, it is true, may be found which seem to take it for granted that the rule is universal. But there are numerous cases, even for breach of contract, in which profits have been properly held to constitute, not only an element, but a measure (and sometimes the only measure) of damages. . . . But whatever may be the rule in actions upon contract, we think a more liberal rule in regard to damages for profits lost, should prevail in actions purely of tort (excepting perhaps the action of trover). Not that they should be allowed in all cases without distinction; for there are some cases where they might, in their nature, be too entirely remote, speculative, or contingent, to form any reliable basis for a probable opinion. And perhaps the decisions which have excluded the anticipated profits of a voyage broken up by illegal capture, or collision, may be properly justified upon this ground; upon this, however, we express no opinion. But generally, in an action purely of tort, where the amount of profits lost by the injury can be shown with reasonable certainty, we think they are not only admissible in evidence, but that they constitute, thus far, a safe measure of damages; as when they are

but another name for the use of a mill (for example), as in *White v. Moseley*, 8 Pick. 356; or for the use of any other property where the value or profit of the use can be made to appear with reasonable certainty by the light of past experience, as might often be done where such profits had been for a considerable time uniform at the same season of the year, and there are no circumstances tending to show a probable diminution, had the injury not occurred. And possibly the same view, subject to the like qualifications, might have been taken of the profits of the plaintiff's business, had it been confined to the mechanical trade of repairing watches and making gold pens, particularly if done purely as a cash business. But this business seems to have been carried on with that of the sale of jewelry; he kept a jewelry store, and the profits of so much of his business as may be regarded as mercantile business, are dependent upon many more contingencies, and, therefore, more uncertain, especially if sales are made upon credit. Past profits, therefore, could not safely be taken as the exact measure of future profits; but all the various contingencies by which such profits would probably be affected should be taken into consideration by the jury, and allowed such weight as they, in the exercise of good sense and sound discretion, should think them entitled to. Past profits in such cases, where the business has continued for some length of time, would constitute a very material aid to the jury in arriving at a fair probable estimate of the future profits, had the business still continued without interruption.

Accordingly such past profits have been allowed for this purpose, both in actions *ex contractu* and *ex delicto*, though more frequently in the latter, where from the nature of the case no element of greater certainty appeared, and the actual damages must be more or less a matter of opinion; and where, as in the present case, though somewhat inconclusive, it was the best evidence the nature of the case admitted. See *Wilkes v. Hungerford*, 2 Bing. N. C. 281; *Ingram v. Lawson*, 6 Bing. N. C. 212; *Lacour v. The Mayor*, 4 Duer, 406; and the following in actions upon contract: *Driggs v. Dwight*, 17 Wend. 71; *Bagley v. Smith*, 10 N. Y. 489. . . .

We are therefore entirely satisfied that all the questions put to the witness, Allison, touched the nature, extent, and profits of the business, before and after the trespass, were competent, and improperly overruled; and that the charge of the Court, so far as it excluded all consideration of the good will of the place, its peculiar value to the plaintiff, and his probable profits, was erroneous.

The judgment must be reversed, with costs to the plaintiff, and a new trial granted.

The other Justices concurred.<sup>1</sup>

<sup>1</sup> [NOTES:

"Certainty of loss affecting recovery for loss of profits." (H. L. R., XIII, 149.)]

132. BALLOU *v.* FARNUM

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1865

11 *Al.* 73

[Printed ante, as No. 30.]

133. LAMB *v.* STONE

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1831

11 *Pick.* 527

ACTION on the case. The declaration contained five counts; the fourth and fifth of which will show the nature of the action. . . . The fifth count alleges, that whereas Thompson, at Oxford, on December 7, 1826, was indebted to the plaintiff in the sum of \$56, and was fraudulently and wrongfully contriving and intending to prevent the plaintiff from recovering the same of Thompson by putting out of his possession the property and estate of which he was possessed, so that the same could not be come at to be attached by due process of law, and avoiding the process of law provided for the collection of debts, by going out of the Commonwealth and the reach of said process — of all which the defendant did, in order to aid and abet Thompson in his wrongful and fraudulent intent, and with the intent to injure and defraud the plaintiff of his demand against Thompson, take into his possession, purchase, and receive the property and estate of Thompson, then and there being found, of great value, to wit, \$250, and did fraudulently and with the intent to deprive the plaintiff of the means of recovering his debt of Thompson, aid, abet, and assist Thompson to avoid the process of law provided for the collection of debts, by departing out of the Commonwealth, which Thompson did, and has ever since remained without the reach and effect of the legal process of the Commonwealth, in foreign parts, to wit, in the State of Vermont; whereby the plaintiff was deprived of the means of collecting his debt, as he might and would otherwise have done, and was about to do, by attaching the property or arresting the body of Thompson by due process of law, and has ever since been deprived of his debt and all means of collecting the same or enforcing payment thereof, and has wholly lost the same, and has been otherwise greatly injured by the fraudulent doings of the defendant as aforesaid.

The general issue was pleaded, and upon the trial a general verdict was returned for the plaintiff.

The defendant moved in arrest of judgment, upon the ground that no sufficient cause of action was set forth in the declaration.

*C. Allen* and *Barton*, in support of the motion, said the plaintiff had



a plain remedy at law, either by attaching the property itself, if it could be found, or if it had been secreted, by summoning the defendant as trustee [garnishee] of Thompson; this new remedy, therefore, by an action on the case, as unnecessary and would not be sustained by the Court. Com. Dig. Action upon the case, B 8; Com. Dig. Action upon the case for a deceit, E 5. There was no privity between these parties. The plaintiff had acquired no lien on the property; and the alleged damage to him was a consequence so remote, that the law will not take notice of it. The injury was common to all creditors of Thompson and not particular to one; and under such circumstances an action of the case does not lie. Com. Dig. Action on the case, B 2; Co. Lit. 56 a. The damages which the plaintiff may have sustained are entirely unnecessary.

*Newton and Washburn*, for the plaintiff. A fraud is set forth in the declaration, and it operated to the injury of the plaintiff, inasmuch as it prevented him from securing his demand against Thompson. It is a general principle, that where the law prohibits an injury, it gives a remedy by action. 1 Chit. Pl. 83; *Ashby v. White*, 1 Salk. 21; *Peabody v. Peters*, 5 Pick. 3. It is true, that in cases like the one at bar, a party is permitted to attach the property by the ordinary process, or by the trustee process. *Burlingame v. Bell*, 16 Mass. R. 320; *Devoll v. Brownell*, 5 Pick. 448. But here the property could not be found to be attached in the first mode, and the trustee process is not an adequate remedy. . . .

The opinion of the Court was afterwards drawn up by

MORTON, J. This case comes before us on a motion in arrest of judgment. The verdict of the jury establishes every material allegation in the plaintiff's declaration. And every fact substantially set forth is to be taken to be true. The question for our decision is, whether these facts are sufficient to entitle the plaintiff to judgment. Although the verdict is general, yet in this case, if either count is good, the verdict may be applied to that count and judgment be rendered upon it.

The following are all the material allegations contained in either of the counts — That the plaintiff had a just debt due him from one Thompson — that the latter had property liable to attachment sufficient to pay this debt — that the defendant took a fraudulent conveyance of this property — that Thompson has absconded from the State — that the plaintiff has not been able to arrest him, to attach his property, or otherwise to obtain satisfaction of his debt — and that the acts done by the defendant were done with intent to defraud the plaintiff, by preventing him from securing or getting satisfaction of his debt. Some of these are omitted in several of the counts; but no one contains any other material allegation.

Will these facts support an action?

Before proceeding to the investigation of the main question, it may be proper to remark, that the declaration contains no averment that

Thompson is insolvent, or that he has not, where he now resides, property liable to be taken, sufficient to satisfy the debt, or that any suit has ever been commenced against him, or any attempt made to arrest his body or attach his property; nor is it alleged, except by implication, that he has not in this State real estate or personal property other than that transferred to the defendant, liable to attachment.

It ought also to be further remarked, that this is not an action of conspiracy or of case in the nature of conspiracy. It is not founded upon any illegal combination or confederacy. The declaration does not set forth any conspiracy to defraud the plaintiff or to evade or defeat any legal process. No such fact can be presumed to exist; and therefore we have no occasion to determine what effect such an averment would have. It will however be perceived, that some of our reasoning would apply to such an action, as well as the one before us.

This is a special action of the case, depending upon the precise facts set forth in the declaration. It is an action of new impression. It is admitted that no precedent can be found for it. This circumstance of itself forms a pretty strong objection. It ought however to have less weight in this than any other form of action. In the diversified transactions of civilized life new combinations of circumstances will sometimes arise, which will require, in the application of well settled principles of law, new forms of declarations.

Among the old and wise axioms of the law none are more sound than those upon which the plaintiff attempts to found this action. In law, for every wrong there is a remedy. 3 Bl. Com. 123; *Ashby v. White*, 1 Salk. 21. Whenever the law creates or recognizes a private right, it also gives a remedy for a violation of it. 1 Chit. Pl. 83; 11 Johns. R. 140. The general principle, that whenever there is fraud or deceit by the one party and injury to the other, or *damnum cum injuria*, there an action will lie, is very often referred to with approbation, and always recognized as good law. *Upton v. Vail*, 6 Johns. R. 182; *Pasley v. Freeman*, 3 T. R. 51; *Eyre v. Dunsford*, 1 East, 329.

But these principles, however sound, must be understood with such qualifications and limitations as other principles of law equally sound necessarily impose upon them. It is very clear that there may be many moral wrongs for which there can be no legal remedy. And there may be legal torts in which the damage to individuals may be very great, and yet so remote, contingent, or indefinite, as to furnish no good ground of action. 3 T. R. 63.

Without entering further into the explanation of these principles, their extent, qualifications, or limitations, we will proceed to inquire how far they may be relied upon in support of this action. To render them applicable the plaintiff must show that he has sustained damage from the tortious act of the defendant, for which the established forms of law furnish him no remedy. If he may have redress by any of the forms of actions now known and practised, it would be unwise and

unsafe to sanction an untried one, the practical operation of which cannot be fully foreseen. The Court will adopt a new remedy to prevent the failure of justice, or to enforce the settled principles of law; but never when justice can be attained by any of the remedies already known to the law. Com. Dig. Actions on the Case, B 8.

The gist of the injury complained of is the fraudulent purchase by the defendant, of the property of the plaintiff's debtor. If the sale was fraudulent, it might be avoided by creditors, and the property was liable to attachment after as well as before the conveyance. The fraud could be established quite as easily in a suit for the chattels themselves, as in the present case. There is no averment that the defendant had concealed the property, removed it out of the Commonwealth, or in any other way so disposed of it that it could not be attached. But even if it were so, and the property could not be come at to be attached specifically, yet it might be attached in the defendant's hands by the trustee process. In this event the defendant would be compellable to disclose all the circumstances attending the transaction, on oath; and if he did not answer truly, would be liable to a special action on the case, by St. 1794, c. 65, § 9. It would be difficult to show any good reason why the plaintiff might not obtain legal justice in the one or the other of these modes, as easily and surely as by the present action. *Burlingame v. Bell*, 16 Mass R. 320; *Devoll v. Brownell*, 5 Pick. 448. . . .

This action, if sustained, would establish a precedent which would produce in practice great inconvenience and oftentimes do manifest injustice. If the plaintiff may maintain this action against the defendant, so may every creditor of Thompson. The plaintiff had done nothing to give him priority. Shall the fraudulent purchaser be holden to pay all the debts of the fraudulent vendor? Justice does not require this. The conveyance might be fraudulent in law, and yet there might be no moral turpitude in the transaction. The property conveyed might be very small and the debts very large. Shall the value of the property transferred be apportioned among all the creditors? By what rules shall the apportionment be made? Shall the creditor who first sues be entitled to the whole, if his debt be large enough to require the whole for its satisfaction? If one creditor should attach the property specifically, another should summon the fraudulent vendee as trustee of the vendor, and a third should commence an action like this, which would have the preference? Can the same party resort to more than one of these remedies at the same time? And would judgment in the one be a bar to the other? Many cases might occur, in which it would be extremely difficult to adopt any rule of damages which would do justice to all the parties interested.

But besides these practical inconveniences, which are of themselves insurmountable, there is another objection fatal to the present action. The injury complained of is too remote, indefinite, and contingent.

To maintain an action for the deceit or fraud of another, it is indispensable that the plaintiff should show not only that he has sustained damage and that the defendant has committed a tort, but that the damage is the clear and necessary consequence of the tort, and that it can be clearly defined and ascertained. What damage has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien, for he had none. No attachment has been defeated, for none had been made. He has not lost the custody of his debtor's body, for he had not arrested him. He has not been prevented from attaching the property or arresting the body of his debtor, for he never had procured any writ of attachment against him. He has lost no claim upon or interest in the property, for he never had acquired either. The most that can be said is, that he intended to attach the property and the wrongful act of the defendant has prevented him from executing this intention. Is this an injury for which an action will lie? How can the secret intentions of the party be proved? It may be he would have changed this intention. It may be the debtor would have made a bona fide sale of the property to some other person, or that another creditor would have attached it, or that the debtor would have died insolvent, before the plaintiff would have executed his intention. It is therefore entirely uncertain whether the plaintiff would have secured or obtained payment of his debt, if the defendant never had interfered with the debtor or his property. Besides, his debt remains as valid as it ever was. He may yet obtain satisfaction from property of his debtor, or his debtor may return and pay him. On the whole it does not appear that the tort of the defendant caused any damage to the plaintiff. But even if so, yet it is too remote, indefinite, and contingent, to be the ground of an action.

Among the many cases cited by the plaintiff's counsel, those of *Adams et al. v. Paige et al.*, 7 Pick. 542, *Yates v. Joyce*, 11 Johns. R. 136, and *Smith v. Tonstall*, Carthew, 3, bear the greatest resemblance to the case at bar. But an examination of these cases will not only show that there is an obvious and broad distinction between them and the one under consideration, but that the principles adopted in all of them support the ground now taken by the Court. . . .

In all these cases the plaintiffs had a clear and valuable interest in or lien on certain property, which was defeated or destroyed by the tortious acts of the defendants. Not so in the case at bar. The plaintiff does not allege that he had any special property or any interest in or claim on any property which was destroyed or injured by any act of the defendant. And we are all of opinion that he has not set forth any such ground of action as can be sustained upon any known principles of law. *Vernon v. Keyes*, 12 East, 632. *Judgment arrested.*<sup>1</sup>

<sup>1</sup> [PROBLEMS :

The plaintiff was under contract with a third person, a manufacturing corporation, to buy its goods, and depended for its business on the delivery of the man-

134. ST. JOHN *v.* MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK

SUPREME COURT OF NEW YORK. 1856

13 *How. Pr.* 527

NEW YORK, General Term, Dec., 1856.

Present, DUER, BOSWORTH, and WOODRUFF, Justices.

Motion by plaintiff for judgment on a verdict subject to the opinion of the Court.

*M. G. B. Wilcoxson*, for defendants.

*A. J. Willard*, for plaintiff.

By the Court — WOODRUFF, Justice. The complaint herein avers, that the plaintiff is the occupant of certain premises situated upon Catharine slip, in this city, used as a refectory and lodging-house. That the premises are situated directly opposite to a public market, and near to a public ferry, and that the street has been and was a great public thoroughfare. That the prosecution of the plaintiff's business, and the public health and convenience required that the said street should be kept clear and free of and from all permanent obstructions of every kind.

The complaint then proceeds to charge the defendants with having erected, or caused, or permitted, or ordered and directed to be built upon and about the sidewalk and street, adjoining the plaintiff's premises, divers stalls for the sale of meat, vegetables, and other articles usually sold at market, amounting to, being, and constituting an appropriation of the public street, to the plaintiff's injury, &c. It states the continuance of those stalls, and their use for the purposes aforesaid, by various persons, from June the 29th to September the 25th, 1854.

That the effect was to obstruct the sidewalk, render the street inconvenient for use, collect around the plaintiff's premises garbage and filth, offensive and injurious, &c., and in other ways stated, interfering with, unmanufactured goods under that contract. The defendant intentionally destroyed the machinery, etc., of the factory, so that no goods could be delivered, and the plaintiff lost the profits from the sales. May the plaintiff recover from the defendant? (1870, *Dale v. Grant*, 34 N. J. L. 142.)

The plaintiff had a statutory lien for \$270, for money advanced, on all the cotton-crop of K. Three bales were made by K. The defendant, knowing this, induced K. to bring the cotton by night to the defendant's premises, and the defendant then took the cotton out of the county, so that the lien could no longer attach. The plaintiff thus lost the means of collecting the debt from K. Has he an action on the case for this damage? (1895, *Michalson v. All*, 43 S. C. 459, 21 S. E. 323.)

NOTES:

"Aiding or inducing debtor to avoid payment of judgment." (H. L. R., X, 519.)

For the principles which may excuse persuasion to a breach of contract or other harm of this sort, see Book III, Title C, Sub-title (III).]

suspending, interrupting, and obstructing the due prosecution of the plaintiff's business by keeping away his patrons and visitors, &c., whereby he lost gains, profits, &c., and is damnified to the amount of two thousand dollars. The defendants answer by a general denial of all the plaintiff's allegations. Upon the trial, the jury were instructed, unqualifiedly, in these terms: "The plaintiff is entitled to recover, and you have only to assess the damages." The defendants having put in issue all the allegations in the plaintiff's complaint, the latter was bound, in order to entitle himself to such an instruction, to establish by evidence, uncontroverted, and admitting of no unreasonable doubt, every fact essential to his right to recover. We think the case, as disclosed by the evidence, did not warrant any such peremptory direction. . . .

In regard to the ruling on the trial, in receiving evidence to prove the plaintiff's damages, there was no error. If the defendants are liable at all, so far as they are liable they are bound to recompense the plaintiff for the damages unnecessarily produced by their acts under the views above suggested. It is not denied that loss of custom is the proper ground of recovery. To prove this was the object and direct tendency of the evidence; the plaintiff showed the actual receipts of his hotel for a year or more, previous to the obstruction complained of, the actual daily receipts during the continuance of the obstruction, and again the actual daily receipts for some months after the obstruction was removed. This furnished the means of computation, and of satisfactorily ascertaining the diminution of receipts. He also showed that the expenses were in the same, or about the same ratio to the receipts during the whole period. When it is borne in mind that the defendant kept a refectory and lodging-house for resort of daily visitors for their various meals, and of transient persons for their lodgings, it is difficult to suggest any other mode of ascertaining the effect upon the plaintiff's business than this. To say that he must prove what persons were prevented visiting his house, and what meals they would have taken and paid for, is to suggest a mode of proof obviously impracticable; and if it was done it would still leave the same inquiry, what would have been the profits upon the meals they took and paid for? which is now objected to.

The loss of custom, and the consequent loss of profits, is the very matter to be recompensed in this action; and the cases to which we are referred, in which loss of profits (it is said) cannot be recovered for, are not analogous. . . .

To illustrate this precise case, suppose A. had, on a given day, by some wrongful means, prevented any customer visiting the plaintiff's house, can it be doubted that in an action for the consequential damages, he would be liable for the loss sustained by the plaintiff thereby? I think not; and the mode of proving the loss would be just the one adopted on the present trial. . . .

Upon the ground first suggested, a new trial must be ordered. Costs to abide the event of the suit.



135. SHAW v. SOUTHERN PACIFIC RAILROAD COMPANY

SUPREME COURT OF CALIFORNIA. 1910

157 Cal. 240, 107 Pac. 108

APPEAL from the Superior Court of Tulare County — *W. B. Wallace*, Judge.

*Power & McFadzean*, for appellants.

*Lamberson & Lamberson* and *H. T. Miller*, for respondent.

SHAW, J. This is an action for damages for bodily injuries to the plaintiff, alleged to have been caused by the negligence of the defendants. The defendants appeal from the judgment and from an order denying their motion for a new trial.

The complaint alleges that by reason of the improper and negligent operation of its cars by the employees of the defendants, while the plaintiff was lawfully in one of its freight cars occupied in loading the same with boxes of grapes, the said boxes were caused to fall upon the plaintiff, "crushing, bruising, and wounding him," and that "by reason of said injuries plaintiff has become and is unable to do or perform any labor, and has become sick, bruised, sore, and disabled, . . . and has suffered and is now suffering great bodily and physical pain, . . . and has been permanently crippled and will continue to suffer from said injuries during the remainder of his lifetime." The damages thus caused are alleged to be in the sum of ten thousand dollars.

Upon the trial the plaintiff testified that before the accident his physical condition was good and that he was able to do the work that he was engaged in doing, and all parts of it. Over the objection of the defendants he was then permitted to testify that his business was that of loading railroad cars with fruit, doing the work by contract on a large scale and having from ten to twenty-five men in his service, that he was a good hand at the work, that prior to the injury he was able to give his full time to the work and to do all parts of it himself, and made from \$150 to \$300 a month on his contracts, that after the injury he did not make any money out of it because he was unable to superintend it correctly and do the work, that he was now working on a salary of from \$80 to \$100 a month, and that if he was able to perform labor as before he could get a larger salary.

1. If this evidence had been allowed to go to the jury for the purpose of establishing, as the measure of the damages to the plaintiff, the loss of the profits he would have made if he had continued in the business in which he was engaged prior to the injury, it would have been outside of the issues. A loss of profits does not always result from such an injury. Damages from such loss of profits are special in their nature, and the facts must be particularly alleged in order to admit evidence thereof and justify a recovery therefor. (*Treadwell v. Whit-*

tier, 80 Cal. 579.) The complaint does not allege a loss of profits. The allegation is merely that he was rendered unable to labor and was permanently crippled.

2. But the evidence was properly submitted to the consideration of the jury for a different purpose. In *Treadwell v. Whittier*, supra, the allegation was similar, although not so specific. It was there decided that it was proper to instruct the jury to consider the loss arising from the fact that the injury received rendered the plaintiff less capable of attending to his business than before, and that such loss was not special damage, but was provable and recoverable under general allegations of permanent disability. It is practically conceded in the case at bar that under such allegations it would be proper to prove the business or occupation in which the plaintiff had been previously engaged, and its nature, and that the injury rendered him less capable, or wholly incapable, of continuing such occupation or business. The authorities are in practical unanimity to that extent.

The real point of the objection, therefore, is, that while the jury may consider the work the plaintiff previously did and was able to do, or the business he was able to and did carry on, they may consider it only in a general way, and that when they come to determine what his financial loss has been from the deprivation of his former bodily ability and vigor, they must rely on their common knowledge as to the value of such occupation or business, to a man of his strength and capacity, and that they cannot have the aid which would come from proof of the amounts he had been accustomed to receive therefrom. Evidence of what a plaintiff had usually earned before his injury, either as wages, or in business on his own account, would be the most accurate, satisfactory, and valuable data from which to determine the value of the time and labor he has lost by being rendered unable to continue such occupation or business. For example, if he had previously made five thousand dollars a year by his personal efforts, and afterwards by reason of his injury could make no more than one thousand dollars, his damage from the deprivation of bodily strength would be much greater than if he had previously been able to make only two thousand dollars a year. The rule contended for would drive the jury from the actual facts of the case to their own surmises and experience as a criterion for decision as to the value of his time and labor. The authorities sanction the more accurate method. In *C. R. L. & P. Co. v. Posten*, 59 Kan. 453, the Court says:

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“In order that the jury may intelligently estimate the loss the plaintiff has sustained, it is necessary that they should be informed with reference to his business affairs, and while they may not, as compensation for the loss of his time, include speculative profits, or profits on invested capital, it is for them to say what loss has resulted to his business because of his being incapacitated from attending to it, and to award him as damages the value of his time and labor to himself in the transaction of his own business. This is the same com-

pensation, and for precisely the same reasons, that a clerk or agent doing the same work for wages might recover for his loss."

. . . In Sedgwick on Damages, volume 1, section 180, the rule is thus stated:

"The most trustworthy basis of damages, in such a case, is the amount which the injured party has earned in the past. This is, however, only evidence from which the jury will be enabled to say what the services of such a man as the plaintiff are worth, and the jury should distinctly understand that it is not to be taken as the necessary and legal measure of damages."

It is the loss occasioned by the particular man who was injured that is to be ascertained, if possible, and not the loss which an average man would sustain from a similar injury. The standard of an average man is resorted to only where the specific evidence as to the actual loss to the particular man is wanting and where experience teaches that there will be some loss from the injury. The following authorities are of similar effect to those above quoted: *Smith v. C. & A. Ry. Co.*, 119 Mo. 253; *Schmitz v. St. L., etc. Co.*, 119 Mo. 277; *Bartley v. Trorlicht*, 49 Mo. 219; *Frobisher v. Fifth Ave. T. Co.*, 30 N. Y. Supp. 1102; *Hamilton v. Great Falls, etc. Co.*, 17 Mont. 352; *Luck v. Ripon*, 52 Wis. 200; *Bloomington v. Chamberlain*, 104 Ill. 268; *Chicago, etc. Co. v. Meech*, 163 Ill. 314; *Chicago, etc. Co. v. Anderson*, 182 Ill. 298; *Wade v. Leroy*, 20 How. 34; *Chatsworth v. Rowe*, 166 Ill. 116; *North Chicago, etc. Co. v. Brown*, 178 Ill. 191; *Bailey v. Centerville*, 108 Iowa, 20; *Falangan v. Baltimore & O. R. Co.*, 83 Iowa, 643; *Goodheart v. Penna. R. Co.*, 177 Pa. St. 1; *Birkel v. Chandler*, 26 Wash. 241; *Ehrgott v. New York*, 96 N. Y. 276; *Cent. P. v. Senn*, 73 Ga. 709.

It is true that there are many decisions to the contrary, and some of the text writers say that the contrary decisions are in the majority. But, for the most part, they are based upon the doctrine that under a general allegation of permanent disability to work, evidence cannot be admitted to prove that his disability renders his devotion to his business less profitable to him after the injury than it was before. In this State the rule is, as established in *Treadwell v. Whittier*, *supra*, that the jury may, under such general allegations, consider the permanent loss from the fact that the injury renders the plaintiff less capable than before of doing the business in which he was previously engaged. If they can consider a loss of this character from partial disability, they can, of course, consider the loss from a disability which renders him wholly unable to carry on his former business and compels him to engage in a business less remunerative. And it would be absurd to say that the jury could consider such loss, and at the time refuse them the aid of any information as to the relative gains from the business formerly carried on and that subsequently conducted, the only facts that would show the actual value, to him, of his time and labor. If the latter were equally or more profitable, no doubt the defendant

would claim, and would be conceded, the right to show that fact in mitigation of the damages. In the States where such proof cannot be made unless the loss of business is specially pleaded, the rule is uniform that evidence of the wages received or gains from business, before and after the injury, is admissible. In this State, where such loss of business power may be considered without having been specially pleaded, it is obvious that the same rule should be applied and evidence of the wages or gains before and after the injury admitted.

The case of *Lombardi v. California St. Ry.*, 124 Cal. 311, is not in conflict with these views. There the plaintiff had specially alleged the amount of the loss by reason of his inability to attend to his business as he formerly did, and that it consisted of a specified sum paid as wages to men working in his place. He offered evidence of special damages from loss of profits in the business which was carried on by himself and a partner in which considerable capital was invested, concerning which there were no allegations. It was held that this evidence was improperly admitted. The Court says that the rule stated in *Treadwell v. Whittier* was not involved. In the case at bar the plaintiff had no capital invested, nor any partner.

It is necessary, in all such cases, as stated by Mr. Sedgwick, *supra*, to direct the jury that no allowance as damages can be made for the specific loss of profits that may be disclosed by the evidence of the comparative gains before and after. This the Court did in the present case. The jury was instructed that, in fixing the amount of damages, they could take into consideration the inability of the plaintiff to perform labor, caused by the injuries received from the defendant's negligence, but that they could not "award the plaintiff in this case any damages to compensate him for the loss of his business, trade, or calling." The evidence is received solely for the purpose of enabling the jury to more intelligently estimate the loss occasioned by his incapacity, and not as a basis for the allowance of the particular losses indicated. It is the usual and ordinary previous gains in his usual and ordinary business that is to be considered, and not exceptional or extraordinary profits from particular transactions. The instructions given as above put the matter to the jury in the proper light, and we must presume that it prevented them from allowing a loss of profits as damages, and that they considered the evidence objected to only to determine the plaintiff's damage from loss of earning power. . . .

The judgment and order are affirmed.

We concur:

ANGELLOTTI, J.

SLOSS, J.

**Topic 2. Destruction of the Relation by Defamation of the Plaintiff****SUB-TOPIC A. EXISTENCE OF THE RELATION, AND ITS LOSS, NOT PRESUMED. DAMAGE CERTAIN AND SPECIFIC (SPECIAL DAMAGE)**

136. W. S. *An Exact Collection of Choice Declarations, etc., translated into English for the benefit and help of young Clerkes* (1653. Part 2, p. 74). Declaration for words saying the plaintiff to be a felon [with allegation of special damage]. E. H. complaineth of W. T. in the Custody of the Marshall, etc. for that namely, hat whereas the said E. remained a good, true, faithful, and Liege Subject of the now Queen, and as a good, true, faithfull, and Liege Subject of the said now Queen, and of divers of her Progenitors, late Kings of England, from the time of his Nativity hitherto, behaved, had and governed himself, and of a good name, fame, condition, conversation, and gesture among all his Neighbours, and other faithfull Subjects of the Lady, the now Queen, with whom the said E. hitherto had fellowship, was noted, and reputed, and as a faithfull subject of the said Lady, the Queen, without any Crime of Theft, Felony, Falsity and Deceit, from the whole time aforesaid hath remained, and continued unhurtfull, untoucht, and unspotted; Notwithstanding which, the said W. not being ignorant of the Premisses, thinking to deprive the said G. of his good name, fame, and credit aforesaid, And so to bring him the said E. into a bad name, fame, and opinion of the Liege people of the said Lady, the Queen, as they the said Liege people of the said Queen, from the Company of him the said E. should withdraw themselves, and with him in any manner they distrusted to deal, or to have Commerce, And in forfeiture of all and singular his Goods and Chattells, Lands, and Tenements, and also to cause to be brought, and put into the danger of the loss of his life [in such a day and year, at, etc.] in the presence and hearing of divers Worshipfull, and other faithfull Subjects of the said Lady, the now Queen, then and there being and hearing, these scandalous and opprobrious English words following, the said W. did speak, utter, affirm, pronounce and publish, that is to say [etc.], by pretence of which said false and scandalous words, speech, and utterance, the said E. not only in his good name, fame, and credit aforesaid, which before towards his Neighbours, and divers Worshipfull, and other faithfull Subjects of the said Lady, the now Queen, he had used, is hurt; And also it is true, they his said Neighbours, and many more faithfull Subjects of the said Lady, the Queen, with the said E. in any manner refused to intermeddle by the said occasion, and from the company of the said E. they withdrew themselves, by which the said E. divers great gains, proffits, and advantages, which he in buying, selling, and lawfull bargaining with such his Neighbours, and other faithfull subjects of the said Lady, now Queen, to the Relief of him the said E. and his Family, might have gained, hath altogether lost, and to let pass to the Damage, etc.<sup>1</sup>

[<sup>1</sup> For the application, to this class of cases, of the principle of Remoteness of Consequences, see Book II, Title C, Sub-title (II).

For the principles which may Excuse persuasion to a breach of contract or other harm of the present sort, see Book III, Title C, Sub-title (III).

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:

*Herbert Spencer*, "Justice," c. XIII, The Right of Incorporeal Property, § 62.

*Henry Sidgwick*, "Elements of Politics," c. IV, § 2, par. II.

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. XI, § 342, p. 337.

*Thomas E. Holland*, "Elements of Jurisprudence," 9th ed., c. XI, par. III, p. 172.

137. SELL *v.* FACY

KING'S BENCH. 1615

2 *Bulst.* 276

IN an action upon the case for scandalous words, upon non culp. pleaded, a verdict was found for the plaintiff: It was moved for the defendant in arrest of judgment, that the declaration here is not good, in regard that he lays, for the ground of his action, a loss of his marriage by reason of the speaking of the words; he lays the same in this manner, "quod intendebat & conatus fuit" to have such a woman in marriage, and that by reason of the words spoken of him, "recusavit," she did refuse to have him. "Intendebat"; this is but onely to shew what his intention was; he lays no communication of marriage, and therefore the declaration is not good, for that he ought to have laid, "quod colloquium habitum fuit de matrimonio"; but it is not so, and therefore not good. . . .

DODDERIDGE, Justice. In an action of trespass, for beating of J. S. per quod servitium suum amisit, this is not good, if he do not lay it expressly that he was his servant. In this principal case, the Court was clear of opinion, that the declaration was not good, but advised the plaintiff to amend his declaration, and to lay, "quod colloquium habitum fuit de matrimonio." If the declaration here had been good, that there was a speech of marriage laid, then this hath been here adjudged, that these words are scandalous, per quod he lost his marriage; this hath been here adjudged good, for a man plaintiff, as well as for a woman; the words were, that he had a bastard, or words to the same effect, per quod he lost his marriage. . . .

CROKE, J. "Conabatur," it is individuum vagum, he ought to have said, "quod colloquium habitum fuit de matrimonio." "Conatus fuit" to sell his manor, is not good, in an action upon the case brought for slandering of his title, but he ought certainly to lay, that he was in speech of sale of the same and hindered by the words.

DODDERIDGE, J. The plaintiffe hath failed here in setting forth his wrong and dammage; for that intention is but the act of the mind, and this is to be taken divers ways.

COKE, Chief Justice. "Conatus,"—quid fit, non definitur in lege. The Court was all clear of opinion against the plaintiffe, that the declaration here was not good; and therefore they advised him, to begin his sute again, and to lay in his declaration an express colloquium de matrimonio; and a breach, or falling off, by reason of these words; but this declaration, as it is, is too short, and not good, and so judgment ought to be given against the plaintiffe, and accordingly the rule of the Court was, quod querens nil capiat per billam.



138. CHAMBERLAIN *v.* BOYD

QUEEN'S BENCH DIVISION. 1883

*L. R.* 11 *Q. B. D.* 407

CLAIM. 1. The plaintiff together with his brother was a candidate for membership of the Reform Club. The defendant was a member of the said club.

2. Upon a ballot of the members of the said club the plaintiff and his brother were not elected to membership.

3. Subsequently to the said ballot, a meeting of the members of the club was called to consider a proposed alteration of the rules regulating the election of members, and the defendant took an active and personal interest in the matter.

4. With a view to retain the regulations as they then existed, and to secure the exclusion of the plaintiff from membership of the said club, the defendant falsely and maliciously spoke and published of the plaintiff, together with his said brother, the words following, that is to say: "The conduct of the Messrs. Chamberlain" (meaning the plaintiff and his said brother), "was so bad at a club in Melbourne, that a round robin was signed urging the committee to expel them. As however they were there only for a short time, the committee did not proceed further": (meaning thereby that the plaintiff had been guilty of conduct, which justified his expulsion from a club in Melbourne, and which unfitted him from membership of the Reform or any other similar club). . . .

7. By reason of the said defamatory statements the defendant induced or contributed to inducing a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the said club. The plaintiff thus lost the advantage which he would have derived from again becoming a candidate with the chance of being elected. And the plaintiff suffered in his reputation and credit.

The defendant demurred. *Field, J.*, overruled the demurrer. The defendant appealed.

March 16, 19. *C. Russell*, Q. C. (*Houghton* with him, for the defendant. It may be conceded by the defendant that if the plaintiff had been rejected at an election for the Reform Club owing to the words complained of, an action would lie; but the claim in its present shape is bad on three grounds: first, there is no sufficient allegation of special damage; secondly, the special damage alleged is unconnected with the slander; thirdly, the special damage is too remote. . . .

*Sir H. James*, A. G., and *Crumphorne*, for the plaintiff. . . . It may be that the words complained of in the present action would be insufficient to support an action without special damage; but any temporal disadvantage is sufficient; it need not be a pecuniary loss. . . . The loss

of hospitality and the exclusion from the society of friends were sufficient to give cause of action. If the defamatory words lessened the plaintiff's chance of being elected, they are actionable; and the liability is the same, if they prevented the steps necessary to secure the plaintiff's election from being taken. . . .

LORD COLERIDGE, C. J. Several points have been raised during the argument before us, some of them merely verbal, but two are points of substance. . . .

First, no damage is alleged in respect of which the law allows an action to be brought. To take the question most favourably for the plaintiff, the statement of claim merely alleges that the defendant falsely and maliciously, that is, with an intention hostile to the plaintiff, spoke and published words whereby a change in the mode of the election of candidates at the Reform Club was prevented, and the members of that club were induced to retain a mode of election which gave less chance of success to the plaintiff if his name should be put up at the club again. I am clearly of opinion that it would be dangerous to hold that these averments give a ground of action: the damage alleged is unsubstantial and shadowy, and is in truth incapable of being estimated in money; and where words spoken, as in the present case, are not actionable in themselves, they can become actionable only when they have been followed by pecuniary or temporal damage. The case is new and is unsupported by the authority of any previous decision, and the argument for the plaintiff is entirely opposed to the principles upon which actions of slander have been determined. I am not inclined to extend the limits within which the law allows actions for defamation to be brought. Upon this ground alone, I think that the demurrer ought to be upheld. . . .

BOWEN, L. J. I am of the same opinion. I decide the case not upon any ingenious criticism of the words used; at this stage of our legal history we ought not to weigh too nicely the language of pleaders. . . . I am of opinion that there is no legal damage such as is necessary to sustain the action. In law, words spoken are different from words written, and special damage is necessary to support an action for slander not imputing crime, misconduct in a profession or a trade, or some kinds of disease; and in the present case no loss of any temporal advantage is alleged. I do not say that if the defendant by speaking the words complained of had actually prevented the election of the plaintiff, the latter might not have had a cause of action. Possibly the membership of a club may be a matter of temporal advantage, and the deprivation of it may be an injury or damage of which the law will take cognizance. But it is not alleged that the defendant's words prevented the election of the plaintiff, and that is the fatal blot in the plaintiff's case. . . . It might have been different if it had been stated that by reason of the defendant's words the plaintiff had been deprived either of the opportunity of standing again or of all chance of being elected. But

that is not alleged in the claim: all that is stated is that the plaintiff was prevented from again seeking to be elected, that is, that the determination of the club to retain the regulations under which the plaintiff had been rejected, made him think it not worth his while to stand again for election. The defendant's words did not deprive the plaintiff of all chance of being elected; they only deprived him of "a" chance. And "a" chance is a word expressive only of the measure of the uncertainty of a man's own mind. Putting the case in the strongest manner for the plaintiff, it only comes to this — that the refusal to alter the regulations kept him in a position in which an election might or might not result in his being chosen a member. But that appears to me to leave the damage too remote, and to place it beyond the line which the law has wisely drawn. The risk of temporal loss is not the same as temporal loss: the risk of suffering injury is not the same as to suffer injury. If it were otherwise, the limitation which the law imposes on liability to actions for words spoken would be entirely done away with, because the party defamed could always urge that he had lost the chance of an advantage or had run the risk of an injury. But the "chance" of an advantage is not the same as the advantage, and the risk of an injury is not the same as the injury. The law had said that in order to support an action for words spoken not imputing crime, misconduct in a trade or profession, or disease, there must be a loss of some temporal benefit, and the plaintiff has failed to shew any.

I also think that the damage alleged is far too remote, and also that it is not the natural and probable consequence of the words spoken. As to this part of the case I have nothing to add to what has fallen from LORD COLERIDGE, C. J., and BRETT, L. J., and I concur in their judgments.

*Judgment for the defendant.*

### 139. HUTCHINS v. HUTCHINS

SUPREME COURT OF NEW YORK. 1845

7 Hill 104

ON demurrer to the declaration. The first count was in these words:

"For that whereas the said defendants (Benjamin B. Hutchins, Daniel Strang and Sarah his wife, James W. Wilde and Caroline his wife), heretofore, to wit, on the first day of January, 1842, and at sundry times previous thereto, at Fishkill, to wit, at the town of Poughkeepsie in the county of Dutchess, did fraudulently combine, confederate and conspire with each other maliciously and for the purpose of enhancing their own interest in the estate of Benjamin Hutchins, the father of the said plaintiff, now deceased (then residing at Fishkill in said county, and being a person of advanced age, and weak and feeble in body and mind, and incapable of transacting business), and for the purpose of injuring and defrauding the said plaintiff of his rights which otherwise would have accrued to him as devisee of the said Benjamin Hutchins, under his will

duly made and executed, bearing date the 10th day of November, 1828, at which time said Benjamin Hutchins was in the full enjoyment and possession of his mental faculties, as was well known to the said defendants, and to induce and prevail upon the said Benjamin Hutchins to revoke his said will, and make and execute another will, whereby the said plaintiff would be wholly deprived of the benefits and rights that would otherwise have accrued to him under said first mentioned will: and the said defendants then and there did, by so fraudulently, maliciously and wrongfully combining, confederating and conspiring together, and by means of fraud, deceit, falsehood and misrepresentation, and by falsely representing to the said Benjamin Hutchins, in conversation, 'that the said plaintiff was getting all his, said Benjamin's, money away, and spending it on his, the said plaintiff's sons, that the said plaintiff was embezzling his, the said Benjamin's, money, and putting it out with his own &c., and that the said plaintiff was mortgaging his, the said Benjamin's, land, and would ruin him, the said Benjamin, so that he would have to go to the county house,' all of which representations were unfounded, untrue, and malicious, did prevail upon and induce the said Benjamin Hutchins to make and execute another will prepared by them, the said defendants, for that purpose, thereby revoking said first mentioned will; and the said Benjamin Hutchins did, after so making and executing the said last mentioned will, depart this life; and the said last mentioned will was, after the said Benjamin's decease, and before the commencement of this suit, duly proved before the surrogate of the county of Dutchess: whereby the said plaintiff was wholly deprived of the interest, benefits and rights that otherwise would have accrued to him under the first mentioned will, had the same remained valid and unrevoked," &c.

The second count was like the first, except in the following particulars: it recited a clause of the first will by which the said Benjamin Hutchins devised a farm to the plaintiff, known as the Ackerman farm, consisting of 151 acres; and charged the defendants with having falsely represented to the said Benjamin, by letters which they caused to be written and sent, that the plaintiff pretended to have a large account against him, sufficient to absorb the whole of his estate, which was to be presented after his decease, for the purpose of depriving the other children of their just shares, &c.: by means whereof

"the said defendants did thereby prevail upon and induce the said Benjamin to execute a will prepared by the said defendants, a part whereof relating to the plaintiff is in substance as follows, to wit: 'And whereas it hath been represented to me that my son William has an extravagant account against my estate, it is my will that if he brings any more accounts against my estate than the rent of the farm he lives on, then that he have no part of my estate, and that such part that might come to him be finally divided among the rest of my children and their heirs'; by which said last mentioned will the said above mentioned devise of the said Ackerman farm was wholly omitted, and the said first mentioned will was revoked," &c.

The third count alleged that the defendants induced the said Benjamin to revoke his first will, &c., by falsely representing to him that the plaintiff was a thief, a liar, a person not to be trusted, etc. In other respects the count was substantially like the first.

The defendant Benjamin B. Hutchins demurred to the declaration, and the plaintiff joined in demurrer. . . .

By the Court, NELSON, Ch. J. The allegation of a conspiracy between the defendants for the purpose and with the intent of committing wrong complained of in the several counts of the declaration, is of no importance so far as respects the cause and ground of the action. . . .

We may therefore lay out of consideration altogether the conspiracy charged against these defendants, in endeavoring to ascertain if any foundation is laid for the action; and regard it the same as if the defendant Hutchins had alone committed the several grievances for which redress is sought. . . . [After stating the case briefly,]

This is the substance of the case, in its strongest aspect, as presented by the pleadings; and the question arises whether any actual damage, in contemplation of law, is shown to have been sustained by the plaintiff?

Fraud without damage, or damage without fraud, gives no cause of action; but where both concur, an action lies. Damage, in the sense of the law, may arise out of injuries to the person or to the property of the party. . . . As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie.

Now, testing the plaintiff's declaration by these principles, has he made out a case from which it can be said that damage has resulted to him? I think not. In respect to the farm devised to him by the first will, he fails to show that he had any such interest in it as the law will recognize. The only foundation of his claim rests upon the mere unexecuted intention of his father to make a gift of the property; and this cannot be said to have conferred a right of any kind. To hold otherwise, and sanction the doctrine contended for by the plaintiff, would be next to saying that every voluntary courtesy was matter of legal obligation; that private thoughts and intentions, concerning benevolent or charitable distributions of property, might be seized upon as the foundation of a right which the law would deal with and protect.

I have not overlooked the cases referred to on the argument, of actions of slander, where special damage must be shown in order to make the words actionable. . . . If this description of special damage is to be regarded as the gist and foundation of the action, I rather think the principle should be regarded as peculiar to that species of injury. I am not aware of any class of remedies given for a violation of the rights of property, where so remote and contingent a damage has been allowed as a substantial ground of action. But the law applicable to the cases referred to proceeds upon the ground that the plaintiff, by the wrongful act complained of, has been deprived of the present, actual enjoyment of some pecuniary advantage. No such damage can be pretended here. At best, the contemplated gift was not to be realized till after the death of the testator, which might not happen until after the death of the plaintiff. or the testator might change his mind or lose his property.

In short, the plaintiff had no interest in the property of which he says he has been deprived by the fraudulent interference of the defendant, beyond a mere naked possibility; an interest which might indeed influence his hopes and expectations, but which is altogether too shadowy and evanescent to be dealt with by courts of law.

I am of opinion that the defendant is entitled to judgment.

*Ordered accordingly.*<sup>1</sup>

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## 140. HARTLEY v. HERRING

KING'S BENCH. 1799

8 T. R. 130

IN an action upon the case for consequential damage arising from certain slanderous words spoken by the defendant of the plaintiff, the declaration stated that the plaintiff was, until the speaking and publishing of the false, scandalous and malicious words, &c., from time to time occasionally employed to preach to a certain congregation of persons dissenting from the church of England, at a certain chapel situate and being in the parish of Saint Mary Lambeth in the county of Surry, for that purpose regularly and in due form of law licensed, and had by reason of such good character and for such preaching received divers great gains profits and emoluments to his great benefit and advantage and to the comfortable support of himself and his family, to wit, at, &c.; Nevertheless the defendant well knowing the premises but maliciously contriving and intending to deprive him thereof, and to bring him into disrepute and detestation among his neighbours and amongst the persons

### <sup>1</sup> [PROBLEMS:

R. made a will said to be in the plaintiff's favor. On R.'s death, the defendant took the will and suppressed it. The plaintiff brings an action of tort. (1909, *Thayer v. Kitchen*, 200 Mass. 382, 86 N. E. 952.)

A reward of \$200 had been offered for the arrest of a criminal. The plaintiff found out where the criminal was hiding, and called up a constable to send him to make the arrest, and share the reward; the telephone-receiver was in the defendant's store, the constable being near by there; the defendant answered the call, pretended to be the constable, got the information, made the arrest, and refused to divide the reward; is there an action? (1898, *Smith v. Gentry*, — Ky. —, 45 S. W. 514.)

The defendant, an ex-employee of the plaintiff, falsely stated to customers that the plaintiff was going out of business; the plaintiff had for several years prepared and sold a Christmas Annual; the defendant sold his annual instead. (1904, *Sheppard Pub. Co. v. Press Pub. Co.*, 10 Ont. 243; analogous facts: 1886, *Dudley v. Briggs*, 141 Mass. 582.)

"Suppose a man had a relation of a penurious disposition, and a third person, knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first has done, by which he induces the relation not to leave him money. Would that be actionable?" (*Per Littledale, J.*, in *Kelly v. Partington*, 5 B. & Ad. 645.)]



frequenting the said chapel, and to induce the said persons to prevent his preaching there or receiving any profit gain or emolument thereby on, &c. at, &c. scandalously, &c. spoke the following words, &c. (setting out the scandalous words, which charged the plaintiff with incontinence), per quod the plaintiff was injured in his good name, &c. and was fallen into disgrace among his neighbours and with the persons frequenting the said chapel as aforesaid, insomuch that the said persons frequenting the said chapel by reason of the speaking, &c. have wholly refused to permit him to preach at the said chapel, and have withdrawn from him their countenance and support, and have discontinued giving him the gains and profits and emoluments which they had usually given and would otherwise have given; and that the plaintiff was in other respects greatly damnified and hindered from getting his livelihood, to wit, at, &c.

*Best* moved in arrest of judgment in the last term, because words charging a person with incontinence are not actionable in the common law courts, unless special damage be laid; and here none is precisely laid, it not being stated who were the persons who in consequence of the slander discontinued giving the plaintiff the emoluments he had before received, or that there was any certain stipend annexed to the chapel, or that the persons who frequented had a right to remove him from it, or that he was a preacher duly qualified according to the 10 Ann. c. 2. And he cited 1 Roll. Abr. 58. C. 35. *Barnes v. Prudlin*, 1 Sid. 396, 7. and *Hunt v. Jones*, Cro. Jac. 499.

*Marryat* now shewed cause. The declaration alleges the special damage with as much certainty as the subject matter is capable of. It states that the plaintiff before the speaking of the scandalous words was employed to preach to a dissenting congregation at a certain licensed chapel, (the locality of which is stated,) and that he derived considerable profit from his good character and preaching, and that by reason of the scandal of the defendant the persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had and would otherwise have given. It was impossible to state who the congregation were by name, because being a large fluctuating and uncertain body they cannot be known to the plaintiff himself. The stating therefore where the chapel was, and the nature of the emolument which the plaintiff derived from his preaching, is stating as much as is necessary to enable the defendant to come prepared to meet the charge; and on this ground the cases cited are distinguishable from the present. 1 Roll. Abr. 58 was the case of slandering a brewer in his trade, by which he lost his customers, without stating any of them by name, which was holden ill: but there the plaintiff must have known who his customers were whom he had lost, and the defendant could not be enabled to defend himself without such notice. . . .

Lord KENYON, Ch. J. I see no objection to this declaration. But

in deciding the present case I wish not to shake the authority of any of the cases relied upon by the defendant, which are distinguishable from the present for the reasons given at the bar. Where a plaintiff brings an action for slander by which he lost his customers in trade, he ought in his declaration to state the names of those customers, in order that the defendant may be enabled to meet the charge if it be false. But here the plaintiff was in possession of this office; and we are to conclude upon this record that he was properly licensed. But how could he have stated the names of all his congregation? He has stated that, in consequence of the words spoken of him by the defendant, he was removed from his office, and lost the emoluments of it, which (I think) is sufficient.

The three other Judges expressing the same opinion, the

*Rule was discharged.*

#### SUB-TOPIC B. EXISTENCE OF THE RELATION AND ITS LOSS PRESUMED WORDS ACTIONABLE PER SE

141. ANON. *The Attorney's Practice in the King's Bench* (1750, 3<sup>o</sup> ed., Vol. II, p. 157). Declaration for words [with no allegation of special damage]. Kent, to wit. W. M. late of C. in the said county was attached to answer to F. R. in a plea of trespass on the case, etc. and whereupon the said F. by — his attorney complains, That whereas he the said F. is a good, true, pious, faithful and honest subject of this kingdom, and as a good, true, pious, faithful and honest subject of this kingdom hath hitherto demeaned and behaved himself, and as a good, true, pious, faithful and honest subject of this kingdom from the time of his nativity until the speaking, uttering and publishing of the scandalous, false, malicious and defamatory words first herein after mentioned to be spoken of the said F. was reputed and esteemed among all faithful and honest subjects of this kingdom with whom he dealt and conversed, and to whom he was known, and never was guilty of theft, robbery, fraud, or any such hurtful and odious crimes, nor until the speaking, uttering and publishing of the false, scandalous, malicious and defamatory words herein after first mentioned of the said F. was ever suspected to be guilty of those crimes or any of them: And the said F. by reason of his good name, fame, and reputation aforesaid, had obtained the love and good-will of all his neighbours and other faithful and honest subjects of this kingdom with whom he conversed and had dealings: Nevertheless he the said W. well knowing the premisses, but contriving and maliciously and wickedly intending to injure, defame and slander the said F. and to deprive him of his good name, fame credit and reputation aforesaid, and bring him into scandal, contempt and reproach, as well among all his neighbours, and friends, as other faithful and honest subjects of this kingdom, and to cause him to be punished according to the laws of this kingdom, made and provided against theft, robbery, felony and fraud, on the eighteenth day of march in the year of our Lord one thousand seven hundred and thirty-eight at Chatham aforesaid, in a certain discourse which the said W. then and there had with divers subjects of this kingdom of and concerning

the said F. did falsely, wickedly and maliciously speak, utter and publish of and concerning the said F. in the presence and hearing of those subjects, certain false, scandalous, malicious and defamatory words, to wit, He (meaning the said F.) is an old rogue and has robbed me (meaning him the said W.); And the said W. of his further malice prepensed against the said F. afterwards, to wit, on the same day and year, at Chatham aforesaid, in a certain other discourse which the said W. then and there had with divers other subjects of this kingdom of and concerning the said F. did falsely, wickedly and maliciously, and without any reasonable or probable cause whatsoever, publish and declare in the presence and hearing of those subjects, that the said F. had robbed him; by reason of the speaking, uttering and publishing which said several false, scandalous, malicious and defamatory words so spoken, uttered and published by the said W. of the said F. as aforesaid, and of the publishing of the said slander, he the said F. is greatly hurt, injured, prejudiced and damnified in his good name, fame, credit and reputation: . . . to the damage of the said F. of two hundred pounds: And thereupon he brings suit, etc

142. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England*. (1765. Book III, p. 123.) Injuries affecting a man's reputation or good name are, first, by malicious, scandalous, and slanderous words, tending to his damage and derogation. As if a man maliciously and falsely utter any slander or false tale of another; which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man hath poisoned another, or is perjured; or which may exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. . . .

A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous light, and thereby diminishes his reputation.

143. ROBERTS v. ROBERTS. (QUEEN'S BENCH. 1864. 5 B. & S. 384.) THE declaration stated that the plaintiff, Margaret, was a member of a sect of Protestant Dissenters, to wit, Calvinistic Methodists, and was a member of a private society and congregation of that sect held at Denbigh in North Wales, and the sect, and the different Societies of it, were subject to certain rules and regulations, and the different members of the sect and the Societies were respectively subject to those rules and regulations, and under the control and authority of the several respective Societies and of the leaders of the same, with respect to the moral and religious conduct of such members, and with respect to their being respectively allowed and permitted to be and continue to be members of the different Societies and congregations of the sect, and by those rules and regulations a member of one Society in the sect could not become a member of another Society in the sect unless the leaders or elders of the first-mentioned Society certified that the said member was morally and otherwise fit to be a member of such sect and of a Society of the same; and the defendant, being a member of the sect and of the Society to which the plaintiff Margaret then belonged, and well knowing the premises, falsely and maliciously spoke and published of the plaintiff Margaret, and of her as a member of such sect and Society, and in the presence of the leaders or elders and other members of the Society and congre-

gation which the plaintiffs and the defendant had just before then been attending, the false and scandalous words following in the Welsh language (setting them out), which words being translated into the English language have the meaning and effect following, and were so understood by the persons to whom they were so spoken and published, that is to say, "You" (meaning the plaintiff Robert Roberts) "have got for a wife" (meaning the plaintiff Margaret) "as great a whore as any in the town of Liverpool. . . ." meaning thereby that the plaintiff Margaret had been guilty of such immoral conduct as would prevent her being allowed and permitted to remain, become, or be a member of any Society and congregation of the sect aforesaid: and by means of the premises the plaintiff Margaret was not allowed or permitted to continue or be any longer a member of the Society and congregation aforesaid, and was turned out of the same, and the leaders or elders of the Society refused to certify that the plaintiff Margaret was morally or otherwise fit to be a member of the sect or of any Society or congregation of the same; and the plaintiff Margaret being desirous of becoming a member of a Society and congregation of the sect in Liverpool, was not allowed or permitted or able to become a member of the Society in Liverpool, and was prevented from attending religious worship; and by means of the premises the plaintiff Margaret became and was greatly injured in her good name and reputation, and became sick and ill and greatly distressed in body and mind. Averment, that, by means of the premises, the plaintiff Robert Roberts had been put to and incurred great expenses in and about nursing the plaintiff Margaret, and endeavouring to get her cured from her sickness, illness and distress of mind, and had sustained divers other injuries and damages. And the plaintiffs claimed 500*l*.

Demurrer, and joinder.

*McInture*, for the defendant. The words in the declaration are not actionable without special damage: *Allsop and Wife v. Allsop*, 5 H. & N. 534; *Lynch v. Knight and Wife*, in error, 9 H. L. C. 577. . . . And no special damage is alleged sufficient to render the words actionable by reason of such damage. . . .

*Crompton Hutton*, contra. Sufficient special damage to the wife is shown for which the husband may maintain this action. If the special damage must be pecuniary, an action for slander of a wife never could be maintained, as the damage would be to the husband, not to the wife. . . .

COCKBURN, C. J. No cause of action is shown on this declaration, as it does not allege special damage sufficient to make the words spoken of the female plaintiff actionable. It is admitted that the loss of consortium vicinorum is not sufficient; and I am of opinion that the loss by the female plaintiff of membership of this Society and congregation, which appears to have been constituted for religious or spiritual purposes, amounts at most to no more than the loss of the merely nominal distinction of being able to call herself a member of it. It does not appear that any real or material advantages attach to membership; such as loss of a seat in the chapel, or of the opportunity of attending Divine worship there. If by reason of the words spoken the female plaintiff had been excluded from the meetings for religious worship, or from anything substantial which by right attached to membership of the Society, I should be disposed to hold that it was sufficient special damage. I think that to prevent a woman whose character for chastity is assailed from bringing an action for the purpose of vindicating it is cruel; but, as the law at present stands, such an action is not maintainable unless it be shown that the loss of some

substantial or material advantage has resulted from the speaking of the words. That is not shown in this declaration, and therefore I reluctantly hold that the demurrer is good. If upon further inquiry anything can be found amounting to such special damage as the law requires, the plaintiffs may have leave to amend their declaration. . . .

BLACKBURN, J. The law upon the subject of disparaging words spoken of other persons is not in a satisfactory state. For words written an action is maintainable, though possibly not more than one farthing damages could be obtained, whereas for words spoken imputing unchastity to a woman no action can be maintained unless special damages is shown; for which purpose there must be material injury to the interests of the person slandered. What is here alleged is not more than loss of the consortium vicinorum.

*Judgment for the defendant.*

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(1) *Oral Defamation (Slander)*

144. CRITTAL *v.* HORNER

COMMON PLEAS. 1619

*Hob.* 219

CRITTAL brought an action of the case against Horner, for saying, that he had caught the French pox, and had carried them home to his wife, and had judgment: the slander is not in the wicked means of getting them, but in the odiousness of the infection, as a leper, 2 Cro. 144. 1 Roll. 44.

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145. LACY *v.* REYNOLDS

KING'S BENCH. 1591.

*Cro. Eliz.* 215

ACTION for words, which were, "He is as very a thief as any is in Warwick gaol"; and avers that J. S. was then a prisoner in Warwick gaol condemned for horse-stealing. And it was clearly held that for these words action did lie, with this averment, but not otherwise.

146. ROBINS *v.* FRANKS

KING'S BENCH. 1601

*Cro. Eliz.* 857

ACTION for these words: "Thou art a rogue, and a thief." After verdict it was moved in arrest of judgment, that an action lies not for

these words, for they are too general. — But the Court held, that for the word “thief” it is maintainable, unless it be coupled with other words, which prove it to be no felony intended. Wherefore it was adjudged for the plaintiff.

### 147. COOPER *v.* SMITH

KING’S BENCH. 1618

*Cro. Jac.* 423

ACTION for these words: “Thou has killed thy master’s cook” (innuendo one John Yarrington, servant to Mr. Dingley), who was murdered.

The defendant pleaded not guilty; and found against him.

It was moved in arrest of judgment, because he doth not shew who was the plaintiff’s master, nor that Mr. Dingley was master to him who was slain; so the words are uncertain. Sed non allocatur; for it is not material who was the plaintiff’s master, because the words in themselves import slander. Wherefore it was adjudged for the plaintiff.

### 148. PETT-MORGAN *v.* KENNEDY

SUPREME COURT OF MINNESOTA. 1895

62 *Minn.* 348, 64 *N. W.* 912

APPEAL by defendant William Kennedy from an order of the District Court for Ramsey County, Otis, J., overruling his demurrer to the complaint. Affirmed. . . .

*John L. Townley*, for appellant. The words set out in the complaint are not actionable per se. . . . The words must charge an indictable offence, involving moral turpitude and subjecting the person to infamous punishment. . . . So far as appears from the complaint, plaintiff was charged with misdemeanor punishable with a fine or imprisonment commutable to a fine. This is not an indictable crime, punishable with infamous punishment. . . . The imputation does not involve moral turpitude. . . .

*Frank P. Hopkins*, for respondent. . . . The words charged impute a crime. . . . The charge involved moral turpitude. . . .

COLLINS, J. It is further contended in appellant’s behalf that the words set out in the complaint as those spoken by Mrs. Kennedy are not actionable per se. They were as follows: “He has been drunk throughout Thanksgiving week. He has not returned any night during that week other than in a state of drunkenness. He has drunken people in his room. He gets people in his room and makes them drunk. He was drunk during the early hours of the morning after Thanksgiving.” Drunkenness is a crime under the laws of this State. G. S. 1894, 6949. It is punishable by indictment. It was held in *St. Martin v. Desnoyer*,



1 Minn. 131 (156), and again in *West v. Hanrahan*, 28 Minn. 385, 10 N. W. 415, that words spoken of another which, when taken in their plainest and most natural sense, and as they would be ordinarily understood, obviously import the commission of a crime punishable by indictment are actionable per se. It is barely possible that, in view of the many indictable offences in this State under the present statutes, some of which reflect very slightly, if at all, upon the moral character of a person indicted, the proposition so flatly laid down in these two cases will have to be qualified; but here the misbehavior charged in the words alleged to have been used by the defendant's wife was not only indictable, but involved the element of moral turpitude, and was such as to injuriously affect the social standing of the plaintiff. In view of the moral sentiment of the people of this State on the subject of drunkenness, so pronounced as to lead to the enactment of the Scheffer law in 1889, we do not hesitate to say that moral turpitude is involved in the charge that a man has been getting other people drunk, and has himself been on a drunken debauch lasting for a week. The words uttered, according to the complaint, were actionable per se.

*Order affirmed.*

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149. LOYD *v.* PEARSE

KING'S BENCH. 1618

*Cro. Jac.* 424

ACTION for these words: "Thou are a bankrupt rogue, and accounted a common knave; and thou art a thief, and hast stolen my corn." As to the first words, "Thou are a bankrupt rogue, and accounted a common knave," the defendant pleaded not guilty; and as to the other words he justified. The issue being thereupon joined, both the pleas were found for the plaintiff, and twelvecpence damages given for the first words, and for the last words thirty-nine shillings; and costs for both. — But the plaintiff having judgment for both, it was for this cause reversed: for the first words in the first issue are not actionable, the plaintiff being neither merchant nor tradesman; and the judgment being entire it is reversable in toto; for, in the judgment, the damages are conjoined, although they were severed in the verdict.

150. CLIFFORD *v.* COCHRANE

APPELLATE COURT OF ILLINOIS. 1882

10 *Ill. App.* 570

ERROR to the Circuit Court of Cook County; the Hon. *Elliott Anthony*, of the Superior Court, sitting as Circuit Judge, presiding. Opinion filed April 10, 1882.

This was an action for libel, brought by appellant against appellee, based on the publication of an article in the Chicago Times newspaper, and which was subsequently republished in the San Francisco Chronicle. The declaration sets forth, in substance, that the plaintiff was an architect by profession; that he was employed by the city hall commissioners of San Francisco, to superintend the construction of the new city hall building in that city; that he gave the required bond, and entered upon the discharge of his duties as architect of the building. It then alleges the formation of a conspiracy, by a ring composed of divers persons in San Francisco, including the proprietors of the San Francisco Chronicle, to force the plaintiff to resign, so that they might elect one of their own number, and thus get control of the expenditure of the moneys, etc.; that to that end they procured certain false "opinions" so-called, of other architects, and among others the opinion of the defendant, Cochrane, to the effect that the plaintiff was crazy and wholly incompetent to discharge the duties of an architect, and that his appointment would be a public calamity, etc. That the opinion of the defendant was in the form of a conversation or interview between a reporter of the Chicago Times and the defendant, the latter knowing at the time of making them that his statements were to be published in that paper. The declaration alleges that the statements were published in the Times, and a few days subsequently appeared in the Chronicle.

The interview, as reported in the Times, was as follows:

*Reporter* : "Mr. Cochrane, with your permission I should like to ask you a few questions. Do you know an architect by the name of John Clifford?"

*Cochrane* : "Well, I did know an architect by the name of John Clifford some years ago, but he has not been a resident here for several years. I wonder what has become of the poor fellow."

*Reporter* : "I can enlighten you. He is in California. What is your opinion of him both as an individual and an architect?"

*Cochrane* : "Well, as an individual, if you want me to speak frankly, I think he is crazy."

*Reporter* : "What would you say if he had been appointed architect of our city hall?"

*Cochrane* : "I could scarcely conceive of such a thing happening; but had it happened I should regard it in the light of a public calamity. But, excuse my curiosity, why do you ask these questions?"

*Reporter* : "Because Mr. Clifford has been appointed architect of the San Francisco city hall —"

*Cochrane* : "What, you are joking! Why, the thing is impossible."

*Reporter* : "Nothing is impossible under an inscrutable Providence. I am afraid you are weak in the faith. Let me reassure you. Not only has this come to pass, but more remarkable still, in view of what you have just said, he refers to you as one who can vouch for his qualifications to creditably fill the position."

*Cochrane* : "You don't say so! He refers to me, does he? Well, well, to be sure, this is a somewhat delicate matter; but I have nothing to take back. I again say that I cannot regard his appointment in any other light than a public calamity."

The declaration contains the usual colloquium and innuendoes, alleging the words to have been spoken of the plaintiff as an architect, and avers that in consequence of the republication of the article in the San Francisco Chronicle, his bondsmen withdrew as sureties on his bond, and being unable to procure others, he was forced to, and did, resign his position of the building in question. The declaration also avers that by reason of the committing of the several grievances complained of, the plaintiff has been injured in his good name and in his reputation as an architect, and has been deprived of great gains and profits, which would otherwise have accrued to him; and that he suffered special damage by being forced to give up his position as architect of the new city hall building, whereby he was deprived of large profits, etc. Damages laid at \$50,000.

To the declaration the defendant filed a general demurrer, which was sustained by the Court, and the plaintiff standing by his declaration, judgment was rendered for the defendant. The plaintiff appealed to this Court, and assigns for error the sustaining of the demurrer to the declaration. . . .

*Mr. W. T. Butler and Mr. Robert Hervey, for plaintiff. . . .*

*Messrs. Roberts & Hutchinson, for defendant in error. . . .*

WILSON, P. J. It is first insisted by the learned counsel for appellee, that the plaintiff's declaration consists of two counts instead of one, and that as such, neither count shows a cause of action. After a careful examination of the allegations and averments of the construction claimed, . . . [we do not accept this view.]

Were the words as set out in the declaration actionable without proof of special damages? That they are so, we entertain no doubt. It is a familiar principle that words not actionable in themselves may become so if spoken of one engaged in a particular calling or profession. The general rule in relation to the speaking words of one in a particular calling may be stated as follows: Any words spoken of such a person in his office, trade, profession, or business, which tend to impair his credit, or charge him with fraud, or indirect dealings, or with incapacity, and that tend to injure him in his trade, profession, or business, are actionable, without proof of special damage. Starkie on Slander, 178 and notes; Townshend on Slander, 278 (3d ed.); *Ostram v. Calkins*, 5 Wend. 263; *Demarest v. Haring*, 6 Cow. 76; *Chaddock v. Briggs*, 13 Mass. 247; *Chipman v. Cook*, 2 Tyler Vt. 456; *McMillen v. Birch*, 1 Binney, 178; *Day v. Buller*, 3 Wils. 59; *Onslow v. Horne*, Id. 177.

In the latter case Lord Ch. J. DeGrey said:

"One of the general rules governing this action, is that words are actionable when spoken of one in an office of profit which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and business, and do, or may probably tend to their damage."

The rule as thus succinctly and comprehensively stated, is quoted by Parker Ch. J. in *Chaddock v. Briggs*, supra, as also in many other

cases, and may be regarded as declaratory of the established principle governing this class of actions. Applications of this rule are found in the cases of clergymen, physicians, lawyers, tradesmen, mechanics, etc. Thus, to accuse a clergyman of incontinence, a physician of being a quack or humbug, a lawyer of being an ignoramus, a watchmaker of being a bungler, when spoken of them in their respective callings, is actionable per se, without proof of special damage.

In *Day v. Buller*, supra, which was an action against the defendant for slandering the plaintiff in his profession as an attorney, the words were, "What! Does he pretend to be a lawyer? He is no more a lawyer than the devil." It was held he was entitled to recover, the words having been spoken of him in his professional character, and so tending to injure him in his business as an attorney. But in another case, where an attorney was plaintiff, and the words were "He has defrauded his creditors, and been horse-whipped off a race-course," the words were held not actionable, without proof of special damage having been spoken of the plaintiff in his individual capacity. *Doyler v. Roberts*, 3 Bing. 835. To say of a physician, if spoken of him in his profession, he is "no scholar," was held actionable. *Starkie on Slander*, 112. But to say of him he is a "dunce," if spoken of him only as an individual, gives no right of action. The citation of analogous cases might be multiplied indefinitely, but it is unnecessary. It may be added that this distinction between the cases, of words spoken of a person in a particular calling and those spoken of him individually, is everywhere recognized and acted upon by the Courts in action for libel and slander.

Applying the rule as above stated to the facts of the present case, there can be no pretence for saying that the words, as alleged in the declaration and admitted by the demurrer, are not actionable per se. To say of the plaintiff, "The poor fellow is crazy," and that his appointment could be regarded in no other light than a public calamity, with other similar statements made and repeated after the defendant had been notified that the plaintiff had referred to him as to his qualifications as an architect, was, if the words were untrue, a grievous slander, which would naturally and almost necessarily tend to the plaintiff's injury. It was tantamount to a direct and positive assertion that the plaintiff was destitute of the necessary qualifications for the proper discharge of the duties of an architect. In actions for slander and libel, the rule no longer is, that words are to be understood in *mitiori sensu*, but they are to be taken according to their plain and natural import. The Supreme Court of Massachusetts say: "The old rule is exploded, and the more sensible course is to give the natural meaning and effect to the terms, according to the spirit and temper in which they appear to have been used." 13 Mass. 247, supra. But it is not necessary to invoke that rule, for here the words are plain and unambiguous, and are susceptible of only one meaning.

As to the plaintiff's claim for special damages by reason of the loss of his position as architect of the San Francisco City Hall, we are inclined to the opinion that no case is shown for the recovery of such damages under the allegations of the declaration. . . .

Being of opinion that the Court below erred in sustaining the defendant's demurrer to the declaration, the judgment is reversed and the cause remanded for further proceedings.

*Reversed and remanded.*

151. OHIO & MISSISSIPPI RAILWAY COMPANY *v.* PRESS  
PUBLISHING COMPANY

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.  
1891

48 Fed. 206

AT LAW. On motion for judgment on demurrer.

Action by the Ohio & Mississippi Railway Company against the Press Publishing Company for libel. Defendant demurred to the complaint, on the ground that "it appears on the face of the complaint that the said complaint does not state facts sufficient to constitute a cause of action." Plaintiff moved for judgment on the demurrer as frivolous.

*Butler, Stillman and Hubbard*, for plaintiff.

*Lowrey, Stone and Auerbach*, for defendant.

LACOMBE, Circuit Judge. The demurrant has wholly mistaken the cause of action set forth in the complaint. Defendant's publication is not declared upon as a "libel on a thing." A corporation, though an artificial person, may maintain an action for libel; certainly for language concerning it in the trade or occupation which it carries on. *Insurance Co. v. Perrine*, 23 N. J. Law, 402; *Mutual Reserve Fund Life Ass'n v. Spectator Co.*, 50 N. Y. Super. Ct. 460; *Omnibus Co. v. Hawkins*, 4 Hurl. & N. 87, 146; *Bank v. Thompson*, 18 Abb. Pr. 413. It is elementary law that every legal occupation from which pecuniary benefit may be derived creates such special susceptibility to injury by language charging unfitness or improper conduct of such occupation that such language is actionable, without proof of special damage.

The complaint avers that plaintiff is a railway corporation, duly organized and existing under the laws of the States of Ohio, Indiana, and Illinois, and a common carrier of goods and passengers, and that it maintains and operates certain lines of railroad. The occupation of the plaintiff, therefore, is the proper, safe, and business-like maintenance and operation of its railroad, so that it may reasonably discharge its duties as such common carrier of goods and passengers. Language which charges the plaintiff with such incapacity or neglect in the conduct of its business that belief in the truth of the charges would, as a

natural and proximate consequence, induce shippers of goods and passengers to refrain from employing the plaintiff as such common carrier, is actionable without proof of special damage. The particular language complained of here is the statement in defendant's newspaper that "over one-half of the ties in the road-bed [of the plaintiff] are rotten, and it is dangerous to run trains very fast." Such a publication is manifestly within the principle above laid down; and, as the complaint further avers that the statement was "false, . . . malicious, and made for the purpose of injuring the credit and business of the plaintiff," a cause of action is set forth in the complaint.

Motion for judgment on the demurrer as frivolous is granted.<sup>1</sup>

<sup>1</sup> [PROBLEMS:

The defendant said of the plaintiff, president of a miners' labor-union, that he was in the pay of the mine-owners. Was this actionable? (*McLaughlin v. Miller*, 32 Ill. App. 54.)

The defendant said of the plaintiff, a physician, "Dr. S. killed my children. He gave them teaspoonful doses of calomel, and it killed them." Was this actionable? (1854, *Secor v. Harris*, 18 Barb. 425.)

The defendant said of the plaintiff, a brewer, "He was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up." Was this actionable? (1841, *Jones v. Littler*, 7 M. & W. 423.)

The defendant said of the plaintiff, a physician, "He is a first or second fool." Was this actionable? (1900, *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526.)

The defendant bank, on presentation of a check by a payee in whose favor the defendant had drawn it, refused to pay, falsely saying that there were no funds to the plaintiff's credit. Was this actionable? (1896, *Svensden v. State Bank*, 64 Minn. 40, 65 N. W. 1086.)

The defendant said of the plaintiff, a merchant, that he was habitually slow in paying his debts. Was this actionable? (1899, *Seebold v. Tatlie*, 76 Minn. 131, 78 N. W. 966.)

Action on the case for these words uttered of the plaintiff, being an attorney: "He is a base cheating cozening knave, and hath cheated me as never any man was cheated." The question was, whether an action would lie for these words? for if he had not shewn that he was an attorney, an action would not have lien; and as it is laid barely, without any circumstance, it doth not appear that it toucheth him in his profession. The Court therefore would advise. (1639, *Jeffries v. Payham*, Cro. Car. 510.)

The defendant, a Roman Catholic clergyman, said of the plaintiff, a physician in the congregation, who had married again immediately after being divorced, "I refuse to go where that person is, because I would not meet an excommunicated person. If any of you are sick and want my assistance, you need not send for me if this person is there"; in consequence of which his patients all ceased to patronize him. Was this actionable? (1890, *Morasse v. Brochu*, 151 Mass. 567.)

NOTES:

"Slander of credit: Dishonor of check." (H. L. R., XV, 757.)

"Officer of corporation defamed: Suit by corporation." (H. L. R., XIV, 289.)

"Acts and words actionable: Words imputing unchastity to woman." (H. L. R., XX, 578.)

"Acts and words actionable: Suit by corporation because of defamation of its former officer." (H. L. R., XXI, 60.)]



152. VAN VECHTEN VEEDER. *History and Theory of the Law of Defamation*. (1904. Columbia Law Review, IV, p. 33, at p. 48.) The law with respect to slander leaves much to be desired. It is obvious that the class of slanders which are most dreaded, which inflict the greatest amount of pain, which occur most frequently, and which are most likely to lead to breaches of the peace and other evils abhorred by the law, are not those imputations comprised within the fourfold rule of actionable slander, but imputations of breaches of social code, the code of honour — untruthfulness, cowardice, treachery, and the like. And yet for such slanders the law provides no redress whatever; for they are not within the list of words actionable per se, nor are they likely to lead to such consequences as the law contemplates under the term special damages. It is actionable to say of a man that he is physically diseased; but you may call him a liar, with impunity. You may not say of a surgeon that he is a bad operator, or of a lawyer that he is ignorant of the law; but you may tell any stories you please about his private life and to the discredit of his personal character. And, most scandalous of all, in England, until very recently, any one was at liberty to slander a woman by the vilest forms of oral imputations upon her chastity, and the law gave her no redress.<sup>1</sup>

I. If, now, taking the law of slander as we find it, we examine the basis of the actionable quality of the particular imputations of which it is made up, it will be found to be as irrational and inconsistent as the selection itself. The principle of selection is past finding out. The one thing that is clear is that the right to reputation seems to have been completely lost sight of. Certain imputations are actionable not because they are defamatory, but for some other reason. . . .

a. An imputation of an indictable offence is said to be actionable per se because it tends to subject one to legal penalties, or, as it was put later, to degrade him in the public estimation. The application of the rule is anomalous. . . . To call him a rogue, a rascal, a swindler, surely exposes him to degradation; but such accusations are not actionable, because they do not endanger him in point of law! . . .

b. It is actionable to impute certain contagious disorders, because they tend to exclude a person from society on the ground of physical (not of moral) taint. It is actionable to charge one with having the plague, leprosy, or syphilis; but it is not actionable to charge one with having had these diseases, or with having any other than those named.<sup>2</sup> A person is not degraded by

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<sup>1</sup> This remarkable state of the law may be explained by reference to the common use of gross language as late as the beginning of the eighteenth century, and to the fact that for centuries the ecclesiastical courts had jurisdiction over such charges. See *Ogden v. Turner* (1704), Holt, 40; 6 Mod. 104. The local courts of the City of London took cognizance of such imputations because of the local custom of carting and whipping prostitutes. When the ecclesiastical courts lost their jurisdiction, such imputations might be made with entire immunity from legal action. In *Lynch v. Knight* (1861), 9 H. L. Cas. (577) 593, Lord Campbell commented upon the "unsatisfactory" state of the law; Lord Brougham denounced it as "barbarous." See also *Jones v. Herne* (1759), 2 Wils. 89, and *Roberts v. Roberts* (1864), 5 B. & S. 384 [supra, No. 143]. By the Slander of Women Act of 1891 (54 & 55 Vict. c. 51) the English law reached the plane of the Mosaic system. In this country such imputations were in many jurisdictions held to be actionable, in the absence of statutory enactments; but the matter is not commonly covered by statute.

<sup>2</sup> See on this subject *Solicitors' Journal*, XI, 1053, 1054.

having leprosy or the plague, as he is by having syphilis; and it is as disgraceful to have any other venereal disease as to have syphilis. The rule has also been put upon the ground of an unfitness to be admitted into society. This would apply equally to small-pox, or an infectious fever, neither of which is actionable.

c. Scandal of a person in the way of his profession, or trade, or means of livelihood, is actionable, because his pecuniary emoluments may be lost. Apart from the conduct of his business, you may freely impute to a merchant all the moral vices; but you must not call him a bankrupt. . . .

d. Finally, any defamatory words spoken of one become actionable upon proof of special damage. In this and in the scandal of a person in relation to his means of livelihood, the law is based squarely upon a pecuniary test. . . .

II. There are three obvious methods of reforming the law of slander.

1. The method commonly adopted among English-speaking peoples is to leave intact the general distinction between libel and slander, and merely remove its worst hardships by extending the list of defamatory imputations which are actionable *per se* when published orally. This course has been adopted in England with respect to imputations upon the chastity of women; but there it has stopped. Such imputations are believed to be universally actionable in this country. In some States further additions have been made by statute to the list of oral imputations which are actionable: adultery or want of chastity in general; <sup>1</sup> impotence; <sup>2</sup> incest and crimes against nature; <sup>3</sup> false swearing; <sup>4</sup> all words, which from their usual construction and common acceptation, are considered as insults, and lead to violence and breaches of the peace.<sup>5</sup>

This patch-work plan is quite in accordance with the spirit of English law reform; but it has little else to commend it. No doubt it is an improvement in the law simply to enact that imputations upon chastity, and some other additions of a like nature, shall be actionable *per se*. But this course does nothing towards removing the theoretical absurdity of the existing law; it would be, moreover, at best merely temporary and imperfect. The injury and annoyance inflicted by particular imputations vary in different classes of society, in different places and circumstances, and especially at different periods. No possible foresight in the enumeration of actionable slanders could make the law reasonably just and equal, even for the present generation; and the next generation would have to do the whole work over again to meet altered conditions. Moreover, no change of this kind could give the relief required without a change also with regard to the special damage sufficient to support an action of slander. Any list of actionable slanders could only include such as are ordinarily likely to produce serious discomfort and loss of credit and respect; but manifestly there must be cases in which those evils would in fact result from other imputations not included in such a list. Yet to extend the protection of the law in such cases by changing the definition of special damage

<sup>1</sup> Arkansas, California, Illinois, North Carolina, North Dakota, Oklahoma, South Dakota, and Tennessee. The Georgia statute allows an action in general terms for imputations of any debasing act which may exclude a person from society, and specifically provides for a charge "against a free white female of having sexual intercourse with a person of color."

<sup>2</sup> California, North Dakota, Oklahoma, South Dakota.

<sup>3</sup> Indiana and Washington.

<sup>4</sup> Arkansas and Illinois.

<sup>5</sup> Mississippi, Virginia, and West Virginia.

would be quite impracticable. To say that mental distress and loss of the opinion of others, with consequent exclusion from society, should be sufficient special damage to support an action, would be in effect to say that all slanders should be actionable.

2. Another method is to substitute for the present distinction, on the ground of mere form, some other classification of a more rational character, applicable to slander and libel alike, founded upon real and substantial distinctions, such as the nature of the imputation, the degree of publicity given to it, or other circumstances surrounding its utterance. In such a method the essential points would be the nature of the imputation and the degree of publicity given to it. This method was adopted in France by the Law of May 17th, 1819. Defamatory publications were divided into two classes, diffamation and injure, the latter being in turn subdivided into two kinds, and each of these three kinds of defamation constituted a distinct offence, and was subject to a prescribed measure of punishment. . . .

3. The third method, which is alike the simplest and the best, is to abolish at once the distinction between libel and slander, and assimilate the law of slander to that of libel. Its advantages are evident. It would put an end at once to the theoretical absurdity of the present law; it would be free from the mischiefs of needless refinement; it would be an efficacious and complete remedy for the mischief to be met; and it would, so far as appears, be a final and lasting settlement of the question. The only plausible objection to it seems to be that it might tend to encourage litigation and lead to oppressive and vexatious actions. These objections apply with quite equal force to the present law of libel. Moreover, in Scotland, where the remedy is alike whether the defamation be oral or written, there has been apparently no serious complaint on this score, and Scotchmen are not less litigious than other people. And such a system has long worked well in the State of Louisiana. Actions of libel are controlled by the law with respect to privilege and by the law of costs. In the case of writings these have been found sufficient to protect the interests of the public and of individuals, and to prevent frivolous actions, and they would do the same with oral publications.

It has been more than once attempted to make this change in English law. In 1816 Brougham introduced a bill in the House of Commons providing that all words, whether spoken or written, which were "in any way injurious to the character and reputation of the plaintiff," should be actionable. But the measure was lost because it contained clauses affecting State prosecutions for libel which raised party questions.<sup>1</sup> The task was again essayed in 1843 under the competent guidance of Lord Campbell. The very important Act which bears his name was the final result of recommendations which embraced other points than those enacted, among which were the following:

"With a view to afford protection to fair fame, to guard honorable men from vexatious litigation, and effectually to put down traffic in calumny, the Committee have come to the following resolutions, to wit:

1. That an action should be maintainable for any words, spoken without just cause, tending to injure the reputation of another — e. g., words imputing want of chastity to a woman, or want of courage or veracity to a man.

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<sup>1</sup> In 1834 Daniel O'Connell introduced a bill on this subject; but it was very loosely drawn, and, whether so designed or not, would in fact have assimilated the law of libel to that of slander.

2. That in an action for words, unless the words impute an indictable offence, it shall be open to the jury, under the plea of not guilty, or non damnificatus, to consider whether, under the circumstances when the words were spoken, they were likely to injure reputation ; and if they think that they were not, to find a verdict for the defendant, without any special justification."

The grounds of these proposals were thus stated in the Report of the Committee:<sup>1</sup>

"At present, while for any words reduced into writing which in any way tend to injure reputation, though communicated to only one individual, the law gives a remedy, there is no remedy without proof of special damage for mere words, however injurious to reputation, and however publicly spoken, unless they impute an indictable offence, or apply to a man in his business, or import that he is laboring under an infectious disease; so that, falsely and maliciously to impute, in the coarsest terms and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honor, cannot be made the foundation of any proceeding civil or criminal; whereas an action may be maintained for saying that a cobbler is not skilful in mending shoes, or that any one has held up his hand in a threatening position to another. The Committee conceive that these distinctions, which are quite peculiar to the law of England, do not rest on any solid foundation, and that wherever an injury is done to character by defamation there ought to be redress by action.

"There might be a danger of frivolous actions for words if costs were to be recovered by the plaintiff where the jury award only nominal damages, and if the jury were obliged to find a verdict for the plaintiff for all defamatory words without considering whether on the occasion when they were spoken they were likely to make any impression on the bystanders; but the Committee think that this danger will be obviated by the existing regulation, which takes away the right to costs where the damages are under forty shillings, and by allowing the jury to consider, in the cases in which an action is now given, whether, under the circumstances, the words were likely to injure reputation, and, without a special justification, to find a verdict for the defendant."<sup>2</sup>

## (2) *Written Defamation (Libel)*

### 153. THORLEY *v.* LORD KERRY

EXCHEQUER CHAMBER. 1812

4 *Taunt.* 355, 3 *Camp.* 214

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench. The plaintiff below declared that . . . the defend-

<sup>1</sup> The report is printed in the *Law Times*, I, 341.

<sup>2</sup> [NOTES:

"Proposed changes in law of libel and slander." (H. L. R., III, 86, 331; XVI, 148.)

In *Cooper v. Seaverns*, — Kan. —; 105 Pac. 509 (1909), Burch, J., in a learned, sensible, and eloquent opinion, reviews the history of the law of slander in detail, and confirms the views represented in Mr. Veeder's article; the question of law was whether an imputation of unchastity in a woman is actionable without special damage proved.]

ant below, . . . maliciously did compose and publish, and cause and procure to be published of and concerning him, . . . the false, scandalous, malicious, and defamatory and libellous matter following. . . . "I sincerely pity the man (meaning the plaintiff below) that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods." . . . Upon not guilty pleaded, the cause was tried at the Surrey spring assizes 1809, when the writing of the letter by the defendant was proved, and that he delivered it unsealed to a servant to carry, who opened and read it; a verdict was found for the plaintiff with 20*l.* damages, and judgment passed for the plaintiff without argument in the Court below. The plaintiff in error assigned the general errors.

*Barnewall*, for the plaintiff in error, in Trinity term 1811, argued, that there were no words in this case, for which, if spoken, the action would be maintainable, and he denied that there was any solid ground, either in authority or principle, for the distinction supposed to have prevailed in some cases, that certain words are actionable when written, which are not actionable when spoken. He contended that all actionable words were reducible to three classes: 1. where they impute a punishable crime; 2. where they impute an infectious disorder; 3. where they tend to injure a person in his office, trade, or profession, or tend to his disherison. . . . And these words do not come within either of those classes. . . .

*Dampier*, in affirmance of the judgment. . . . The principle on which actions may be sustained for words is rather narrowly laid down in the argument for the plaintiff in error, when the causes of action are said to be only crime, pecuniary damage, and infectious disease. . . . 2 Wils. 403, *Villars v. Monsey*. *Bathurst, J.*, held that writing and publishing anything of a man that renders him ridiculous, is a libel, and actionable; and fully recognized the distinction between written and spoken slander.

MANSFIELD, C. J., delivered the opinion of the Court.

This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the plaintiff was tenant to Archibald Lord Douglas of a messuage in Petersham; that, being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house, that the plaintiff in error was churchwarden, and that the defendant in error gave him notice of his agreement with Lord Douglas; and that the plaintiff in error, intending to have it believed that the said earl was guilty of the offences and misconducts thereafter mentioned (offences there are none, misconduct there may be), wrote the letter to the said earl which is set forth in the pleadings. There is no doubt

that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals was sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action.

But the question now is, whether an action will lie for these words so written, notwithstanding such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action between written and parol scandal; for myself, after having heard it extremely well argued, and especially, in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the Courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is, therefore, actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal.



But that distinction has been established by some of the greatest names known to the law, Lord Hardwicke, Hale, I believe Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it. Com. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says there is a distinction between written and spoken scandal; by his putting it down there as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken; upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

*Judgment affirmed.*

#### 154. LATHROP v. SUNDBERG

SUPREME COURT OF WASHINGTON. 1909

55 Wash. 144, 104 Pac. 176

DEPARTMENT 1. Appeal from Superior Court, King County; *Arthur E. Griffin*, Judge.

Action by C. F. Lathrop against John C. Sundberg and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with instructions.

*Willett and Willett*, for appellant.

*McBurney and Cummings*, for respondents.

FULLERTON, J. This is an action for libel. In his complaint the appellant, who was plaintiff below, alleged that he was a regular graduate osteopath from a school of osteopathy, holding a doctor's degree as an osteopathic physician from such school; that at the time of filing his complaint he was, and for a long time prior thereto had been, practising his profession in Seattle, in the State of Washington, having his office in the Eitel Building, in such city, which building was owned by the respondent, Crane Realty Company; that on or about March 16, 1908, the respondents published and circulated of and concerning him in his business and professional capacity a petition, addressed to the owners of the Eitel Building, in the following words:

"We, the following reputable physicians and dentists, occupying offices in the Eitel Building, endeavoring to uphold the honor and dignity of our professions and desiring to encourage only the best and most desirable tenants for our office building, and thereby conserve the best interests of the public at large, are most emphatically opposed to the indiscriminate rental of offices in this building to osteopaths, neuropaths, autopaths, chiropractors, uptontereists, unprofessional masseurs, criminal practitioners, 'medical institutes,' advertising 'specialists,' patent medicine fakirs, quacks, charlatans, and other fraudulent concerns. We therefore demand the removal of all such persons now holding offices in this building and the exclusion therefrom of all such undesirable tenants in the future."

He further alleged that the signers of the petition delivered a copy thereof with their names attached thereto to R. G. Shrader and the Crane Realty Company, and that these persons caused the same to be circulated and published. He then alleged that the respondents intended by the publication to and did charge him with being a quack and a charlatan in his profession, and with operating a fraudulent concern, and with being an undesirable tenant; and that such charges were false and untrue, and were made wilfully, without just cause or excuse, and for the purpose of injuring and destroying the appellant's good name, and to expose him to hatred, contempt, and ridicule, etc., and that by reason thereof he has suffered damages in the sum of \$75,000. To the complaint a demurrer was interposed by the respondents, which the trial Court sustained. The appellant thereupon elected to stand on the complaint, when a judgment of dismissal and for costs was entered against him. This appeal was taken therefrom.

The record does not disclose the ground upon which the trial judge sustained the demurrer to the complaint, but counsel in this Court contend that it was properly sustained for two reasons: First, that the writing on which the action is founded is not libellous; and, second, if it be held to be libellous, it must be held to be privileged. That the writing is libellous per se it has seemed to us there can be but little question. In order to constitute a civil libel per se, it is not necessary that the words published should involve an imputation of crime. It is enough that they be of such a nature that the Court can presume as a matter of law that they will tend to disgrace the party of whom they are published, or hold him up to public ridicule, or contempt, or cause him to be shunned or avoided. The published article in question here tends to do all this, if it does not tend to do more. It carries an insinuation that the appellant is not a reputable physician, or one endeavoring to uphold the honor and dignity of the profession. It classes him with criminal practitioners, patent medicine fakirs, quacks, charlatans, and other fraudulent concerns. It demands his removal from the building in which he has his office as an undesirable tenant, and demands that in the future he be excluded therefrom. Clearly this is libellous per se if published of and concerning the appellant, and he is engaged in a reputable practice, and that it was published of and concerning the

appellant and that his practice is reputable, was distinctly alleged in the complaint. . . .

The complaint states a cause of action. The judgment appealed from is reversed and remanded, with instructions to reinstate the case, and require the respondents to answer to the merits of the complaint.

RUDKIN, C. J., and CHADWICK, GOSE, and MORRIS, JJ., concur.

## 155. QUINN v. REVIEW PUBLISHING COMPANY

SUPREME COURT OF WASHINGTON. 1909

55 Wash. 69, 104 Pac. 181

DEPARTMENT 2. Appeal from Superior Court, Spokane County;  
*E. H. Sullivan*, Judge.

Action by Edward F. Quinn against the Review Publishing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*H. M. Stephens*, for appellant.

*Alex. M. Winston*, for respondent.

MOUNT, J. The respondent brought this action to recover damages upon two causes of action, for alleged libels published against him in the regular issues of the *Spokesman-Review*, on June 6 and 7, 1908. The action was tried to the Court and a jury. A verdict was returned in favor of the plaintiff on the first cause of action for \$999, and on the second cause for \$1. The defendant has appealed.

It appears that the respondent was appointed inspector of sidewalks and cement and concrete work thereon for the city of Spokane, in May, 1904; that he continued as such inspector until July, 1905, when he became chief inspector of such work until June 5, 1908, when he was discharged. It was respondent's duty to inspect all sidewalk work done under contracts with the city, and to see that the terms of such contracts were faithfully complied with by the contractors. While he was chief inspector he had several inspectors under him, and it was his duty to instruct these inspectors, and also to see that they performed their duty. On June 5, 1908, respondent was discharged for alleged incompetency, and the next day the *Spokesman-Review* published an article as follows:

*"Blow at Graft and Jobbery.*

"One by one facts are being disclosed by City Engineer Ralston which demonstrate that the management of the city business under the old Daggett-Omo-Gill-McIntyre régime, now drawing slowly to an end, has been honey-combed with inefficiency, favoritism, and graft. The domination of the board of public works by a majority of the members of the city council, and the presence until recently in the city engineers' office of an engineer who conducted that office with little regard for the efficiency in the service, together with the prevalence throughout of an iniquitous and corrupting system of political pull, have conspired to undermine the integrity of the business and of the city admin-

istration for the profit of favored contractors and others having business dealings with the city. Disclosures of the past few days have shown that appointments to places under the Omo board of public works have been made upon recommendation of members of the council with no regard for the fitness of the applicants; that specifications for contract work have been drawn carelessly in the interests of dishonest or careless contractors, that the system of inspection over street improvement contracts has consisted of one half idle pretence and the other half deliberate favoritism, exerted in behalf of contractors who were influential with the political powers behind the foreman of inspectors, Ed. Quinn. City Engineer Ralston is to be heartily commended for his action in securing the removal of Foreman Quinn and thereby striking one effective blow at this system of graft and jobbery. Already the efforts of Mayor Moore to restore responsible government to the city hall in the interests of the taxpayers are beginning to bear fruit."

And on June 7, 1908, another article was published as follows:

*"Camera Catches False Inspectors.*

*"Civilian Spies also aid in Detecting City Sidewalk Frauds.*

"A small army of volunteer civilian inspectors and a professional photographer were employed by City Engineer Ralston in procuring the evidence of the collusion of city inspectors through which cement contractors have been able to cheat the city in cement work by from 15 to 35 per cent of the amount of cement called for in their contracts and from 10 to 30 per cent of the actual cost of the work. As a result of the efficient employment of these agencies the engineer has made a case against some of the inspectors which is unshakable, and it was upon this evidence that he discharged a number of inspectors and procured the discharge of Foreman Quinn for inefficiency. Some of the disclosures obtained by the engineer prove the ingenuity of the contractors themselves, but others indicate that the skimping of cement work was accomplished through the frankly confessed negligence or collusion of the inspectors employed by the city to watch the contractors."

It is argued by the appellant that these articles are not libellous per se, but, if libellous, are true, and that, therefore, the trial Court erred in denying the appellant's motions made at the close of respondent's evidence, and again at the close of all the evidence, for a directed verdict. In the case of *Wofford v. Weeks*, 129 Ala. 349, 30 South. 625, 55 L. R. A. 214, 87 Am. St. Rep. 66, the Supreme Court of Alabama quoted from *Iron Age Publishing Company v. Crudup*, 85 Ala. 520, 5 South. 333, as follows:

"Generally any false and malicious publication, when expressed in printing or writing, or by signs or pictures, is a libel, which charges an offence punishable by indictment, or which tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society. This general definition may be said to include whatever tends to injure the character of an individual or blacken his reputation, or imputes fraud, dishonesty, or other moral turpitude, or reflects shame, or tends to put him without the pale of social intercourse." And then said: "This quotation

clearly recognizes the principle that, if the words employed in the alleged libellous publication impute dishonesty or corruption to an individual, they are actionable *per se*—a principle well established in other jurisdictions. So, too, it is libellous to impute to any one holding an office that he has been guilty of improper conduct in office, or has been actuated by wicked, corrupt, or selfish motives. Newell, *Defamation, Slander & Libel*, p. 69."

Under this definition, which is no doubt correct, the publications in this case were clearly libellous *per se*. They charge that the management of the city business under the old régime has been honeycombed with inefficiency, favoritism, and graft; that the domination of the board of public works by a majority of the city council and the presence of an engineer, together with the prevalence throughout of an iniquitous and corrupting system of political pull, have conspired to undermine the integrity of business and of the city administration, for the profit of favored contractors; that the system of inspection over street improvement contracts has consisted of one half idle pretence and the other half deliberate favoritism, exerted in behalf of contractors who are influential with the political powers behind the foreman of inspection, Ed. Quinn. City Engineer Ralston is to be commended for his action in securing the removal of Foreman Quinn, and thereby striking an effective blow at this system of graft and jobbery. It is plain that this article and the one published the next day, upon which the second cause of action was based, clearly charged the respondent with being part of the system of jobbery and graft in the management of city contracts, and the main one through whom such jobbery and graft were accomplished; and it was no doubt intended thereby to charge, and did charge, the respondent with being guilty of improper conduct in office, and that he has been actuated by wicked, corrupt, and selfish motives. The articles were therefore libellous *per se*. . . .

We find no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., and PARKER, DUNBAR, and CROW, JJ., concur.

## 156. PECK *v.* TRIBUNE COMPANY

SUPREME COURT OF THE UNITED STATES. 1909

214 *U. S.* 185, 29 *Sup.* 554

ARGUED April 29, 30, 1909. Decided May 17, 1909. On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Illinois, directing a verdict for the defendant in an action for libel. Reversed.

Reported below, 83 C. C. A. 202, 154 Fed. 330.

The facts are stated in the opinion.

*Mr. S. C. Irving*, with whom *Mr. Rufus S. Simmons* and *Mr. Frank J. R. Mitchell* were on the brief, for petitioner.

The article declared upon was libellous and actionable per se. . . . Words must be construed in their ordinary meaning. . . . The publication which imputes to a person language known to those among whom she lives to contain false statements is libellous. . . . To charge a person with being a liar is libellous per se. . . . Even though the libel does not name the person injured, it is sufficient if it can be shown that it refers to him. . . . Though plaintiff's name was not mentioned, still the words of the publication may clearly refer to the plaintiff. . . . Mistake is not excuse for the publication of a libel.

*Mr. John Barton Payne*, with whom *Mr. William G. Beale* was on the brief, for respondent.

The publication of the advertisement, together with the picture of the petitioner, was not libellous per se. . . . The advertisement not being libellous per se, petitioner cannot maintain an action for the publication of her picture because it violates her alleged right of privacy.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an action on the case for a libel. The libel alleged is found in an advertisement printed in the defendant's newspaper, *The Chicago Sunday Tribune*, and, so far as is material, is as follows: "Nurse and Patients Praise Duffy's. Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving, and Curative Properties of Duffy's Pure Malt Whisky." Then followed a portrait of the plaintiff, with the words, "Mrs. A. Schuman," under it. Then, in quotation marks, "After years of constant use of your Pure Malt Whisky, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all local and run-down conditions," etc., etc., with the words, "Mrs. A. Schuman, 1576 Mozart St., Chicago, Ill.," at the end, not in quotation marks, but conveying the notion of a signature, or at least that the words were hers. The declaration alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer from whisky and all spirituous liquors. There was also a count for publishing the plaintiff's likeness without leave. The defendant pleaded not guilty. At the trial, subject to exceptions, the judge excluded the plaintiff's testimony in support of her allegations just stated, and directed a verdict for the defendant. His action was sustained by the Circuit Court of Appeals, 83 C. C. A. 202, 154 Fed. 330.

Of course, the insertion of the plaintiff's picture in the place and with the concomitants that we have described imported that she was the nurse and made the statements set forth, as rightly was decided in *Wandt v. Hearst's Chicago American*, 129 Wis. 419, 421, 6 L. R. A. (N. S.) 919, 116 Am. St. Rep. 959, 109 N. W. 70, 9 A. & E. Ann. Cas. 864; *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725. Therefore the



publication was of and concerning the plaintiff, notwithstanding the presence of another fact, the name of the real signer of the certificate, if that was Mrs. Schuman, that was inconsistent, when all the facts were known, with the plaintiff's having signed or adopted it. Many might recognize the plaintiff's face without knowing her name, and those who did know it might be led to infer that she had sanctioned the publication under an alias.

There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait, or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libellous, the defendant took the risk. As was said of such matters by Lord Mansfield, "Whenever a man publishes, he publishes at his peril." *R. v. Woodfall*, Lofft, 776, 781. See further, *Hearne v. Stowell*, 12 Ad. & El. 719, 726; *Shepherd v. Whitaker*, L. R. 10 C. P. 502; *Clarke v. North American Co.*, 203 Pa. 346, 351, 352, 53 Atl. 237. The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable if the statements are false, or are true only of some one else. See *Morasse v. Brochu*, 151 Mass. 567, 575, 8 L. R. A. 524, 21 Am. St. Rep. 474, 25 N. E. 74.

The question, then, is whether the publication was a libel. It was held by the Circuit Court of Appeals not to be, or, at most, to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whisky is wrong, or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may be that the action for libel is of little use, but, while it is maintained, it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride. See *Martin v. The Picayune* (*Martin v. Nicholson Pub. Co.*),

115 La. 979, 4 L. R. A. (N. S.) 861, 40 So. 376. It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view. *Culmer v. Canby*, 41 C. C. A. 302, 101 Fed. 195, 197; *Twombly v. Monroe*, 136 Mass. 464, 469. See *Gates v. New York Recorder Co.*, 155 N. Y. 228, 49 N. E. 769.

It is unnecessary to consider the question whether the publication of the plaintiff's likeness was a tort per se. It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with other facts, even if more subtilty is needed to state the wrong than is needed here. In this instance we feel no doubt. *Judgment reversed.*

## 157. MERRILL v. POST PUBLISHING COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1908

197 Mass. 185, 83 N. E. 418

APPEAL from Superior Court, Essex County.

Action by W. Harvey Merrill against the Post Publishing Company, for libel. From a judgment for defendant, plaintiff appeals. Affirmed in part and reversed in part.

The following is the alleged libellous article referred to in the opinion.

"Blood relatives and co-heirs, living together in the house jointly owned for over twenty years, and not having spoken to each other for over ten long years, is the strange story of Salem's divided house, of which Miss Sophie Merrill, now out on bail in connection with thefts from the Salem post office, is a member.

"She and her father, William H. Merrill, occupying and owning half of the house 12 Liberty Street, and her cousin, John Barker, occupying and owning the other half, have lived under the same roof, used the same entrances and the same yard, have passed each other in the entries of the house day in and day out, and have never exchanged even a syllable in all that long ten years.

"Ever since Miss Merrill, to the great surprise of all who knew her, was arrested, charged with the theft of mail matter from the post office, of which her brother is the official head, many sensational stories have been afloat.

"The veil of mystery seems to surround the strange case of Sophie Merrill, who, on an income of \$900 a year, was, it is alleged, forced to steal in order to live. . . .

"While she herself is little known, Postmaster Merrill's friends are legion, and there is great sympathy for him, in view of what was to him a great and unexpected blow.

"After his sister's arrest he or his wife, to whom the property belonged, sold

five houses in South Salem at a sacrifice, for the same reason, it is said, that he desired to turn the East Boston house into cash.

"For a long time after his sister's arrest Mr. Merrill called every day to see her. . . .

"Even Postmaster Merrill, a man with a sunny disposition and an unusual number of friends, has enemies. He has lost a fortune in his lifetime, and is said to be heavily burdened with debt, besides which he is heavily weighed down by the crushing calamity that has fallen upon him. . . ."

*Harrison Dunham*, for appellant.

*Elder & Whitman* and *James T. Pugh*, for appellee.

LORING, J. It is alleged in the first count, which by reference sets forth at length the whole article published in the defendant's newspaper, that this article was published "of and concerning the plaintiff, in conjunction with his sister also mentioned in said libellous publication."

We are of opinion that as matter of law there is nothing in what is there written as to the mystery of the divided house No. 12 Liberty Street, Salem, which is a libel on the plaintiff. It is not stated that the plaintiff lived at that house during the time in question. It was Sophie and her father and John Barker and his mother who originally lived in the two halves of that house, and the period of ten years' silence between the two families began about 1894, when John Barker's mother died. During this time the plaintiff lived "in South Salem," and it is stated that after Sophie's arrest John Barker "always spoke to his cousin, the postmaster, in whose trouble he sympathized."

If the first count sets forth a libel on the plaintiff, it is in substance because, in a variety of ways, the article in question states "of and concerning the plaintiff" that his sister Sophie has been arrested for larceny of letters from the post office.

The defendant's argument is that this is a libel on Sophie and not on the plaintiff. This is undoubtedly a libel on Sophie, but it does not necessarily follow that it is not a libel on the plaintiff also. See *Dow v. Long*, 190 Mass. 138, 76 N. E. 667. To write of a man that he is the brother of a sister arrested for larceny might well be thought by a jury "to impair his . . . standing in the community," to use the language employed by this Court in *Bishop v. Journal Newspaper Co.*, 168 Mass. 327, 331, 332, 47 N. E. 119.

In almost every case of libel the reputation of the plaintiff as to character is attacked. The case at bar presents the question whether there are not statements which affect a person's standing in the community which do not affect his character. And we are of opinion that there are. It was so decided in *Shelby v. Sun Printing & Publishing Ass'n*, 109 N. Y. 611, 15 N. E. 895, affirming "on opinion below," the decision made below reported in 38 Hun, 474. The libel in that case consisted in stating that the plaintiff and his sister "are illegitimate children of the adopted father's intimate friend." In the Court below it was stated that:

"In this case there was no charge against the integrity or morality, or behavior or reputation, of the plaintiff. The statement is that she is illegitimate, a circumstance over which, of course, she could have no control, and for which she was personally in no way responsible. In the estimation of mankind, however, as it is understood, the assertion that a person is illegitimate is a reproach, and one which might, in all probability, frequently subject the person of whom it is said to contumely, to indignity, and, perhaps, to insult. It is unfortunate to be obliged to take this view of human conduct, but we must take the world as we find it, and reason out the problems which are presented to us with reference to human frailties or human prejudices, whatever may be the designation given to a disposition often exhibited to make a person suffer for the deeds of his ancestors."

And in support of that conclusion Starkie on Slander and Libel (Am. ed. of 1830), 166, and the cases of *Cropp v. Tilney*, 3 Salk. 226, and *Villars v. Monsley*, 2 Wils. 403, were there cited. See also, in this connection, Wythens, J., in *Baldwin v. Flower*, 3 Mod. 120; Odgers, Libel & Slander (4th ed.) 16.

The statement that the plaintiff is a bastard is not the only statement which affects his standing in the community. We cannot doubt that it would be a libel to publish of a white man that he is a negro. A negro may be far more noble in character than the white plaintiff; but that is not the question. If a plaintiff is stated in writing to be a negro when he is in fact a white man, his standing in the community is or may be affected.

In our opinion the same is true of a written statement that the plaintiff's father and mother and other ancestors were criminals, and in a less degree, as in the case at bar, that a brother or sister is a criminal or has been arrested for crime.

The defendant has cited the case of *Subbaiyar v. Kristmaiya* (I. L. R.) 1 Mad. 383, as a decision to the contrary. That was a case where a brother brought an action because the defendant had uttered a defamatory statement as to his sister. The defamatory statement in that case was made of the sister and not of the plaintiff, and the plaintiff's name was not mentioned in connection with the statement in question. All that was decided in that case was that to be the foundation of an action the defamatory words complained of must have been spoken of the plaintiff. The decision was plainly right. To write of a woman that she has had an illegitimate daughter (who is not named) is a libel on the woman. But it is not a libel on the woman's illegitimate daughter, and although it may hurt the daughter she cannot sue the defendant because he has published a libel of and concerning her mother. See in this connection the reasoning of Cranch, C. J., in *Johnson v. Brown*, 4 Cranch, C. C. (U. S.) 235, 237, Fed. Cas. No. 7375. On the other hand, to write of the daughter that she is an illegitimate child, without naming the mother, is a libel on the daughter, as was held in *Shelby v. Sun Printing & Publishing Ass'n*, 109 N. Y.

611, 15 N. E. 895, but it is not a libel on the mother. And although the mother may suffer she cannot sue, for the reason that the defamatory words were not written of her. The cases of *Luckumsey Rowji v. Hurbun Nursey* (I. L. R.), 5 Bomb. 580, and *Sorensen v. Balaban*, 11 App. Div. 164, 42 N. Y. Supp. 654, are cases where the defamatory words were spoken of a deceased person, and they are decisions standing on the same footing as *Subbaiyar v. Kristmaiya*, *ubi supra*, namely, that the defamatory words were spoken of the deceased person alone and were not spoken of the plaintiff.

The case at bar is a case where the defamatory words are alleged to have been spoken "of and concerning the plaintiff, in conjunction with his sister also mentioned in said libellous publication." It remains to consider whether that is legally possible; whether, for example, a written statement that a woman (naming her) has had an illegitimate daughter, (naming her) is or may be a libel on both, and we are of opinion that it may be, although the case of *Wellman v. Sun Printing & Publishing Ass'n*, 66 Hun, 331, 21 N. Y. Supp. 577, seems to be a decision to the contrary.

We are of opinion that we cannot withdraw the case stated in the first count from the jury. To do so we must be able to say that with respect to the plaintiff the publication is not reasonably capable of being understood in a defamatory sense. See *Twombly v. Monroe*, 136 Mass. 464, 469. . . .

It follows that the entry must be:

Judgment for the defendant on the third and fourth counts affirmed.  
Judgment for the defendant on the first and second counts reversed.

## 158. DAVIS *v.* NEW ENGLAND RAILWAY PUBLISHING COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1909

203 *Mass.* 470, 89 *N. E.* 565

REPORT from Superior Court, Suffolk County.

Suit by William L. Davis against the New England Railway Publishing Company and others. The cause was heard by a single justice on the demurrers of the respective defendants, and the cause was reported for the opinion of the full court. Demurrer overruled, with leave to answer.

*Warren, Hoague, James & Bigelow*, for plaintiff.

*Edwd. F. McClellen* and *A. T. Wright*, for defendants.

KNOWLTON, C. J. The plaintiff is the proprietor of the Northern Express Company, which carries merchandise between Boston and many cities and towns in Massachusetts, Maine, and New Hampshire. He also sublets portions of his office to the proprietors of other express companies doing business in or near Boston. The defendant corporation

is the publisher of the "A. B. C. Pathfinder and Dial Express List." The bill contains the following averments: "The publication is the only one of its kind issued or in circulation in Boston. The publication is in a form intended and calculated to create in the minds of the public the belief that it contains the names of all the reputable local expresses doing business in Boston and vicinity. It has created and does create such belief in the minds of the public. This belief is the main, if not the sole, reason inducing purchases of the publication by the public. This belief has enabled the corporation to obtain a large circulation among the business houses and general public in Boston and vicinity. The above publication is usually and frequently consulted by persons having occasion to employ a local express. It has come to be accepted by the general public as the recognized directory of local express companies." There are other averments showing some of the particulars of the contents of the publication, which tend to support the above general averments, and particularly the averment that it is intended and calculated to create in the minds of the public the belief that it contains the names of all the reputable local expresses doing business in Boston and vicinity. A copy of the publication is made a part of the bill, and it tends to confirm and strengthen this averment. It is averred that "the plaintiff and each of his subtenants is conducting his express business in a lawful and proper manner, and to the convenience and satisfaction of his patrons"—in substance, that these express companies are reputable—and that "no good reason exists why the defendant corporation should discriminate against them or any of them, or should exclude reference to them or any of them from its publication." It is averred that the defendant corporation has omitted any reference in its publication to the business of the plaintiff or of his subtenants, and that it is about to bring out another issue of the same general publication, and has been requested to include the plaintiff's office in the list of express offices, and to make reference to the express business of the plaintiff and his subtenants, and has refused and still refuses so to do. The plaintiff also alleges that the defendant corporation refuses to assign any reason for its objectionable conduct.

It is alleged that the other two defendants control a majority of the general local express companies whose names appear in the publication, that they have an acquired and dominating influence in this business in Boston, and are seeking to obtain an absolute monopoly of this kind of business, to the exclusion of the plaintiff. He avers that they have conspired together to prevent the publication by the defendant corporation of any reference to the business of the plaintiff and his subtenants, and by threats and false statements have induced the defendant corporation to leave the plaintiff and his business without mention in the publication.

The case comes before us on a demurrer, which, for the purposes of the hearing, admits the truth of all the averments of the bill.



The ground on which the plaintiff seeks relief is not that he has a right to compel the defendants or either of them to do anything for his benefit, but that he has a right to have them refrain from intentionally doing anything, without legal justification, to his injury. The defendant corporation professes to give the public a full list of all the reputable express companies doing business in Boston. While it does not say in express words that the list is complete, that is the meaning which the publication is intended to convey and does convey. Its list is false and misleading, to the plaintiff's injury. One purpose of the list is to show the public where they can go to get their express business done. Another purpose is to give the express companies named in the list the benefit of having their names and the nature of their business brought before the public who have such business to be done. The direct effect of the false statement is to point those who want the services of an express company to other companies, and to divert them from the plaintiff. They are told, in substance, that there is no such person as the plaintiff, and no such company as the Northern Express Company, engaged in this kind of business. The averment of the plaintiff that he is greatly injured in this way is no more than a statement of the natural result of publishing a directory of express companies with his name and the name of his company left out of it. An intentional act of this kind, without excuse, is a violation of his legal rights. It is the publication of a falsehood concerning him, the direct and natural effect of which is to injure him in his business. The public is misled by the intentional publication of an incorrect list. But the gist of the plaintiff's action is the wrong done him by intentionally turning away from him those who otherwise would do business with him. He is entitled to a remedy for this wrong.

It is peculiarly a case for equitable relief. The wrong is a continuing, and in a sense an irreparable, one. The extent of the injury cannot be measured accurately in an attempt to assess damages.

The injury is to property, and it is not technically a libel upon the plaintiff. The rule that a court of equity will not enjoin the mere commission of a crime does not apply. The conduct complained of works a continuing and permanent injury to the plaintiff's property. Upon proof of the facts set out in the bill, the plaintiff will be entitled to an injunction to protect him from the wrongful publication. . . .<sup>1</sup>

<sup>1</sup> [PROBLEMS:

"We are looking into the doings of this tribe of attorneys. It looks very much as though they put their heads together, and each of them get as much out of the estate as possible. An outside attorney told me a few days ago that M. had put a lien on the John Zeller estate for \$1,250 on account of the heirs you represent, and \$500 extra to fight the church, making \$1,750 for one and the same thing. Outrage!" Was this libellous? (1898, *Mosnat v. Snyder*, 105 Ia. 500, 75 N. W. 356.)

"He is a dangerous, able, and seditious agitator." Was this libellous? (1895, *Wilkes v. Shields*, 62 Minn. 426, 64 N. W. 921.)

"We feel that the firm of B. are withholding money collected from and belong-

(3) *Publication. Innuendo. Hearer's Understanding of Words*159. PRICE *v.* JENKINS

EXCHEQUER CHAMBER. 1591

*Cro. Eliz.* 865

ACTION for words. And declares, that the defendant spake these words in Welsh (reciting them particularly), signifying haec Anglicana verba, "Thou hast murdered thy wife." After verdict, and judgment for the plaintiff, error was brought and assigned in hoc, that it is not averred that the words were spoken in the company of Welshmen, or of such who understood the Welsh tongue; but it is alleged that they were spoken in praesentia et auditu quamplurimorum subditorum dominae reginae. And the action was brought in the county of Monmouth,

ing to this company, and that the criminal laws provide for their action." Is this libellous? (1899, *Merchants' Ins. Co. v. Buckner*, C. C. A., 98 Fed. 222.)

Is it libellous to print of a white man that he is a colored man? (1905, *Flood v. News & C. Co.*, 71 S. C. 112, 50 S. E. 637.)

Is it libellous for one newspaper to term another the "Evening Ananias"? (1894, *Australian Newspaper Co. v. Bennett*, 1894, App. Cas. 284.)

"He is low enough. You can't get him down any lower. You can't spoil a rotten egg." Was this libellous? (1895, *Pfitzinger v. Dubs*, C. C. A., 64 Fed. 696.)

The plaintiff is arrested on a charge of crime, but has not been convicted nor tried; is it a libel to place the photograph in the "rogue's gallery," i. e., a book of photographs of ex-convicts and other suspicious persons with whose faces all detective officers are required to be familiar? (1909, *Downs v. Swann*, 111 Md. —, 73 Atl. 653.)

The plaintiff, a physician, belonged to a medical society which forbade its members to advertise their cures, this being contrary to medical ethics. A committee reported resolutions to this effect, and the plaintiff for the committee gave to the defendant newspaper a copy of the resolutions. A few days later, the defendant, without consent of the plaintiff, published an account of a great cure by the plaintiff. Was this libellous? (1906, *Martin v. N. O. Picayune*, 115 La. 979, 40 So. 376.)

The defendant published, of the plaintiff's wife, who assisted the plaintiff in carrying on his business as a grocer and draper, that she had committed adultery. The plaintiff could prove a falling off in the profits of his business since the publication, but could not prove the loss of any specific customers. Has he an action? (1876, *Riding v. Smith*, L. R. 1 Ex. D. 91.)

The plaintiff alleged that the defendant had published in a newspaper the false statement that the plaintiff's title as a shareholder in a certain mine was defective and that the working of the mine had therefore been stopped by legal proceedings; and in consequence of this defamation his shares had depreciated in market value and he had been prevented from selling them. Was this actionable? (1836, *Malachy v. Soper*, 3 Bing. N. C. 371.)

The defendant advertised a foreclosure of a mortgage, known to him to be fraudulent, held by him upon the plaintiff's premises, in consequence of which the plaintiff's tenants held back the rent then payable. Has he an action? (1898, *Gore v. Condon*, — Vt. —, 39 Atl. 1042.)

The plaintiff was a physician of the regular school, having an office in the

which was once parcel of Wales, but was now an English county. — And all the Justices and Barons held, that for this cause it was erroneous; for it shall not be intended that any there understood the said tongue, unless it had been shewn; and then it was not any slander, no more than if one spake slanderous words in French or Italian; an action lies not, unless it be averred that some there present understood those languages; as it was held in the case of *John v. Daux*. But because the damages were found to 50*l.* and if the plaintiff should begin *de novo*, he might not have peradventure so great damages, they moved him to accept of 10*l.* and to make an end without further proceedings: and so it was done, and no judgment entered.

## 160. HICK'S CASE

STAR CHAMBER. 1619

*Hob.* 216

ONE sent a letter, closed and sealed up, to Sir Baptist Hicks, which was so delivered to his hands, containing many despiteful scandals delivered ironice, as saying, "*You will not play the Jew nor the hypocrite,*" and in that sort taunting him, for an almshouse and certain good works that he had done; all which he charged him to do for vain-glory. Whereupon Sir Baptist Hicks sued him in the Star-Chamber. And now upon hearing it was resolved, that though it were not proved that the defendant had any way published it, yet the Court would hold plea of it, and so did, and fined the defendant, and sentenced him to wear papers, and to make his submission to Sir Baptist Hicks in Cheapside. Yet an action of the case will not lie in that case, for want of publication; but the King and Commonwealth are interested in it, because it is a provocation to a challenge, and breach of peace.

building with numerous quacks, etc. The defendant sent the letter set forth in the case of *Lathrop v. Sundberg*, supra, No. 154. Has the plaintiff an action? (1909, *Dunlap v. Sundberg*, — Wash. —, 104 Pac. 830.)

## ESSAYS:

*Frank Carr*, "The English Law of Defamation; its History." (L. Q. R., XVIII, 255, 388.)

*H. Campbell Black*, "Libel of the Dead." (A. L. R., XXXIII, 578.)

## NOTES:

"Effigy, libel by." (H. L. R., VII, 492.)

"Photograph of plaintiff in connection with libellous article." (H. L. R., XVII, 359.)

"Acts and words actionable: Defamation of plaintiff's sister." (H. L. R., XXI, 448.)

"Libel by publication of picture." (M. L. R., II, 496.)

"Libellous per se." (M. L. R., III, 242.)

"White man published as 'colored.'" (M. L. R., III, 669.)

"Slander of title: Disparaging quality of property; special damage." (C. L. R., VII, 628.)

161. PELZER *v.* BENISH<sup>1</sup>

SUPREME COURT OF WISCONSIN. 1886

67 Wis. 291, 30 N. W. 366

APPEAL from Circuit Court, Jackson County.

Action for slander. Demurrer to complaint. Overruled. Defendant appeals.

*Joseph Roy*, for respondent, Pelzer.*J. C. Gores* and *T. F. Frawley*, for appellants, Benish and others.

TAYLOR, J. This is an action for slander. After the preliminary allegations, the complaint alleges the slanderous words spoken as follows: "He [the plaintiff meaning] is a swindler. He [the plaintiff meaning] has swindled everybody. He, [the plaintiff meaning] and speaking in the German language, is a 'spitzbube,' meaning, and the persons so hearing so understanding, that the plaintiff was a thief and a robber. That the language so spoken by the defendant was the German language, and the persons so present and hearing the same all understood the German language, and so understood the words spoken of and concerning the plaintiff by the said defendant as imputing the crimes aforesaid."

The defendants are husband and wife, and the words are alleged to have been spoken by the wife. To this complaint the defendants demurred on the ground that it does not state facts sufficient to constitute a cause of action. The Circuit Court overruled the demurrer, and from the order overruling such demurrer the defendants appealed to this Court.

The learned counsel for the appellant insist that the demurrer should have been sustained upon two grounds — First, because the complaint alleges that the slanderous words were all spoken in the German language, and the slanderous words in the complaint are all set out in the English language, with the exception of the one word, "spitzbube"; and, second, because the complaint does not give a translation of that German word in the English language. The first objection to the complaint was held good by this Court as long ago as 1850 (see *Zeig v. Ort*, 3 Pin. 30–32), and as late as 1884 (see *Simonsen v. Herold Co.*, 61 Wis. 626; s. c. 21 N. W. Rep. 799), and in this last case, the case of *Zeig v. Ort* is cited to sustain the objection. The allegations of the complaint showing that the slanderous words were spoken in the German language, it was clearly the duty of the pleader to set out the words in that language. It is also equally clear that, after having set out the slanderous words in the German language, if they were in fact spoken in such language, such words should have been followed by a translation into the English language, and an allegation of the correctness of such translation. See *Simonsen v. Herold Co.*, *supra*. In this com-

<sup>1</sup> [For examples of an innuendo in a declaration, see Nos. 141, 143, *ante*.]

plaint there is no translation of the one German word set out in the complaint. Without such translation, the Court cannot say that such German word is actionable, or that it supports the allegation that the defendant meant to charge the plaintiff with being a thief and a robber.

The order of the Circuit Court is reversed, and the cause is remanded, with directions to sustain the demurrer to the complaint.

## 162. DAINES *v.* HARTLEY

EXCHEQUER OF PLEAS. 1848

3 *Exch.* 200

CASE for the slander of plaintiffs in their trade, uttered in the presence of one Briggs and one Scott. . . .

The defendant pleaded not guilty; and issue was joined thereon.

At the trial, before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1847, Scott was called, and deposed to the words spoken by the defendant, "You must look out sharp that those bills are met by them." The counsel for the plaintiff then proposed to put the question to the witness, "What did you understand by that?" The question was objected to, and the Lord Chief Baron was of opinion that it could not be put in that shape, and rejected it. A verdict having been found for the defendant,

*M. Chambers* obtained a rule nisi for a new trial, on the ground that the question was improperly rejected. Against which, in Trinity Term last (June 8),

Sir *F. Thesiger* and *T. Jones* showed cause. The question proposed to be put to the witness could not properly be put in the shape in which it was offered. It is a question for the jury to decide, whether the words attributed to the defendant convey that meaning which the innuendoes in the declaration ascribe to them. . . . This was an attempt to substitute the witness for the jury. Words are to be understood in their ordinary sense, unless the party who hears them has something in his mind which leads him to put a different meaning upon them. . . .

*M. Chambers* and *Bovill*, in support of the rule. The evidence was admissible for the purpose of showing in what sense the words were used. The words spoken might have an injurious or an innocent meaning. In all cases where the language is ambiguous or equivocal, it is competent for either party to prove in what sense they were understood by the bystanders. This evidence is admissible for the guidance of the jury. . . .

POLLOCK, C. B., now said — In this case a motion was made for a new trial, on the ground of the improper rejection of evidence. The case was moved by Mr. Chambers, on the ground that he was not allowed to put the question to a witness who heard part of the conversation — "What did you understand by that?" I stated to the learned counsel,

at the time that the trial was going on, that I did not reject the question altogether, but that, in my judgment, he could not put the question in that shape; and he declined to put it in any other, but applied to the Court for a rule for a new trial. The Court granted a rule, and the case was fully argued. We are of opinion that the question could not so be put. There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered is uttered in an ironical sense, and, therefore, that it may mean directly the reverse of what it professes to mean. Something may have previously passed, which gives a peculiar character and meaning to some expression; and some word which ordinarily or popularly is used in one sense, may, from something that has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean. But the proper course for a counsel who proposes so to get rid of the plain and obvious meaning of words imputed to a defendant, as spoken of the plaintiff, is to ask the witness, not "What did you understand by those words?" but "Was there anything to prevent those words from conveying the meaning which ordinarily they would convey?" because, if there was, evidence of that may be given; and then the question may be put. When you have laid the foundation for it, the question then may be put, "What did you understand by them?" when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning. I believe we may say, that generally no question ought to be put in such a form as possibly to lead to an illegal answer. Now, taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker. But no doubt a foundation may be laid, by showing something else which has occurred; some other matter may be introduced, and then, when that has been done, the witness may be asked, with reference to that other matter, what was the sense in which he understood the words. But the mere question, "What did you understand with reference to such an expression?" we think is not the correct mode of putting the question. The rule, therefore, for a new trial, must be discharged.

*Rule discharged.*

### 163. BARR v. BIRKNER

SUPREME COURT OF NEBRASKA. 1895

44 *Nebr.* 197, 62 *N. W.* 494

ERROR to District Court, Clay County; *Hastings*, Judge.

Action by E. A. Barr against J. M. Birkner. Judgment for defendant, and plaintiff brings error. Reversed.



*Thomas H. Matters*, for plaintiff in error.

*L. P. Crouch*, for defendant in error.

HARRISON, J. The plaintiff commenced an action of slander against the defendant in the District Court of Clay County, in which she filed the following petition: "The plaintiff, representing unto this Honorable Court, sets forth that she is now, and has been for more than two years last past, a resident of Clay County, Nebraska, and that during her residence in Clay County she has been engaged in the business of keeping a hotel in the city of Sutton, in said county. (2) That the defendant is a physician and surgeon, duly qualified under and by virtue of the laws of the State of Nebraska to practise medicine. (3) That during the whole time of her residence in Clay County, Nebraska, up to the 15th day of April, 1892, this plaintiff employed said defendant as her family physician. . . . (6) The plaintiff, further representing unto this Court, shows that said defendant, in the presence and hearing of divers persons, in the month of April, 1892, in a certain discourse which he then had of and concerning the plaintiff, in the presence and hearing of divers persons, did falsely and maliciously speak and publish the following false and defamatory words; that is to say, 'She is an old cat'—meaning that the plaintiff was a prostitute. . . . That each and every one of said statements were made falsely and maliciously and wickedly, for the purpose of injuring the plaintiff in her good name, by means of which said several premises the plaintiff has been greatly injured in her good name, to her damage in the sum of \$5,000."

To this the defendant filed an answer, in which he admitted the statements made in the first and second paragraphs of the petition. . . . And, "(8) Further answering the petition of plaintiff, in regard to other supposed defamatory words alleged by plaintiff to have been used by defendant of and concerning the said plaintiff, to wit, 'She is an old cat,' says with reference thereto that he has no recollection of using the said words; but, if he did use them, it was not in the sense of nor with the intent to convey the idea that the said plaintiff was a prostitute." . . .

In the sixth paragraph of the petition it was alleged that in the month of April, 1892, the defendant, in the presence and hearing of divers persons, did falsely and maliciously speak and publish of and concerning the plaintiff the following false and defamatory words, "that is to say, 'She is an old cat,'—meaning that the plaintiff was a prostitute." The defendant's answer to this is that he has no recollection of using the words, but, if he did use them, it was not in the sense of, nor with the intent to convey the idea that plaintiff was a prostitute. He does not deny that he used the words stated, or that they had the meaning alleged, and conveyed such meaning to the persons hearing them or to whom they were spoken. His answer to this allegation of the petition, aside from the admission it contains, is an allegation that he had an intent and used the words spoken with a meaning different from the

one which the petition alleges they had and conveyed at the time and to the parties hearing them, and that he had a secret intent and meaning for the words. This is not a denial that they had the meaning to the bystanders, when spoken, which the petition says they had, and, to be available to the defendant as a defence, it would be necessary that it be shown from the drift of the conversation, or what had been said and done at the time the words were spoken, of the facts and circumstances connected with the conversation or its subject-matter, that they had such bearing upon the import of the words as to limit the meaning conveyed to the hearers to that entertained by the speaker of them. In the absence of such a showing, the fact that he had such intent and meaning at the time of uttering the words is immaterial. *Folkard's Starkie, Sland. & L. §§ 591, 592; Moak's Underhill, Torts, pp. 139, 140; Maybee v. Fisk, 42 Barb. 327; Sabin v. Angell, 46 Vt. 740.* It being admitted in the answer that the defendant had spoken of the plaintiff the words alleged, and not denied that their meaning was as claimed, this was, in effect, admitting that defendant had circulated the report that plaintiff was a prostitute; and no proof on this branch of the case was necessary on the part of plaintiff to entitle her to a verdict for at least nominal damages, for this was such a charge against her as was actionable in such a sense that when proved, or, as in this case, admitted, to have been made, entitled her to damages; nominal damages, at least, being presumed without any further proof. . . .

*Reversed and remanded.*

#### 164. SIMONS *v.* BURNHAM

SUPREME COURT OF MICHIGAN. 1894

102 *Mich.* 189, 60 *N. W.* 476

ERROR to Circuit Court, Ingham County; *Rollin H. Person*, Judge. Action by Benjamin F. Simons against David Burnham for libel. There was judgment for plaintiff, and defendant brings error. Affirmed.

*T. E. Barkworth* and *Arthur D. Prosser*, for appellant.

*Smith, Lee & Day*, for appellee.

HOOKE, J. The parties to this action are rival merchants in the city of Lansing. It is alleged by the plaintiff that in October, 1889, the defendant sent to various firms in other cities, with whom the plaintiff had business relations, clippings from a Lansing paper, showing real-estate transfers, including between ink lines, placed there by himself, the following: "Benjamin F. Simons to Adeline A. Simons, lots 1, 2, and 3, block 150, Lansing, \$5,000." This clipping was attached to a half-sheet of paper, on which was written the following, viz. (after the above quotation from the clipping, the words), "his wife," and: "The real estate transferred and marked in slip is estimated to be

worth at least \$10,000; other real estate heavily mortgaged; reported to be heavily indebted to three or four banks, for borrowed money, at a high rate of interest, say 8 or 10 per cent per annum, and payable every 60 days." In one instance it is claimed that to a clipping of the kind mentioned, enclosed by ink lines as aforesaid, the following pencil writing was appended, viz.: "In time of peace, prepare for war." The declaration contained several counts charging that communications similar to that first above described were sent to different persons, and one count upon the last-described writing; each count containing by way of inducement the statement that the plaintiff was a merchant, dependent for his living upon such business; that he had always conducted himself with fairness and punctuality towards his creditors, and until then had never been suspected of bankruptcy, insolvency, or any fraudulent intention, and had always been, and then was, in good circumstances, credit, and esteem; knowing which, the defendant, with the intention of injuring the plaintiff in his good business name and credit, and in his business, and to cause him to be reputed as worthy of no credit, and to injure him and his said credit with the several persons to whom said communications were sent, published the writings counted upon. By way of innuendo, each count alleged the following, in substance, viz.: Thereby the said defendant, by the said clipping and writing, letter partly written and partly printed, as aforesaid, meaning and intending to charge and cause the said (person to whom the same was sent) to understand, believe, and be informed that the said plaintiff was fraudulently conveying his property to his wife, and was insolvent, and in failing circumstances, and unreliable, and unworthy of credit. The counts respectively allege special damage, by stating that the creditors of plaintiff and others, and especially those to whom the communications were sent (naming them), have refused to have further dealings with the plaintiff, or to give him further credit, and that he has, by reason thereof, been prevented from obtaining credit, and from replenishing his stock, and maintaining his trade, which has suffered therefrom, to his loss of profits, and injury.

It is contended by the defendant's counsel that the words declared upon are not actionable per se; that they were declared upon without any inducement which would make the innuendo applicable, and that the natural meaning of the words must therefore govern as to the sense in which they were published; but that, even if it were competent for the jury to ascribe a meaning different from the natural meaning of the words, it was unnecessary for a plea of justification to be broader than the charge in the declaration. The words in the several counts, standing alone, are unambiguous, and must therefore be construed in their ordinary sense, in the light of such allegations of the circumstances surrounding the transaction as the declaration sets forth. Most of this language admits of but one meaning when so construed. It is that this plaintiff has conveyed \$10,000 to his wife for \$5,000; that he

has mortgaged other property to the extent of \$10,000; and that he is heavily indebted to banks, upon which indebtedness he is paying a high rate of interest mentioned. If this has no significance further than a personal one, it is not libellous per se. If, however, it can be said to apply to the business of the plaintiff, it may be. The declaration, by way of inducement, states that plaintiff was in the habit of purchasing goods, with which to maintain his stock, of certain firms, naming them; that defendant, with the intention and for the purpose of injuring his credit with, and preventing his purchase of goods from, said firms upon credit, made certain statements concerning his indebtedness, and incumbrances upon his property, and the transfer of property to his wife upon an ostensible consideration of one-half its value. The innuendo charges defendant with meaning that plaintiff was fraudulently disposing of his property, was in failing circumstances, and unworthy of credit.

Counsel for defendant assert that this language is not libellous per se, and it is possible that, standing alone, it might not be, as in that case it might have to be construed as written concerning the person merely; and there is nothing in the act of conveying property to a wife, with or without consideration, or in securing creditors, or borrowing money at a lawful rate of interest, that can be said to be reprehensible or disgraceful, or that necessarily tends to beget ridicule or contempt in the sense essential to a libel. But the declaration charges this publication in connection with other facts, which, if true, authorize the conclusion that it was made in connection with the business of the plaintiff. It has been held that it is not actionable to say of traders that they had executed a chattel mortgage. *Newbold v. Bradstreet*, 57 Md. 38. But those familiar with mercantile affairs, or the litigation which they beget, understand that the filing of mortgages, conveyance of property to relatives, and large lines of credit at banks invariably provoke distrust and caution, and usually cause a loss of credit, and legal proceedings to collect accounts. So well understood is this that we feel justified in holding that a false statement of the kind set up in this declaration would necessarily cause a loss of credit, and therefore would be actionable per se when applied to one alleged to be a trader, in the habit of purchasing upon credit. A case very similar to this will be found in *Newell v. How*, 31 Minn. 235, 17 N. W. 383, where the defendant reported of the plaintiff, to his correspondent as follows, viz.:

"His assets, consisting of merchandise, show cases, tools, book accounts, as per his own guess, is about \$1,800. His indebtedness is, as far as I know, about the same amount. He may know more. I speak of what I know. \$1,300 is to merchants like you, and \$500 a demand note. If any one of his creditors should crowd him, the demand would be pushed. We would advise caution on your part in selling, and a prompt payment of indebtedness."

This was held libellous per se, within the rule that those callings in which, ordinarily, credit is essential to their successful prosecution,

language which imputes to one in any such calling a want of credit or responsibility is actionable *per se*. *Read v. Hudson*, 1 *Ld. Raym.* 610; *Davis v. Lewis*, 7 *Term R.* 17; *Dobson v. Thornistone*, 3 *Mod.* 112; *Chapman v. Lamphire*, *id.* 155; *Sewall v. Catlin*, 3 *Wend.* 291; *Ostrom v. Calkins*, 5 *Wend.* 263; *Mott v. Comstock*, 7 *Cow.* 654; *Lewis v. Hawley*, 2 *Day*, 495; *Whittington v. Gladwin*, 5 *Barn. & C.* 180; *Southam v. Allen*, T. *Raym.* 231; *Phillips v. Hoefer*, 1 *Pa. St.* 62.

But this is not the end of the question in this case. Plaintiff ascribed a certain meaning to the words used, — beyond their ordinary import, — which he sets forth in the innuendo, *i. e.*, substantially a design to defeat or defraud his creditors by conveying property to his wife, etc., and that he was unworthy of credit, and in failing circumstances. The words used are not in themselves ambiguous, and, unless they are to be taken in some other than their ordinary sense, they cannot legitimately be construed to express the meaning alleged in the innuendo. To ascertain this, we must examine the facts alleged in the declaration, and see if these words, read in the light of such facts, are susceptible of the construction claimed. These circumstances have been detailed as describing plaintiff's business and the fact of his dealing upon credit with the persons to whom the information was sent, to injure which, and to cause the repute and credit of plaintiff and his said business to be injured and degraded, the writing was published. The declaration also alleges that it had the intended effect. We can understand how words may be used and understood in a different, and even opposite, sense from what they naturally and ordinarily import, as where used ironically, or in the nature of slang, or as a quotation having a well-understood significance, or where they are used in cipher; but in all such cases it is necessary that the declaration should allege facts which, if proved, will enable a Court to say that these words, interpreted in the light of them, may reasonably be held to bear the construction claimed, leaving to the jury the truth or falsity of the allegation upon which the alleged meaning depends, as well as the question of the meaning. It is not enough for the pleader to allege that the language meant a certain thing. The innuendo cannot enlarge the language complained of, except as it is supported by the inducement. It must be the circumstances surrounding the case, not the intention of the defendant, that modifies the language. A declaration that complained that a defendant had said of the plaintiff (a woman) that she was chaste, followed by innuendo to the effect that he thereby meant that she was unchaste, would not warrant a Court in leaving it to the jury to say what was meant. But if, by way of inducement, it was alleged that the parties were enemies, and that in a conversation in which the defendant was speaking in a derogatory manner of the plaintiff (giving his statements) he had said in an ironical manner and tone that she was chaste, following it with the innuendo, it would be competent for the Court to leave the question to the jury whether the language used would not be so

meant and understood, — i. e., whether that would not be the common and ordinary understanding of the language when used in that way, and under such circumstances. The innuendo would not, in such case, enlarge the words, or alter the sense in which they were used, except by reference to the inducement which would support it, and which would be susceptible of proof and contradiction by evidence. An issue can never be raised upon the truth of an innuendo. *Fry v. Bennett*, 5 Sandf. 54; *Com. v. Snelling*, 15 Pick. 335; *Taylor v. Kneeland*, 1 Doug. (Mich.) 67.

So we return to the question, do the words, read in the light of the alleged circumstances under which they were published, sustain the innuendo? For the purpose of this discussion we must assume the statements of the writing to be true as to the literal meaning of the words, — i. e., that the plaintiff did make the conveyance, and was indebted and mortgaged, as therein stated. These things being true, can it be said that the sense or meaning of the statement is changed into a charge of fraud by the facts that the plaintiff was a merchant, who was in the habit of dealing upon credit with the persons to whom the writings were sent; that the defendant intended to injure his credit with such persons, and that it had that effect? To be consistent with what has been said of the effect of the acts alleged in the writing upon the mind of the average creditor, we must concede that the inference from such acts would probably be that the debtor was to a greater or less extent embarrassed, and perhaps that he was placing his property in the hands of his wife with fraudulent design, though the latter, at least, is not a necessary inference. There is nothing better settled in this State than the proposition that the truth of the publication is a complete defence to the action of libel. Here, then, the defendant has simply told the truth without comment of any kind. Shall we say that, because of the inferences which naturally follow, the meaning of the language should be extended to include the inferences? If so, it logically follows that the truth of the publication is not a complete defence in cases where inferences naturally follow the statement of certain facts. Would the character of the publication depend upon the expectation by plaintiff that the inference would be drawn? And would the failure of the person addressed to draw the inference relieve the plaintiff from liability? We get into deep water when we depart from the rule that actions for slander and libel do not lie upon inferences (*Townsh. Sland. & L.* § 133), though we must recognize a distinction between inferences which are the natural result of implications contained in the language of the publication — which may, in a sense, render it ambiguous, and justify a construction at variance with the strict meaning of the words as ordinarily used — and inferences drawn only from the facts themselves. In the former case the action may lie, — not because of the inference, but by reason of the implication; in the latter it will not. Applying this rule to the case before us,



we feel constrained to say that these words are not susceptible to the construction alleged in the innuendo.

From what has been said, the third count should be excepted. In that count the charge consisted of the real-estate transfer, followed by the words, "In time of peace, prepare for war." The statement of the paper was true as to the transfer. If the writing was libellous, it must be by reason of the use of the words, "In time of peace, prepare for war." The natural meaning of this will depend largely on the circumstances under which the words were written, and unless we can say that they do not contain an intimation that the plaintiff was in failing circumstances, or unworthy of credit, it was proper to leave this question to the jury. *Ewing v. Ainger*, 96 Mich. 587, 55 N. W. 996. It is patent that the marking and sending of the real-estate transfer to plaintiff's creditor may have been, and probably was, intended to apprise such creditor of the fact that his debtor had conveyed the property. The advice, in connection with it, may reasonably be thought to imply that the creditor better look after his interests in that direction while it was yet a time when he might secure them; that delay in that particular case might be dangerous. If the jury so found, the words were actionable per se. If they could not so find, they were not actionable, being fully justified by the proof of the truth of the conveyance. From what has been said, it is plain that the jury might have been directed that some of the counts did not contain language that could be construed in accordance with the innuendo. Such instruction was not asked, except as the request applied equally to the other count. Error might have been assigned upon the language of the charge upon this subject, inasmuch as the Court expressed a different view to the jury from that contained herein, rendering it possible that they found defendant guilty upon all of the counts. But we find no assignment of error upon this language, nor is the point made in the brief of counsel that it was error. Inasmuch as there is one count which will sustain the verdict, we cannot reverse the cause upon the ground that the jury was allowed to find a verdict upon a declaration containing two bad ones.

### 165. LEE *v.* CRUMP

SUPREME COURT OF ALABAMA. 1906

146 Ala. 655, 40 So. 609

APPEAL from City Court of Gadsden; *John H. Disque*, Judge.

Action by J. D. Crump against Fitzhugh Lee. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The complaint contains three counts. In the first count, the libellous words imputed are, "You stole my cabbage," viz., on about the 15th day of December. The libellous words in the second count are, "Id Crump stole my cabbage" (same date as above). In the third count

the words were alleged in substance at follows: "I did say you stole my cabbage, and you are the only man I ever knew to steal a wagon load of cabbage" (same date). The plea was the general issue. The plaintiff requested the Court in writing to give the following charges, which the Court gave:

Charge 1: "The Court charges the jury that there is no evidence in this case that Crump stole the cabbage." Charge 2: "The Court charges the jury that if they find from the evidence that the words used as charged in the complaint were used by the defendant in the presence of others as charged in the complaint, and, further, that the defendant intended by the use of these words to impute to the plaintiff the charge of larceny, then, if the jury further find that these words were used for slander, and also that they were used by defendant because he was mad at the plaintiff and had ill will against him, then the words were used maliciously."

The defendant requested the general affirmative charge, which the Court refused to give. There was verdict and judgment for plaintiff, and his damages were assessed in the sum of \$300.

*W. H. Denson*, for appellant.

*Goodhue & Blackwood*, for appellee.

WEAKLEY, C. J. The complaint contains three counts, each alleging that the defendant falsely and maliciously charged the plaintiff with larceny, by speaking of and concerning him the words set forth. The words in substance are that the defendant stole the plaintiff's cabbage, or, as expressed in the third count, that the defendant stole a "wagon load of cabbage." The case was tried upon the plea of the general issue, the only plea filed, and the plaintiff obtained a verdict and judgment. The appellant, who was the defendant in the Court below, first insists that error was committed in refusing his request for the affirmative charge; and this contention rests upon three grounds, which we will consider in the order in which they have been argued. . . .

The words used by the defendant, in their ordinary signification and standing alone, imputed to the plaintiff the infamous crime of larceny, and hence were, if false and malicious, actionable without proof of special damage. No doubt the defendant, upon settled principles of law, would have been allowed to show, if he had offered to make such proof, that the words were spoken in reference to the severing by the plaintiff from the soil of growing cabbage and his taking them away by one continuous act, thereby imputing a trespass merely, notwithstanding the use of the more offensive word "steal," and that this application of the words was known or communicated to his hearers at the time. *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573; *Dunnell v. Fiske*, 11 Metc. (Mass.) 559; *Parmer v. Anderson*, 33 Ala. 78; *Williams v. Cawley*, 18 Ala. 206; 18 Am. & Eng. Ency. Law (2d ed.), 888. But there is an entire absence of any proof that the hearers of the words either knew or were informed that the defendant had reference to a mere trespass, instead of to a felony. It will not avail the defendant

that the plaintiff had in fact not committed the crime of larceny, nor been guilty even of a trespass.

"It is actionable per se to charge a person with having committed a crime, even though such crime has not been committed, if the hearers of the slander do not know that circumstance." 18 Am. & Eng. Ency. Law (2d ed.), 874.

It results that the affirmative charge requested by the defendant was properly refused. . . .

There is no error in the record, and the judgment is affirmed.

*Affirmed.*

166. ROCKY MOUNTAIN NEWS PRINTING COMPANY  
v. SMYTH

SUPREME COURT OF COLORADO. 1909

46 Colo. 440, 104 Pac. 956

APPEAL from District Court, City and County of Denver; *P. L. Palmer*, Judge.

Action by Isolde Smyth, by Florence C. Smyth, her next friend, against the Rocky Mountain News Printing Company. Judgment for plaintiff, and defendant appeals. Reversed.

The complaint alleges: That the plaintiff is unmarried, and of the age of seventeen years. That the defendant corporation is the publisher of the Rocky Mountain News, a newspaper of large circulation. That in said newspaper on July 24, 1902, the defendant maliciously published of and concerning the plaintiff the following false and defamatory article, to wit:

"Miss Smyth a Mother."

"Isolde Smyth, the girl who was assaulted by an unknown man in North Denver last New Year's eve, became a mother yesterday."

That by reason of said publication, plaintiff was damaged in the sum of \$10,000, for which sum judgment is prayed. The defendant's answer admits that the defendant owned the paper mentioned, that it had the circulation alleged, and that it published the article as set forth in the complaint.

The answer continues as follows:

"Third. It denies that the defendant published said article maliciously, and denies that it was a libel, and denies that it was defamatory, and denies that it was a false article, but admits that that portion of the article which states that the plaintiff became a mother was incorrect, and admits that the said plaintiff did not and has not become a mother, or given birth to a child, and alleges that that portion of the article which states that the plaintiff was assaulted by an unknown man in North Denver last New Year's eve was true and correct, [and that the plaintiff was, on or about said date, criminally assaulted by an unknown man in North Denver. And the defendant alleges that on or

about said date the plaintiff reported to the officers of the law that she had been criminally assaulted by an unknown man and outraged ; that said attack upon her created great excitement in the city and State ; that numbers of men were, from time to time, arrested upon said charge, and the occurrence attracted great attention to the plaintiff; that thereafter and on, to wit, the 23d day of July, 1902, it was reported to said newspaper, by what was by the said newspaper upon reasonable grounds believed to be reliable authority, that the plaintiff had become a mother, and believing the same to be true, and without any malice whatever, and with the motive only of publishing the news, the said article was published; that said article was not published in any conspicuous or prominent place in said paper,] and on the following day, upon learning that said statement was not correct, there was published in the regular edition of said paper the statement that the report that plaintiff had become a mother was wholly groundless; [that none of the owners of said paper or of said company knew of the article.]

"Fourth. Denies each and every other allegation in the complaint contained, not hereinbefore admitted or denied.

"And for a second and further answer and defence defendant says : That on, to wit, the evening of the 31st day of December, 1901, the plaintiff, who at that time was sixteen years of age and over, with her brother, — Smyth, had repaired to a lonely lake in or near North Denver, in the county aforesaid, to engage in the pastime of skating. That she and her brother were then and there approached by a man apparently twenty-one years of age and over, but to the plaintiff and defendant unknown, who did then and there order the plaintiff and her brother to lie down upon the ground where she and her brother were. That the brother, anticipating that the person so commanding intended to assault and ravish his sister, resisted, upon which the said ruffian struck him with an axe and killed him. That there and immediately thereafter the said assailant seized and choked the said plaintiff into insensibility, and did there and then, notwithstanding the resistance of plaintiff, as defendant is informed and believes, assault and ravish and carnally know the said plaintiff. That immediately, and upon the day following the said murder and criminal assault, and for many days thereafter, the daily newspapers printed and published in the city of Denver, in the county aforesaid, to wit, the Rocky Mountain News, the Denver Post, the Denver Times, and the Denver Republican, did contain full, complete, and extended notices of said murder and assault, many columns of said paper being filled with the accounts of the same, and the crime charged in said newspaper articles against the said murderer and assailant of plaintiff was that he had feloniously killed and murdered plaintiff's said brother and thereupon had choked plaintiff into insensibility and did then and there criminally assault said plaintiff, meaning thereby that he had criminally assaulted her, and had carnal knowledge of her against her will. That these statements in the said newspapers were widely and generally read, and, as defendant is informed and believes, were without exception accepted and regarded as true, and they aroused great ire and indignation against the perpetrator of the crime, for the said plaintiff was a pure and virtuous girl, and beloved and respected by all her friends and acquaintances, and the said brother was a valiant and manly boy, and was killed because of his attempted defence of his sister's (plaintiff's) honor. That the publication in the Rocky Mountain News complained of was printed and published without any malice or ill will whatsoever. That the defendant had at all times sympathized with the plaintiff on account

of the outrage aforesaid, and by reason of her youth and good character, and had in the newspaper published by it so expressed its feelings in the strongest and plainest language that it could employ. That the statement in the publication complained of had reference solely to the outrage aforesaid perpetrated upon plaintiff, and though, as defendant subsequently learned, the statement that she had become a mother was untrue, it was published upon an honest belief that it was true, the same having been prepared for publication by a reporter, an employee of the defendant, who theretofore had been reliable, conservative, and trustworthy in his statements of the news he gathered for publication, and had been instructed by defendant to report as news only that which he found to be true. That the publication aforesaid was intended to carry with it, and did in fact carry, the information that the plaintiff became a mother as the result of the outrage aforesaid committed upon her person, and the carnal knowledge which, as affiant is informed and believes, the perpetrator of the outrage had of the plaintiff at the time of the said assault; and defendant avers that such was the sole and only view taken of said publication by those who knew the plaintiff or had heard or read of the criminal assault aforesaid. And defendant avers that the said publication by reason of the facts aforesaid in no manner charged or implied any want of chastity upon the part of plaintiff. That, while the said publication was untrue as aforesaid, the same, by reason of the facts aforesaid, was not defamatory or libellous, and it in no wise caused her to lose her reputation for virtue and chastity, and defendant denies that the publication defamed the plaintiff in any way or brought her into disrepute, socially or morally, and it denies that it damaged her in the sum of \$10,000 or any other sum."

The plaintiff filed a motion to strike out those parts of the third paragraph of the answer appearing above in italics [brackets], and also demurred to all that portion of the answer beginning with the words, "And, for a second and further answer and defence, defendant says." The motion to strike and the demurrer were both sustained, and thereupon replication filed. The issues being thus made, the cause was tried to a jury, resulting in a verdict for plaintiff, who is appellee here. The defendant thereupon filed a motion for a new trial, which being overruled judgment was entered on the verdict, and the case brought here for review.

*Thos. M. Patterson and Richardson & Hawkins*, for appellant.

*Theodore H. Thomas*, for appellee.

WHITE, J. (after stating the facts as above). The appellant contends that the judgment should be reversed for various reasons, but we deem it necessary to consider only those relating to the action of the Court in sustaining the demurrer to the second defence, and the striking out certain parts of defendant's answer.

The demurrer to the second defence was based upon the ground that it did not state facts sufficient to constitute a defence, and that the matters therein set forth were immaterial and irrelevant. Directing our attention to the defence demurred to, we find that, while some of the allegations therein are legal conclusions, others are clearly well plead, and as to such the demurrer confessed their truth, and the ruling of the

Court thereon deprived the defendant of the right to show to the jury what the facts of the case were, how the publication came to be made, the way it was intended, and was understood by the readers of the paper. These, we think, the defendant had a right to bring before the jury, and it was error to limit the pleadings in that respect. Libel is defined by Mills' Ann. St. § 1313, as follows:

"A libel is a malicious defamation expressed either by printing, or by signs, or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him or her to public hatred, contempt or ridicule."

. . . The article under consideration, in order to be libellous, must also impeach the virtue of the plaintiff. Every false article is not an actionable libel, just as every untruth is not a lie. To be an actionable libel, the elements to make it such must be present in the article itself, or fairly implied therefrom and the circumstances surrounding its publication. So, if the elements that constitute libel are clearly expressed in the article, it is actionable per se, and becomes conclusive upon the publisher, unless, under the circumstances, the words used were fairly capable of being understood in a special sense, rendering them not defamatory, and that they were so understood. The intent of the publisher and the effect of the publication must be gathered from the words and the circumstances under which they were uttered, and the publisher is prima facie presumed to have used them in the sense which their use is calculated to convey to the minds of the readers of the publication. When so construed, the words may be defamatory on their face, in which case the action may be maintained, unless the defendant can, and does, allege and prove that under the circumstances they were fairly capable of being understood in a special sense, rendering them not defamatory, and that they were so understood. Or they may not be defamatory on their face, in which case the action cannot be maintained, unless the plaintiff can and does show that they were, under the particular circumstances, fairly capable of a special meaning rendering them defamatory, and that they were so understood. . .

It is clearly a question of law for the Court to determine whether or not words constituting an alleged libel, and which are actionable per se, are capable of having the special meaning claimed by a defendant, and, when the Court holds that words ordinarily actionable per se may nevertheless under the circumstances of a particular case have such special meaning, then it becomes a question of fact, to be determined by the jury, as to what the real meaning is, and how the words were understood. To illustrate these principles we adopt the example suggested by counsel. The wife of A is despondent because her husband neglects her, and commits suicide. These facts are well known to the public generally. B thereupon, while the matter is fresh in the minds



of the people, publishes of A that he murdered his wife. A sues B for libel, alleging that B accused him of having committed murder. B answers that, while the language used would ordinarily mean what A claims, yet, under the circumstances of the accusation, the real meaning was that A's absence from home and neglect of his wife so preyed upon her mind that she killed herself, and that the readers of the publication so understood the charge. Under these circumstances, the Court certainly would have no right to sustain a demurrer to the answer, and to hold that the publication means that plaintiff was guilty of homicide. Under such circumstances, it would be for the jury to determine whether or not the publishers intended, and the readers did or did not understand, the language used to mean as contended by defendant.

It is certainly libellous *prima facie* to say of an unmarried woman that she has become a mother, for such words ordinarily imply the want of chastity, and brings the case clearly within the statutory definition of libel. Almost without exception, such a charge carries with it the imputation that the female is guilty of fornication — is lacking in virtue; but we are of the opinion that this does not necessarily follow. To say of an unmarried female, who has been carnally known against her will, that she has become a mother, does not necessarily charge her with unchastity or impeach her virtue. It is not a certain accusation of unlawful or illicit intercourse on her part. It does not necessarily mean that she is guilty of fornication or any wrong. It may mean only that mysterious nature has taken its course in that process by which the human race is propagated and continued. An unmarried female may become a mother and still be virtuous. Such an one, who has been carnally known against her will, and as a result thereof becomes a mother, has not thereby lost her virtue nor her chastity. She may, notwithstanding the outrage committed upon her, be of unspotted purity. The child in her arms is not the result of her own evil. Marian Erle in "Aurora Leigh" expresses this thought when, with her babe in her arms, she says:

"Man's violence,  
Not man's seduction, made me what I am."

. . . The sustaining of the demurrer and the striking of portions of the answer by the trial Court are so at variance with our view of the law applicable to this case, that the judgment must be, and accordingly is, reversed.

*Judgment reversed.*

STEELE, C. J., and BAILEY, J., concur.<sup>1</sup>

<sup>1</sup> [PROBLEMS :

A letter is sent in an unsealed envelope. Is there a publication, as to other than the sendee? (1895, *Fry v. McCord*, 95 Tenn. 678, 33 S. W. 568.)

A libellous letter is handed to a clerk to copy in the blotter-press. Is there a publication? (1894, *State v. McIntire*, 115 N. C. 769, 20 S. E. 721; 1907, *Western Union Tel. Co. v. Cashman*, C. C. A., 149 Fed. 367.)

When a slander is uttered in Italian, and the declaration contains the Italian

### Topic 3. Diversion of the Relation by Imitation of Name or Mark

#### SUB-TOPIC A: UNFAIR TRADE, AT COMMON LAW<sup>1</sup>

167. DODERIDGE, J., in *Southern v. How* (King's Bench, 1618; Poph. 144). . . . Doderidge said, that 22 Eliz. an action upon the case was brought in the Common Pleas by a clothier, [alleging] that whereas he had gained great reputation for his making of his cloth, by reason whereof he had great utterance to his great benefit and profit, and that he used to set his mark to his

original and an English translation, must the translation be proved to be correct? (1906, *Romans v. Devito*, 191 Mass. 457, 78 N. E. 105.)

Defendant wrote a libellous letter and addressed it to "G. H., C. H." It was received by C. H. and handed by him to G. H., who opened and read it. C. H. sues. Was there a publication? (1901, *Schmuck v. Hill*, — Nebr. —, 96 N. W. 158.)

"Tell Sarah to bring back the door she stole from my house." Is this libellous, without more shown? (1987, *Blackburn v. Clark*, — Ky. —, 41 S. W. 430.)

The plaintiff and the defendant were quarrelling loudly. The cause of the quarrel was the defendant's maintenance of a stable near the plaintiff's dwelling. The defendant was an angry old woman of eighty. Finally she called the plaintiff "swindler." Was this actionable? (1896, *Mihojevich v. Bodechtel*, 48 La. An. 618, 19 So. 672.)

"B. in hands of notary." Is this libellous, without more shown? (1893, *Continental Bank v. Bowdre*, 92 Tenn. 723, 23 S. W. 131.)

A telegraph operator transmits by telegraph a defamatory message. Is it to be tested by the rules of libel, or of slander only? And is there a publication? (1898, *Peterson v. Tel. Co.*, 72 Minn. 41, 74 N. W. 1022.)

After a trial in court, the defendant said of the plaintiff, "I wouldn't have sworn to a lie as you did, for all that was involved." In an action for slander, many bystanders, who heard, testify whether the defendant's statement affected in any way their esteem of the plaintiff? (1910, *Linehan v. Nelson*, — N. Y. —, 90 N. E. 1114.)

The plaintiff kept an academy in which the pupils were required to perform military drill, and, as at West Point, a weekly class in dancing was part of the training. The defendant, on behalf of a committee of pastors who regarded dancing as immoral, sent around a circular advising parents not to patronize the academy, because it was a "hotbed of immorality." Was this libellous? (1894, *St. James Military Academy v. Gaiser*, 125 Mo. 517, 28 S. W. 851.)

A libellous letter is dictated to and typewritten by a stenographer. Is this a publication? (*Pullman v. Hill*, 1891, 1 Q. B. 524; 1904, *Puterbaugh v. G. M. F. M. Co.*, 7 Ont. L. R. 582; 1901, *Gambrill v. Schooley*, 73 Md. 48, 48 Atl. 720.)

#### NOTES:

"Application to plaintiff: Initials used to indicate name." (H. L. R., VII, 243.)

"Consent to publication; whether bar to action." (H. L. R., X, 181; XIV, 225.)

"Agent of plaintiff, publication to." (H. L. R., X, 181.)

"Dictation to stenographer." (H. L. R., VIII, 53; XV, 230; XII, 355.)

"Acts and words actionable: Laudatory words: nature of action for." (H. L. R., XIX, 527.)]

<sup>1</sup> [For the circumstances which may justify a defendant in using his own name or that of his place, to designate his goods, even though it injures the plaintiff, see Book III, Title C, Sub-title (III).]

cloth, whereby it should be known to be his cloth: and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him; and it was resolved that the action did well lie.

168. DAY *v.* BINNING

VICE-CHANCELLOR'S COURT. 1831

*C. P. Coop.* 489

THE plaintiff and the defendant were manufacturers of blacking, and the latter sold his blacking in bottles, which not only resembled the bottles used by the plaintiffs, but were labelled in a similar manner; the only difference between the two labels was that the label of the plaintiffs described their blacking as "manufactured by Day & Martin," whilst that of the defendant described his blacking as "equal to Day & Martin's." The words "equal to" were printed in a very small type. An injunction was granted *ex parte* to restrain the defendant from using any labels in imitation of those of the plaintiffs.

169. WEINSTOCK, LUBIN, & COMPANY *v.* MARKS

SUPREME COURT OF CALIFORNIA. 1895

109 *Cal.* 529, 42 *Pac.* 142

APPEAL from a judgment of the Superior Court of Sacramento County. *Matt F. Johnson*, Judge.

The facts are stated in the opinion of the Court.

*Holl & Dunn*, for appellant. The word "mechanics" is a generic term, and generic terms cannot be appropriated as trademarks. . . . The plaintiff cannot claim the exclusive use of the word "mechanics" as a trademark, for the reason that he has not filed such claim with the secretary of state as provided by the statute. . . . The Court has no power to command the defendant to place and maintain a sign showing the name of the owner. The object of a mandatory injunction is to restore matters in statu quo. . . .

*Johnson, Johnson & Johnson*, for respondent. All practices between rivals in business which tend to engender unfair competition are odious, and will be suppressed by injunction. . . . The use of a trade name to designate a business so similar to that of another as to raise a strong probability of misleading and deceiving the public will be restrained. . . . It was within the power of the Court to order the defendant to put signs upon his building in such a manner that persons intending to trade would know that they were trading in his store, and not in that of the plaintiff.

GAROUTTE, J. Plaintiff is a corporation carrying on a large clothing and dry-goods business in the city of Sacramento. Defendant is also

a dealer in clothing of the same general character, and is carrying on business in a building adjoining plaintiff's place of business. The present action is one of injunction, and by its decree, among other things, the Court ordered defendant to refrain from further use of the name "Mechanical Store" as the designation of his place of business, and further decreed that defendant maintain and place in a conspicuous part of his store, and also in a conspicuous place on the outside or front thereof, a sign showing the proprietorship of his said store, in letters sufficiently large to be plainly observable by passers-by and customers entering therein. Defendant appeals from the foregoing portions of the judgment.

The judgment is based upon certain findings of fact made by the trial Court upon the evidence offered at the trial, and no complaint is now heard that this evidence does not fully support these findings. It therefore follows that the merit of this appeal presents itself upon a consideration of those findings and the decree based thereon. These findings of fact are full and in detail, and, for present purposes, we deem it sufficient to state the general tenor and effect of some of them.

(1) The Court finds that on or about the 8th day of October, 1874, H. Weinstock and D. Lubin entered into a copartnership under the firm name and style of Weinstock & Lubin, of the city of Sacramento, and, as such partners, engaged in the business of dealing in wearing apparel for men, women, and children, and that said Weinstock & Lubin selected as the name of their place of business "Mechanics' Store," and designated the same by that appellation, by which name their said store thenceforth was continually known; that, in the management and conduct of their business, they fixed a price upon each and every article carried by them in the stock of said store, and marked the said prices in figures upon each article, and sold such articles at the prices so marked, and never deviated therefrom; and they advertised the said method of doing business extensively throughout the entire Pacific coast by means of newspapers, etc., by means whereof their said method of doing business became widely known to the trade and public throughout the entire Pacific coast, and by reason whereof it became and was well known to the trade and public in California and the other States and Territories of the Pacific coast that at the store of said Weinstock & Lubin only one price was charged for goods sold therein, and that no deviation from said price was permitted.

(2) That, by care, attention, skill, and strict adherence to business and the rules as aforesaid, this plaintiff has materially increased the volume and importance and value of said business, and enhanced the good will thereof, and the said plaintiff has established for the said store and business throughout the said States and Territories a wide and honorable reputation, and thereby said business has become extensive and valuable and profitable, and the public have become accustomed to plaintiff's said method of doing business, and have been induced to

rely, and do rely, upon the good faith of the plaintiff in managing and conducting its business in the manner aforesaid, and by reason thereof have been induced to bestow and do bestow upon the plaintiff their custom, trade, patronage, and business.

(3) That on or about 1885 the defendant, who had previously been engaged in business elsewhere, and was without any established reputation of his own, and whose business was unknown to the trade and general public, removed his business from the place he then occupied to the premises on the east of and near the premises of this plaintiff; and the defendant then and there engaged in a similar line of trade as this plaintiff, and ever since then he has maintained and conducted, and still maintains and conducts, the said store at said place, and carries on the said business therein; and he named his store in the year 1887 or thereabouts the "Mechanical Store."

(4) That the defendant, well knowing the foregoing facts, and contriving, intending, and designing fraudulently to injure this plaintiff, and to obtain undue advantage of plaintiff, and to deprive the plaintiff of its business, and fraudulently and unlawfully to increase his own business, and to pirate and make use of and appropriate to himself the good will of the plaintiff's business, and the said reputation and honorable esteem and confidence that the plaintiff enjoyed in the minds of the people of the Pacific coast, and in order to create confusion in the public mind, and to take advantage of the standing that the plaintiff by its aforesaid acts had acquired in said territory, and fraudulently designing to deceive the public and people intending to trade with the plaintiff, and to divert the custom of the plaintiff to himself, and to deprive the plaintiff of its customers and of the trade, and to induce the people to trade with the defendant under the belief that they were trading with the plaintiff, and for the purpose of deceiving plaintiff's customers and persons intending to trade with plaintiff into believing that the defendant's store was that of the plaintiff, and thereby inducing them to enter said store of defendant to trade with said defendant, to his profit, and in order to carry out his fraudulent and corrupt designs as aforesaid, — the defendant has persistently carried out a system of deceit and misrepresentations concerning his store and its ownership, in connection with plaintiff's store and business, as follows: That in 1891 plaintiff, at its place of business, erected a store, the front of which is of peculiar architecture, containing arches and alcoves, of which there was none other similar in the city of Sacramento; that afterwards the defendant, at his said place of business, and adjoining plaintiff's store, erected a building which, so far as the first or lower story is concerned, was and is similar in architecture in every respect to the store of plaintiff, so much so that passers-by were liable to go into the store of defendant thinking that they were entering the store of plaintiff, and that customers of plaintiff in many instances did so enter the store of defendant thinking they were in the store of plaintiff; that defendant had no sign inside

of his store or on the outside of his store by which customers could for themselves ascertain the true proprietorship thereof; that the erection of the defendant's building exactly the same as plaintiff's building in every particular, and the adoption of the use of the words "Mechanical Store," and the absence of any name or sign upon or in defendant's store designating the true proprietorship of defendant's store, were all done by the defendant for the purpose of deceiving the public, and more especially plaintiff's customers, and enticing and pirating and securing the patronage of said customers from plaintiff to defendant.

(5) That, by the aforesaid means the defendant has diverted from the plaintiff a large part of plaintiff's trade and custom; has induced many persons to trade with the defendant who otherwise would have traded with the plaintiff; has sold large quantities of goods in his said store to persons who, but for said acts of defendant, would have purchased said goods of the plaintiff; has deprived the plaintiff of a large share of its legitimate profits; has injured the business and reputation of the plaintiff; has impaired the confidence of the public in the plaintiff and its method of doing business; and has deprived the plaintiff of a large number of its customers and patrons.

The foregoing chapter of facts makes interesting reading, and we first turn our attention to that portion of the judgment restraining defendant from the further use of the words "Mechanical Store" as a designation of his place of business. We see but little difficulty in arriving at a conclusion upon this branch of the case. Defendant assails the judgment in this particular with but a single weapon. He insists that the words "Mechanics' Store" are not the subject of trademark, and that, therefore, plaintiff can have no exclusive right to them. As we view the picture presented by the findings of fact, the question as to what may or may not be the subject of trademark is not the problem to be solved. That these words are of a kind that may be used as a trade name we have no doubt, and, having established that fact, we are required to pursue the investigation no further. That certain names and designations which may not become technical or specific trademarks may become the names of articles or of places of business, and thereby the use thereof receive the protection of the law, cannot be doubted, for the cases everywhere recognize that fact. The learned judge said in *Lee v. Haley*, 5 Ch. App. 155:

"I quite agree that they [the plaintiffs] have no property right in the name, but the principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carried it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

A similar doctrine is declared in *Manufacturing Co. v. Hall*, 61 N. Y. 226, and also in the late case of *Coats v. Thread Co.*, 149 U. S. 562,



13 Sup. Ct. 966. This Court said in *Pierce v. Guittard*, 68 Cal. 71, 8 Pac. 645:

"We are of opinion that it is not necessary to decide whether the plaintiff's label, with the accompanying words and devices, constituted a trademark, and, as such, the exclusive property of the plaintiff, for the reason that it is a fraud on a person who has established a business for his goods, and carries it on under a given name or with a particular mark, for some other person to assume the same name or mark, or the same with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with a person who has given a reputation to that name or mark."

The same general principle is also recognized and approved in *Schmidt v. Brieg*, 100 Cal. 672, 35 Pac. 623. While in these two cases the fact appears that the defendants were selling an inferior article, and thereby deceiving and defrauding the public, it is not apparent that such fact was a necessary element in pointing the judgment. Neither do we consider it so upon principle; and in cases without number, restraining defendants from trespassing upon the good will of plaintiff's business, such fact was an element foreign to the litigation. It may be said that the adjudged cases for relief are based solely upon the ground of loss and damage to the tradesman's business, by unlawful competition. In *Levy v. Walker*, Cox, Man. Trade-Mark Cas. No. 639, the learned judge declared:

"The Court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything."

While our statutes attempt to deal with trademarks, and provide for the filing thereof with the secretary of state, with accompanying affidavits, etc., yet trade names are equally protected upon analogous principles of law. And that the words "Mechanics' Store" may be made a trade name, and the user thereof become entitled under the law to protection from pirates preying upon the sea of commercial trade, we have no doubt. We think the defendant should be restrained from the use of the words "Mechanical Store." The Court has declared the fact to be, and it is not challenged by defendant, that these words were used as a designation of his store for the purpose of deceiving the public, and especially plaintiff's customers, and thereby securing the advantages and benefits of the good will of plaintiff's business. To say that such conduct upon the part of defendant is unfair business competition is to state the fact in the mildest terms. In *Celluloid Manuf'g Co. v. Cellonite Manuf'g Co.*, 32 Fed. 97, Justice Bradley, of the Supreme Court of the United States, in speaking to the question of similarity in name, said:

"It was not identical with the plaintiff's name. That would be too gross an invasion of the complainant's rights. Similarity, not identity, is the usual

recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer, is obnoxious to the law."

In this case the trial Court determined that there was a sufficient similarity in the names to deceive the public; that the defendant adopted the name for the purpose of deceiving the public and securing plaintiff's business; and that such results had followed. These things being true, the decree must go against him.

The remaining branch of the case presents a novel and original proposition of law. In its facts we apprehend no case like it can be found, either in this country or England. The decree orders the defendant to place, both upon the outside and inside of his store, a sign, plainly legible to customers and passersby, indicating his proprietorship; and, while the power of the Court to issue mandatory injunctions in many cases must be conceded, yet cases where such power has been exercised have generally involved matters of nuisance, or at least cases where Courts have ordered the subject-matter of the litigation to be placed in its original condition; or, for instance, the removing of obstructions to ancient lights. But let us for a moment turn our attention to the facts of this case. The store of plaintiff was known as the "Mechanics' Store." By various kinds of advertising, and attention, honesty, and skill in the conduct of the business, it increased the volume thereof and enhanced its good will, and throughout the Pacific coast established for it a wide and honorable reputation as a fair and reliable house with which to deal. Plaintiff erected a store building of peculiar architecture, there being none like it in the city of Sacramento; and defendant thereupon erected a store building, immediately adjoining that of plaintiff's, in every respect of similar architecture. It further appears that defendant erected this particular kind of building for the purpose of deceiving the public, and securing the patronage of plaintiff's customers; and for the same purpose he refrained from placing any sign in or upon the building indicating the proprietorship of the business, or designating it in any way so that it might be distinguished from the store of plaintiff. And, by reason of these acts of defendant, many of plaintiff's customers were deceived into purchasing goods in defendant's store, believing that they were trading in plaintiff's store; and defendant thus diverted from the plaintiff a large part of its trade and custom, and thereby injured its business and curtailed the value of its good will. Upon this bald statement of facts, it cannot be gainsaid that defendant has done the plaintiff wrong; and it is said that for every wrong there is a remedy. These facts certainly indicate a case of unlawful business competition, and courts of equity have ever been ready to declare such things odious. It is strange if plaintiff may be deprived of the fruits of a long course of honest and

fair dealing in business by such wicked contrivances, and, upon appeal to the courts for relief should be told there was no relief. This cannot be so, for the whole law of trademarks, trade names, etc., is recognized, approved, and enforced for the very purpose of protecting the honest tradesman from a like loss and damage to that which threatens this plaintiff; and the fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him. It has been said by some judge or law writer that "no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive." By device, defendant is defrauding plaintiff of its business. He is stealing its good will, — a most valuable property, — only secured after years of honest dealing and large expenditures of money; and equity would be impotent, indeed, if it could contrive no remedy for such a wrong.

The fundamental principle underlying this entire branch of the law is that no man has the right to sell his goods as the goods of a rival trader. Mr. Browne, in his work upon Trade-Marks, declares the wrong to be,

"not in imitating a symbol, device, or fancy name, for any such act may not involve the slightest turpitude; the wrong consists in unfair means to obtain from a person the fruits of his own ingenuity or industry, — an injustice that is in direct transgression of the decalogue, 'Thou shalt not covet . . . anything that is thy neighbor's.' The most detestable kind of fraud underlies the filching of another's good name, in connection with trafficking."

We think the principle may be broadly stated that when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed, — a fraud which a Court of equity will not allow to thrive. In *Howard v. Henriques*, 3 Sandf. 725, the Court, in speaking of the competitor in business, said:

"He must not by any deceitful or other practice impose on the public, and he must not by dressing himself in another man's garments, and by assuming another man's name, endeavor to deprive that man of his own individuality and of the gains to which by his industry and skill he is fairly entitled."

It may well be said that the defendant, by duplicating plaintiff's building, with its peculiar architecture and immediately adjoining, entering into the same line of business, with no mark of identification upon his store, has dressed himself in plaintiff's garments; and, having so dressed himself with a fraudulent intent, equity will exert itself to

reach the fraud in some way. In the leading case of *Lee v. Haley*, supra, the whole question is condensed by the final conclusion of the Court into the principle of law "that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person." If the same evil results are accomplished by the acts practised by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a Court of equity say, "If you cheat and defraud your competitor in business by taking his name, the Court will give relief against you, but, if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law?" Equity will not concern itself about the means by which fraud is done. It is the results arising from the means — it is the fraud itself — with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trademarks and trade names. They reach away beyond that, and apply to all cases where fraud is practised by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent. In *Glenny v. Smith*, reported in the *Jurist* of 1865 (page 965), the Court held:

"Where a tradesman, in addition to his own name upon his shop front, placed upon his sunblind and upon his brass plate the words 'From Thresher & Glenny' (in whose employment he had been), the Court, being of opinion that this was done in such a way as to be likely to mislead, and there being evidence that persons had been actually misled, granted an injunction to restrain such a use of the name of the firm Thresher & Glenny."

In *Knott v. Morgan*, 2 Keen, 213, the "London Conveyance Company" had its omnibuses painted green, and its servants clothed in the same colors. Another adopted the same name, and likewise its vehicles were so painted and its servants so clothed. It was conceded that plaintiff could have no exclusive property right in any of these things, but the Court issued its injunction, declaring that plaintiff had

"a right to call upon this Court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages really the defendant's belong to and are under the management of the plaintiffs." . . .

The same principle is reiterated by the same learned judge in *Croft v. Day*, 7 Beav. 84, in the following words:

"It has been very correctly said that the principle of these cases is this: That no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a

right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person or that he is connected with and selling the manufacture of such other person while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud."

In the very recent case of *Coats v. Thread Co.*, 149 U. S. 566, 13 Sup. Ct. 966, the Court said:

"There can be no question of the soundness of the plaintiff's proposition that, irrespective of the technical question of trademark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. . . . They have no right by imitative devices to beguile the public into buying their wares under the impression they are buying those of their rivals."

To the same point, see *System Co. v. Le Boutillier* (Super. Ct.), 24 N. Y. Supp. 890; *Apollinaris Co. v. Scherer*, 27 Fed. 18; *Burgess v. Burgess*, 3 De Gex, M. & G. 896; *Von Mumm v. Frash*, 56 Fed. 830.

Having decided that defendant's acts constitute a fraud upon plaintiff, and that a Court of equity will administer relief, the question then presents itself, what shall be the form of the decree? How may the Court reach the wrong? The defendant had the right to erect his building, and erect it in any style of architecture his fancy might dictate. He had the right to erect it in the particular locality where it was erected. He had the right there to conduct a business similar to that of plaintiff. He had a right to do all these things, for, of themselves, they did not offend against equity; but when they were done with a fraudulent intent, when they were done for the purpose of tolling away the customers of plaintiff by a deception, a fraud is practised, and equity will do what it can to right the wrong. The decision of the trial Court in effect ordered defendant to place signs both inside and outside his building, showing to the world the proprietorship thereof. We think this decree holds defendant to a rule too strict, in that it requires the proprietorship of the store to be shown. In this particular we think the decree should be modified so as to require that the defendant, in the conduct of his business, shall distinguish his place of business from that in which the plaintiff is carrying on its business, in some mode or form that shall be a sufficient indication to the public that it is a different place of business from that of the plaintiff. For the foregoing reason, the judgment in this respect only is reversed, and the cause remanded, with directions to the trial Court to modify the same, as heretofore suggested; and thereupon it is ordered that said judgment stand affirmed. Appellant is to pay the costs of this appeal.

We concur: HARRISON, J.; VAN FLEET, J.

170. MOSSLER *v.* JACOBS

APPELLATE COURT OF ILLINOIS. 1896

66 Ill. App. 571

INJUNCTION, to restrain the use of a trade name. Appeal from the Circuit Court of Cook County; the Hon. *John Gibbons*, Judge, presiding. Heard in this Court at the October Term, 1896. Affirmed. Opinion filed November 5, 1896.

*Charlton & Copeland*, attorneys for appellants.

*L. D. Condee* and *Louis Boisot, Jr.*, attorneys for appellees.

The bill of complaint of the appellees alleges that they have been engaged in the tailoring business in the State of New York and advertising the same under the style of "Six Little Tailors," for the last fifteen years, and that during a greater portion of said time they have had branch stores in several of the eastern cities, and that as recently as the month of March of this year they opened a branch store under the same name in the city of Chicago; which name of "Six Little Tailors," they allege, constitutes their trademark and trade name.

They also allege, among other things, that the appellants, some time in the month of February of this year, opened a tailoring establishment at No. 357-359 State Street, under the firm name and style of the "Six Big Tailors," which style of name appellees allege and claim to be an infringement upon the name adopted by them, to wit, "Six Little Tailors."

The appellants, in their answer to the appellees' bill of complaint, among other things, allege that the Court below had no jurisdiction over the subject-matter involved in this litigation, and deny that the appellees had, or could have, any property right or trademark in the words "Six Little Tailors"; they also claim and allege in their said answer that the use of the words "Six Big Tailors" in no manner infringes upon the words "Six Little Tailors"; and insist that they, the appellants, have the right to use the words "Six Big Tailors" as their trade name.

The evidence of complainants shows that in November, 1895, they first took preliminary steps looking toward the establishment of a branch store in Chicago under the style of "Six Little Tailors"; that they advertised in the way of posters, circulars, and newspapers prior to their opening of their store March, 1896, and spent some money in that direction; also shows that prior to that time, and for a period probably of fifteen years, they had two stores in New York City, one in Buffalo, one in Philadelphia, one in Boston, one in Washington, one in Pittsburg, and one in Cleveland, all of which were carried on under the style of "Six Little Tailors"; they also testify that they had copyrighted some ten years ago photographs of the six Jacobs brothers, which were placed on their business cards and other advertising under the title



of "Six Little Tailors"; and that they used the words "Six Little Tailors" in every way they possibly could in the way of advertising; that they had received mail orders from various parts of the United States and Europe, and many from the city of Chicago, for suits of clothes. In the deposition of Mr. Jacobs, many exhibits are made of the style of advertising in newspapers, posters, and also copies of letters and envelopes received from various portions of the country making inquiries about suits, etc. He also testifies that the firm of "Six Little Tailors" is composed of six Jacobs brothers, who are a little below the medium size in stature, and that therefore the title "Six Little Tailors" is consistent with the makeup of their firm.

On the other hand, the appellant, Benjamin S. Mossler, testifies that appellants opened their place of business as "Six Big Tailors," at 357-359 State Street some time in the month of February, and that there are six brothers in their family, all of whom are above the medium size in stature, and that the two appellants (brothers) had, before the opening of their establishment on State Street as "Six Big Tailors," obtained the consent of the other four brothers to use that name.

There is no proof that any person had been misled or deceived by reason of the similarity of the names used by appellants and appellees.

A decree was entered restraining the defendants, their employees, agents, etc., from using by signs, cards, letterheads, or otherwise, in advertising the business of making and selling clothing, the style and words "Six Big Tailors," or any other words in imitation of complainants' said trade name, or resembling the same.

Mr. Justice WATERMAN delivered the opinion of the Court as follows:

This was an action to restrain the use of the words "Six Big Tailors" in such a way as to infringe upon the rights of the complainants under their trade name of "Six Little Tailors."

No person is entitled to represent his goods as being the goods of another man, or articles of his manufacture as having been made by another, and no person is by the law permitted to use any mark or sign, symbol, name, or device or other means whereby he makes a false representation or deceives as to his goods, or the goods of another, or whereby, without himself making a false representation to a buyer who purchases from him, he enables such buyer to tell a lie or to make an untrue representation to some one else who may be a prospective purchaser. Nor is it a defence to an action, the gist of which is a charge of deception, to reply that the words uttered by the defendant were the literal truth; for the truth may be stated in a way likely to and that does deceive. What is required is that a party shall not conduct his business so that by what he says and does he will deceive customers to their injury, or that of a competitor. . . .

While the Court is not bound to interfere where ordinary attention will enable the purchaser to discriminate between the trademark used on the goods manufactured by different parties, nevertheless the char-

acter of the article, the use to which it is put and the kind of people who are likely to ask for it, as well as the manner in which it is probable it will be ordered, must not be lost sight of. . . .

We regard the words "Six Big Tailors" as so similar to the complainant's trade name of "Six Little Tailors," that it is calculated to deceive the unwary; that confusion is likely to arise therefrom, and thus that it is probable purchasers may be entrapped into buying what they did not intend; that is, goods of appellants, when intending to buy of complainants. We can hardly think, in view of the testimony, that appellants chose the name of "Six Big Tailors," without first considering the publicity which complainant's trade name had acquired, and with the thought that by adoption of a very similar name, they could avail themselves of the reputation of a rival. We are the more inclined to this view, because of the fact that, while the complainant's firm is composed of six tailors, appellants is made up of two only. Appellants appear to have been guilty of unfair competition in business.

While it does not appear that thus far any one has been deceived, we do not think that complainants are obliged to wait until injury has actually occurred; it is sufficient that it is probable customers would be deceived and misled. The tendency to abbreviate is such that nearly all firms and corporations are ordinarily spoken of, and their names remembered by a portion only of their true title. Complainant's name is quite likely to be carried in mind as "Six Tailors." . . .

The decree of the Circuit Court is affirmed.

171. SUPREME LODGE KNIGHTS OF PYTHIAS *v.*  
IMPROVED ORDER KNIGHTS OF PYTHIAS

SUPREME COURT OF MICHIGAN. 1897

113 *Mich.* 133, 71 *N. W.* 470

APPEAL from Circuit Court, Wayne County, in chancery; *William L. Carpenter*, Judge.

Bill by the Supreme Lodge Knights of Pythias against the Improved Order Knights of Pythias and others. There was a decree dismissing the bill, and complainant appeals. Affirmed.

*Philip T. Colgrove* and *John C. Burns* (*Philip T. Van Zile*, of counsel) for appellant.

*Conely & Taylor* (*Florea & Seidensticker*, of counsel), for appellees.

MONTGOMERY, J. Complainant filed a bill for an injunction, praying that defendants be restrained from using the ritual and jewels of the order of the Knights of Pythias, and from using the name "Improved Order Knights of Pythias." A careful examination of the authorities cited by counsel, and of the reasons urged by them, has failed to convince us that the learned trial judge erred in dismissing the bill. The opinion

of Judge Carpenter contains so full a review of the case, and its reasoning is so satisfactory, that we adopt it as our own. That opinion is as follows:

CARPENTER, J. "The Knights of Pythias is a secret, unincorporated society, organized in 1864, and has about 500,000 members. Complainant is the Supreme Lodge of the Knights of Pythias, and was incorporated by special Act of Congress in 1894. The Improved Order Knights of Pythias is also a secret, unincorporated society, and had, June 30, 1895, when the last report was made, 1,738 members. It was formed in December, 1894, by former members of the Knights of Pythias. These last-mentioned members left the old order, and formed the new, because a convention of the Supreme Lodge Knights of Pythias, in August, 1894, declared that 'henceforth and forevermore the ritual used in this and all other English-speaking countries shall be printed in the English language only.' Both orders are fraternal and benevolent. They have many resemblances. The important difference between them, as already indicated, is this: The ritual of the improved order may be printed in German, while that of the Knights of Pythias cannot be. Complainant asks an injunction restraining defendants from using the name 'Improved Order Knights of Pythias,' and from using the name 'Knights of Pythias,' or any derivative thereof, and from printing or using any ritual in substance like that used by the Knights of Pythias. There is no proof that the defendants' ritual is so nearly like complainant's as to justify the interference of a court. The sole question is, then, whether defendants shall be enjoined from using the name 'Improved Order Knights of Pythias.' Complainant's counsel insist that by the Act incorporating complainant as 'Supreme Lodge Knights of Pythias' an exclusive right to the name 'Knights of Pythias' was acquired. Numerous cases are cited holding that a corporation has an exclusive right to its name. No case, however, is cited holding that incorporation gives an exclusive right to a name already in use, as the name 'Knights of Pythias' was, by an existing voluntary society. On the contrary, *McGlynn v. Post*, 21 Abb. N. C. 97, cited by complainant's counsel, and *Association v. Munday*, 21 Abb. N. C. 99, hold that in such a case an exclusive right is not acquired. Indeed, if complainant, by incorporating, acquired the exclusive right to the name 'Knights of Pythias,' it could at will compel the order of which it is only the head, and all other lodges, subordinate and grand, to cease using the name, 'Knights of Pythias.' It seems clear, therefore, that complainant did not, by becoming a corporation, acquire the exclusive right to the name 'Knights of Pythias,' and that, whatever are its rights, they cannot exceed those of the order of which it is the head.

"The question, then, arises, are the rights of the order violated? Nearly all the members who withdrew from the old order and went into the new are Germans, and many of them are unable to read and understand a ritual not printed in German. Prior to the action of

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I. THE DAMAGE ELEMENT

the order which was the occasion of their withdrawal, the order furnished for their use, and they used, rituals printed in German. Defendants therefore withdrew from the society of which they were members, because it changed, not because it continued, its policy. The propriety of the conduct of complainant in forbidding the printing of the ritual in German, the propriety of the conduct of defendants in withdrawing from the order, are questions solely for the consideration of the parties themselves. The Knights of Pythias had a lawful right to declare that its ritual should be printed only in English, and defendants had an equally lawful right to found an order whose ritual might be printed in German. Having formed this order, is it possible that defendants cannot give it an appropriate name, a name which will properly describe it? This new order is formed by the members of the Knights of Pythias who withdrew from the Knights of Pythias because that order changed its policy in a matter which it must be presumed they thought important. This order resembles the Knights of Pythias. Is stands to these members in the place which the Knights of Pythias has vacated. To a certain extent it carries out a policy which the Knights of Pythias formerly carried out and abandoned. Complainant charges that the defendants have seceded from it, and have established a rival and very similar organization. No name could appropriately be adopted, under these circumstances, which did not contain the words 'Knights of Pythias,' because no name could properly describe it, either by reference to its origin, its history, or its purposes, which did not contain those words. Suppose that this new order had received some other name. It would have been none the less, in the minds of complainant, a seceding faction of the Knights of Pythias; it would have been none the less, to the defendants, a substitute for the Knights of Pythias; and it would have been none the less, to the impartial historian, an offshoot of the Knights of Pythias. One excellent test of an appropriate name to select under such circumstances is furnished by the history of schisms in other societies. Nearly all our varieties of churches of the same denomination are the results of secession or withdrawals from the parent church of that name, and it has been the usual course for the new church society to adopt as a permanent part of its name the name of the parent organization. Take one instance: A part of the Methodist Episcopal Church withdrew and established the Protestant Methodist Church. So we have the Order of Foresters of America, formerly the Ancient Order of Foresters of America; the Canadian Order of Foresters; the Independent Order of Foresters, — all of which are, as I understand, offshoots of the Ancient Order of Foresters of England. No one has ever questioned the appropriateness of using the parent name as part of the name of a new society formed under these circumstances, so far as I can learn. To my mind, it is clear, therefore, that defendants, in naming their order, not only could, but were almost bound, in order to properly describe it, to make use of the words 'Knights of Pythias.'

"Of course, there is this limitation: Defendants should not use a name so much like the name of the order from which they have withdrawn as to work a damage to that order. The only way that the order can be damaged, as the least reflection will prove, is by depriving it of members who would otherwise join it. Let us apply to this case the principles by which courts determine similar controversies of trading concerns. The decisive principle is this: 'No man has a right to sell or advertise his own business or goods as those of another.' *Williams v. Farrand*, 88 Mich. 478, 50 N. W. 448. 'One must not, therefore, adopt a name so similar to that of another as to draw to himself business intended for that other.' *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490; *Tallcot v. Moore*, 6 Hun, 106; *Potter v. McPherson*, 21 Hun, 559; *Holmes v. Holmes*, 37 Conn. 296. The correct principle is stated in complainant's brief (page 71) as a quotation from the opinion of Judge Foster, of the Superior Court of Vanderburgh County, Indiana, rendered in the suit of *St. George Lodge, K. of P. v. Rosenthal et al.*

'Where a corporation has appropriated and used a name for such length of time as to become identified by the name, and had established a character and reputation under it, it is a fraud upon the corporation and the public if this name be assumed by others under such circumstances as would lead the public to believe that they constitute the original corporation, and, where injury will result to the corporation on account thereof, courts of equity will, at the suit of the injured parties, by injunction restrain the further perpetration of the wrong. It is the special injury to the party aggrieved and the imposition upon the public that constitute the wrong which the courts will redress. It is not necessary that the wrong should be intentionally committed. It is enough that the name should be used under such circumstances as would lead the public to believe that the latter organization was the former, and thereby cause injury to the former corporation.'

"Where one uses the name of another for the fraudulent purpose of attracting to himself business which belongs to that other, no injustice will be done if the Court assumes that the name chosen accomplishes this purpose, even though the resemblance be not great. If one intends that the name he has chosen shall be believed to be that of another, it is fair to infer that he will so use that name as to promote the desired belief. Accordingly we find that the motives with which a name is chosen, and the circumstances attending its use, as well as the similarity of names, have a bearing in determining whether business is liable to be diverted, and, consequently, whether the Courts shall interfere. Compare *Myers v. Buggy Co.*, 54 Mich. 215, 19 N. W. 961, and 20 N. W. 545, and *Williams v. Farrand*, 88 Mich. 479, 50 N. W. 446. See, also, *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 471, 39 N. E. 490. Where the name was not chosen for the purpose of deception, and has not been used under circumstances intended or calculated to deceive, the similarity of names must be such as to deceive ordinary persons

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“Of course, there is this limitation: Defendants should not use a name so much like the name of the order from which they have withdrawn as to work a damage to that order. The only way that the order can be damaged, as the least reflection will prove, is by depriving it of members who would otherwise join it. Let us apply to this case the principles by which courts determine similar controversies of trading concerns. The decisive principle is this: ‘No man has a right to sell or advertise his own business or goods as those of another.’ *Williams v. Farrand*, 88 Mich. 478, 50 N. W. 448. ‘One must not, therefore, adopt a name so similar to that of another as to draw to himself business intended for that other.’ *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490; *Tallcot v. Moore*, 6 Hun, 106; *Potter v. McPherson*, 21 Hun, 559; *Holmes v. Holmes*, 37 Conn. 296. The correct principle is stated in complainant’s brief (page 71) as a quotation from the opinion of Judge Foster, of the Superior Court of Vanderburgh County, Indiana, rendered in the suit of *St. George Lodge, K. of P. v. Rosenthal et al.*

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“Of course, there is this limitation: Defendants should not use a name so much like the name of the order from which they have withdrawn as to work a damage to that order. The only way that the order can be damaged, as the least reflection will prove, is by depriving it of members who would otherwise join it. Let us apply to this case the principles by which courts determine similar controversies of trading concerns. The decisive principle is this: ‘No man has a right to sell or advertise his own business or goods as those of another.’ *Williams v. Farrand*, 88 Mich. 478, 50 N. W. 448. ‘One must not, therefore, adopt a name so similar to that of another as to draw to himself business intended for that other.’ *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490; *Tallcot v. Moore*, 6 Hun, 106; *Potter v. McPherson*, 21 Hun, 559; *Holmes v. Holmes*, 37 Conn. 296. The correct principle is stated in complainant’s brief (page 71) as a quotation from the opinion of Judge Foster, of the Superior Court of Vanderburgh County, Indiana, rendered in the suit of *St. George Lodge, K. of P. v. Rosenthal et al.*

‘Where a corporation has appropriated and used a name for such length of time as to become identified by the name, and had established a character and reputation under it, it is a fraud upon the corporation and the public if this name be assumed by others under such circumstances as would lead the public to believe that they constitute the original corporation, and, where injury will result to the corporation on account thereof, courts of equity will, at the suit of the injured parties, by injunction restrain the further perpetration of the wrong. It is the special injury to the party aggrieved and the imposition upon the public that constitute the wrong which the courts will redress. It is not necessary that the wrong should be intentionally committed. It is enough that the name should be used under such circumstances as would lead the public to believe that the latter organization was the former, and thereby cause injury to the former corporation.’

“Where one uses the name of another for the fraudulent purpose of attracting to himself business which belongs to that other, no injustice will be done if the Court assumes that the name chosen accomplishes this purpose, even though the resemblance be not great. If one intends that the name he has chosen shall be believed to be that of another, it is fair to infer that he will so use that name as to promote the desired belief. Accordingly we find that the motives with which a name is chosen, and the circumstances attending its use, as well as the similarity of names, have a bearing in determining whether business is liable to be diverted, and, consequently, whether the Courts shall interfere. Compare *Myers v. Buggy Co.*, 54 Mich. 215, 19 N. W. 961, and 20 N. W. 545, and *Williams v. Farrand*, 88 Mich. 479, 50 N. W. 446. See, also, *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 471, 39 N. E. 490. Where the name was not chosen for the purpose of deception, and has not been used under circumstances intended or calculated to deceive, the similarity of names must be such as to deceive ordinary persons

the order which was the occasion of their withdrawal, the order furnished for their use, and they used, rituals printed in German. Defendants therefore withdrew from the society of which they were members, because it changed, not because it continued, its policy. The propriety of the conduct of complainant in forbidding the printing of the ritual in German, the propriety of the conduct of defendants in withdrawing from the order, are questions solely for the consideration of the parties themselves. The Knights of Pythias had a lawful right to declare that its ritual should be printed only in English, and defendants had an equally lawful right to found an order whose ritual might be printed in German. Having formed this order, is it possible that defendants cannot give it an appropriate name, a name which will properly describe it? This new order is formed by the members of the Knights of Pythias who withdrew from the Knights of Pythias because that order changed its policy in a matter which it must be presumed they thought important. This order resembles the Knights of Pythias. It stands to these members in the place which the Knights of Pythias has vacated. To a certain extent it carries out a policy which the Knights of Pythias formerly carried out and abandoned. Complainant charges that the defendants have seceded from it, and have established a rival and very similar organization. No name could appropriately be adopted, under these circumstances, which did not contain the words 'Knights of Pythias,' because no name could properly describe it, either by reference to its origin, its history, or its purposes, which did not contain those words. Suppose that this new order had received some other name. It would have been none the less, in the minds of complainant, a seceding faction of the Knights of Pythias; it would have been none the less, to the defendants, a substitute for the Knights of Pythias; and it would have been none the less, to the impartial historian, an offshoot of the Knights of Pythias. One excellent test of an appropriate name to select under such circumstances is furnished by the history of schisms in other societies. Nearly all our varieties of churches of the same denomination are the results of secession or withdrawals from the parent church of that name, and it has been the usual course for the new church society to adopt as a permanent part of its name the name of the parent organization. Take one instance: A part of the Methodist Episcopal Church withdrew and established the Protestant Methodist Church. So we have the Order of Foresters of America, formerly the Ancient Order of Foresters of America; the Canadian Order of Foresters; the Independent Order of Foresters, — all of which are, as I understand, offshoots of the Ancient Order of Foresters of England. No one has ever questioned the appropriateness of using the parent name as part of the name of a new society formed under these circumstances, so far as I can learn. To my mind, it is clear, therefore, that defendants, in naming their order, not only could, but were almost bound, in order to properly describe it, to make use of the words 'Knights of Pythias.'

“Of course, there is this limitation: Defendants should not use a name so much like the name of the order from which they have withdrawn as to work a damage to that order. The only way that the order can be damaged, as the least reflection will prove, is by depriving it of members who would otherwise join it. Let us apply to this case the principles by which courts determine similar controversies of trading concerns. The decisive principle is this: ‘No man has a right to sell or advertise his own business or goods as those of another.’ *Williams v. Farrand*, 88 Mich. 478, 50 N. W. 448. ‘One must not, therefore, adopt a name so similar to that of another as to draw to himself business intended for that other.’ *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490; *Tallcot v. Moore*, 6 Hun, 106; *Potter v. McPherson*, 21 Hun, 559; *Holmes v. Holmes*, 37 Conn. 296. The correct principle is stated in complainant’s brief (page 71) as a quotation from the opinion of Judge Foster, of the Superior Court of Vanderburgh County, Indiana, rendered in the suit of *St. George Lodge, K. of P. v. Rosenthal et al.*

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“Where one uses the name of another for the fraudulent purpose of attracting to himself business which belongs to that other, no injustice will be done if the Court assumes that the name chosen accomplishes this purpose, even though the resemblance be not great. If one intends that the name he has chosen shall be believed to be that of another, it is fair to infer that he will so use that name as to promote the desired belief. Accordingly we find that the motives with which a name is chosen, and the circumstances attending its use, as well as the similarity of names, have a bearing in determining whether business is liable to be diverted, and, consequently, whether the Courts shall interfere. Compare *Myers v. Buggy Co.*, 54 Mich. 215, 19 N. W. 961, and 20 N. W. 545, and *Williams v. Farrand*, 88 Mich. 479, 50 N. W. 446. See, also, *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 471, 39 N. E. 490. Where the name was not chosen for the purpose of deception, and has not been used under circumstances intended or calculated to deceive, the similarity of names must be such as to deceive ordinary persons



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proceeding with ordinary care, to justify the interference of a court. High, Inj. § 1888; *Seixo v. Provezende*, 1 Ch. App. 192; *McLean v. Fleming*, 96 U. S. 251. There is not a particle of evidence in the case that defendants chose the name 'Improved Order Knights of Pythias' with the intention that their order should be supposed to be the Order Knights of Pythias, nor that they have done anything since the order was founded to lead the public to believe that the others were the same. On the contrary, the official communications issued by defendants, some of which are set up in complainant's bill, inform all who read them that their order is not the Knights of Pythias, but is a separate, and, they claim, an improved, order. Defendants seem quite as anxious as complainant to have it understood that their order is not the Knights of Pythias.

"This, then, is the test: Is the name 'Improved Order Knights of Pythias' so nearly like the name 'Knights of Pythias' that ordinary persons using ordinary care would think them identical, would think them two names for the same order, or for branches of the same order, so that they would become members of the defendant's society when they really wanted to join complainant's society? In considering this question, it should be borne in mind that no complaint is or can be made on account of any damage resulting from the fact that the defendant society is a rival and a competing organization, and that the founders of an order have the right to claim that their order is superior to any and every other order. It is fatal, therefore, to complainant's case, if the difference of names indicates that defendants' society is a different society (even though it is claimed to be better) from complainant's. The law does not protect the name from any consideration for the feelings of those who bear it. *Day v. Brownrigg*, 10 Ch. Div. 294. The sole question is, as already stated, the effect, or probable effect, of the similarity of names, in diverting business. In determining this question, Courts do not receive much, if any, aid from adjudicated cases. In the communications of defendants set up in complainant's bill, the name of their society appears as follows: 'Improved Order K. of P.' The name of the complainant is set forth as follows: 'Supreme Lodge Knights of Pythias.' It is the head of the 'Order Knights of Pythias.' To me it is self-evident that no careful person could think that these two orders were identical, and, as has been said, in cases of this class the question is whether the similarity is calculated to mislead the ordinary run of mankind. There certainly is just as much distinction between these names as there is between that of the Episcopal Church and the Reformed Episcopal Church, or that of the Presbyterian Church and the United Presbyterian Church.

"But we referred to the case of *Cement Co. v. Le Page*, 147 Mass. 206, 17 N. E. 304, holding that the introduction of the word 'improved' into the name of the article manufactured by defendant will not justify its use if, in other respects, its use is unjustifiable. Another case very

similar is that of *Hohner v. Gratz*, 52 Fed. 871. In the former case it was held an invasion of the rights of the owner of the name 'Le Page's Liquid Glue' to use the name 'Le Page's Improved Liquid Glue.' In the latter case it was held an invasion of the rights of Mr. Hohner, who made and sold harmonicas under his own name, to use the name on harmonicas, 'Improved Hohner.' The distinction between these cases and the case at bar is obvious. In those cases the word 'improved' indicated, not a different glue, but an improved quality of the same glue. One wishing to buy 'Le Page's Liquid Glue' would naturally wish to buy 'Le Page's Improved Liquid Glue.' In the *Hohner* case the Court said, 'The words "Improved Hohner" would signify his (Hohner's) make of a better quality,' and upon this ground an injunction was granted. Now, the name 'Improved Order Knights of Pythias' does not mean, and no one can think for a moment that it does mean, that it is the same order as the Knights of Pythias. Every one who knows enough about secret societies to be qualified to join them knows that a different name of a society means a different society. He would know that the Improved Order Knights of Pythias was not a variety of the Order Knights of Pythias. The difference of names would indicate to him possibly a claim on the part of defendants that theirs was the better order, of which he must for himself determine; but certainly that it was a different order. If, in the *Le Page* or *Hohner* case, the names had only indicated that a different article was claimed to be superior to one of similar name, it is obvious that the Court would not have interfered. 'Improved' has a different signification when prefixed to the name of an order from what it has when prefixed to the name of an article. . . .

The best possible evidence that names are sufficiently similar to mislead the public is the fact that the public, or some portion thereof, has been misled. The defendant order was in existence more than a year before the testimony in this case was taken, and yet not a particle of evidence was introduced showing or tending to show that the similarity of names ever misled or deceived any one. This case must be decided, not by citation of authorities, but by answering the question: Would an ordinary person, using ordinary care, wishing to join the Knights of Pythias, join the Improved Order Knights of Pythias? For the reasons above stated, I must answer this question, No. A decree will be accordingly entered dismissing complainant's bill."

The decree will be affirmed.

LONG, C. J., did not sit. The other justices concurred.

## 172. FLAGG MANUFACTURING COMPANY v. HOLWAY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901

178 *Mass.* 83, 59 *N. E.* 667

BILL in equity brought to restrain the defendant from selling zithers made in imitation of the plaintiff's, filed December 14, 1899.

In the Superior Court the case was referred to William A. Copeland, Esq., as special master, from whose report the following extracts are taken:

The bill of complaint alleges that since May, 1897, the plaintiff has been engaged in the manufacture and sale of a certain kind of musical instrument known to the trade and public as the Regent zither, and has built up a lucrative trade in the same; that one of the distinguishing features of the Regent zithers is that the strings are arranged in groups and are supported by bridges arranged diagonally on a four-sided sounding board, with a straight lower edge and peculiarly curved sides and top; that with the zithers of the plaintiff are used certain patented sheets of music, the patent on which is numbered 614,775, dated November 22, 1898, and is owned by the plaintiff; that the strings of the zithers made by the plaintiff are arranged at distances one from the other, in correspondence to the distance between certain columns of characters on the patented music, and the music so patented is sold by the plaintiff for use only on zithers of its own manufacture, and is incapable of use on any other instruments except the zithers of the defendant complained of; that as a means of holding the music in proper position on its zithers the plaintiff has inserted in the sounding board two pins, and has punched two holes in the sheets of music made under its patents, which holes fit over the pins and hold the music in proper position with relation to the strings, and the fact that the zithers of the plaintiff are capable of use with its patented music has become and is one of the most valuable features of the zithers made by the plaintiff.

The bill charges that since November 1, 1899, the defendant has been selling, without the license of the plaintiff, zithers, under the name of Germania Zither No. 5, not of the plaintiff's manufacture and inferior in quality to the plaintiff's zithers, but constructed and arranged with all of the peculiarities of the plaintiff's zithers, so as to be practically a facsimile thereof, and that the defendant thereby deceives the public and causes it to believe that the zithers sold by the defendant are the zithers manufactured and sold by the plaintiff. . . .

The prayer is for an injunction restraining the defendant from selling zithers which imitate and simulate the zithers made and sold by the plaintiff, and zithers whose strings are arranged and spaced as are the strings made by the plaintiff, and specifically from selling zithers like defendant's Germania Zither No. 5; that the defendant be ordered

to deliver to the plaintiff, or to destroy, all such zithers and advertising matter now in his possession, and to pay to the plaintiff compensation for all damages.

The defendant in his answer alleges that substantially the same kind of instruments, under the name of zither, and other names, have been manufactured and sold by various persons for many years, and the name and style are public property; that the distinguishing mark of the plaintiff's instrument is a peculiar design upon the upper surface around the opening, with the name "Regent Zither" and the company's name and place of manufacture; . . . and that he distinguishes his zithers from the zithers of the plaintiff by plain distinguishing marks, and that he has never used the name "Regent" nor the plaintiff's peculiar figure on the sounding board above mentioned. . . .

There was no contention that the plaintiff had a patent for the mechanical construction, or for the method of stringing his zither Exhibit B, nor that he had a patent for the shape of the body of the instrument.

The master ruled:

"I rule that the principle is 'that no one shall, by imitation or any unfair device, induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his own products or merchandise. The question here is whether the zithers like Exhibit A, sold by the defendant, deceive or are calculated to deceive or 'to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters,' and cause him to believe that he is purchasing the plaintiff's zither. . . . Apparently, the plaintiff's contention is that, as the plaintiff was the first to put on the market zithers strung like Exhibit B, the public have come to believe that all zithers so strung and capable of use with the St. John music are necessarily from the same source of manufacture, and therefore the plaintiff is entitled to continue such monopoly. In the absence of direct evidence of such fact, I am unable to find that they would be likely to be so misled, or that the defendant would be accountable for such erroneous understanding on the part of the public if the defendant's goods are otherwise clearly distinguishable from the plaintiff's. . . . I find no evidence of actual deceit of any purchaser, nor any evidence of actual attempt to deceive, except so far as it may be inferred from the resemblance of the two exhibits. . . .

"I am of the opinion that an injunction should be granted against the selling or offering for sale by the defendant of zithers like exhibit A, unless they are so clearly and unmistakably marked as to indicate in some way that they are the product of the defendant, and not the product of the Flagg Manufacturing Company." . . .

The following exceptions to the master's report were filed by the plaintiff:

1. The master erred in not finding that the defendant had no right to imitate the plaintiff's arrangement and spacing of the strings, including bridges and tuning pins. 2. The master erred in not finding that the defendant has no right to imitate the peculiar style of the body

of the plaintiff's instrument. 3. The master erred in not finding that the defendant had no right to make, sell, or offer for sale instruments simulating the plaintiff's instruments as to arrangement and spacing of strings, bridges, and tuning pins, and also as to style of body. 4. The master erred in not finding that the defendant's instruments are simulations of the plaintiff's, and that the defendant has no right to make, sell, or offer for sale such simulations. 5. The master erred in finding that defendant has a right to make, sell, and offer for sale simulations of the plaintiff's instrument on condition that such simulations are clearly and unmistakably marked so as to indicate in some way that they are the product of the defendant and not the product of the plaintiff.

After a hearing upon these exceptions, the Superior Court made the following decree:

"And now this cause came on to be further heard at this sitting upon the coming in of the master's report and exceptions thereto filed by the plaintiff, and was argued by counsel, and thereupon, upon consideration thereof, no exceptions having been taken to any findings of fact made by the master, it is ordered, adjudged, and decreed that the first and second exceptions be overruled, and that the third, fourth, and fifth exceptions to the master's rulings as matter of law be sustained; and that an injunction issue perpetually restraining and enjoining the defendant, his agents and servants, from selling, offering for sale, or disposing of any zither or zithers like the zither made and sold by the plaintiff and known as Regent Zither No. 5 and being Exhibit B of the plaintiff's bill, or in any form calculated or intended to pass off or to enable others to pass off such zither or zithers as and for the zither or zithers of the plaintiff and known as Regent Zither No. 5; and that the plaintiff recover its costs of suit to be taxed by the clerk and that execution issue therefor in common form."

From this decree the defendant appealed to this Court.

*C. H. Welch*, for the defendant.

*J. E. Maynadier*, for the plaintiff.

HOLMES, C. J. This is a bill brought to restrain the defendant from selling zithers which imitate the plaintiff's, or with strings arranged and spaced as the plaintiff's strings are arranged and spaced, and specifically to restrain it from selling a particular form of zither heretofore sold by it and exhibited by the bill. The case was sent to a master, who reported what is manifest on inspection, when the time of the respective manufactures is known, that the defendant deliberately copied the plaintiff's instrument in all essential and many non-essential details, adding that this was done for a wrongful purpose. The Superior Court made a decree for the plaintiff, in terms almost as broad as the prayers of the bill, and the defendant appealed.

We are of opinion that the decree was wrong in principle. Both zithers are adapted for the use of patented sheets of music, but the zithers are not patented. Under such circumstances the defendant has



the same right that the plaintiff has to manufacture instruments in the present form, to imitate the arrangement of the plaintiff's strings or the shape of the body. In the absence of a patent the freedom of manufacture cannot be cut down under the name of preventing unfair competition. *Stamping Co. v. Fellows*, 163 Mass. 191, 40 N. E. 105, 28 L. R. A. 448. See *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. All that can be asked is that precautions shall be taken so far as are consistent with the defendant's fundamental right to make and sell what it chooses, to prevent the deception which no doubt it desires to practise.

It is true that a defendant's freedom of action with regard to some subsidiary matter of ornament or label may be restrained, although a right of the same nature with its freedom to determine the shape of the articles which it sells. But the label or ornament is a relatively small and incidental affair, which would not exist at all, or at least would not exist in that shape, but for the intent to deceive; whereas the instrument sold is made as it is, partly at least, because of a supposed or established desire of the public for instruments in that form. The defendant has the right to get the benefit of that desire even if created by the plaintiff. The only thing it has not the right to steal is the good will attaching to the plaintiff's personality, the benefit of the public's desire to have goods made by the plaintiff. Probably if there were an absolute conflict between the defendant's right as we have stated it and that of the plaintiff's, the defendant's would prevail. *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 86, 87, 53 N. E. 141, 43 L. R. A. 826. But the plaintiff's right can be protected sufficiently by requiring the defendant's zithers to be clearly marked so as to indicate unmistakably that they are the defendant's and not the plaintiff's goods. This is the relief which the master found to be proper, and we are of opinion that he was right. To go further is to save the plaintiff from a competition from which it has no right to be exempt.

*Decree reversed.*<sup>1</sup>

<sup>1</sup> [ESSAYS :

*Grafton Dulany Cushing*, "On Certain Cases Analogous to Trade-Marks." (H. L. R., IV, 321.)

*Rowland Cox*, "The Prevention of Unfair Competition in Business." (H. L. R., V, 139.)

*E. R. Coffin*, "Fraud as an Element of Unfair Competition." (H. L. R., XVI, 272.)

NOTES :

"Extent of property right in a trademark" (note). (A. L. Reg. 57, o. s., 251.)

"Unfair competition." (C. L. R., III, 494; V, 63.)

"Trademarks: Nature of the right." (C. L. R., V, 401.)

"Protection of trade names: Development." (C. L. R., VII, 120.)

"Unfair competition: Designation of department of a business." (C. L. R., VII, 221.)

### SUB-TOPIC B. IMITATION OF REGISTERED TRADEMARK (BY STATUTE)

173. STATUTES AT LARGE OF THE UNITED STATES OF AMERICA. *An Act to authorize the Registration of Trademarks used in Commerce with foreign Nations or among the several States or with Indian tribes, and to protect the same.* (St. Feb. 20, 1905, c. 592; 33 Stats. 724; supplanting St. July 8, 1870, and St. March 3, 1881.) Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That the owner of a trademark used in commerce with foreign nations or among the several States, or with Indian tribes, provided such owner shall be domiciled within the territory of the United States, or resides in or is located in any foreign country which, by treaty, convention, or law, affords similar privileges to the citizens of the United States, may obtain registration for such trademark, by complying with the following requirements: First, by filing in the Patent Office an application therefor, in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicile, location, and citizenship; the class of merchandise and the particular description of goods comprised in such class to which the trademark is appropriated; a description of the trademark itself, and a statement of the mode in which the same is applied

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"Basis of action for unfair competition." (H. L. R., II, 19-27; VI, 156; X, 56, 447; XI, 405; XII, 285; XV, 440-445.)

"Deceptive use of words or symbols associated with rival business." (H. L. R., V, 139-145; X, 286-295.)

"Fraudulent imitation of store front." (H. L. R., IX, 363.)

"Fraudulent imitation of wares." (H. L. R., IX, 291; X, 282-286, 377; XVI, 272-290.)

"Trademarks and unfair trade." (M. L. R., V, 187.)

The following cases illustrate the application of the principle to imitations of well-known products. *Pillsbury v. Pillsbury-Washburn Mills Co.*, 1895, C. C. A., 64 Fed. 841, and *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 1898, C. C. A., 86 Fed. 608 (Minneapolis flour); *Fuller v. Huff*, C. C. A., 1900, 104 Fed. 141 (Battle Creek health food); *Carlsbad v. Kutnow*, 1895, 68 Fed. 795 (Carlsbad salts); *Bauer v. Société*, 1903, C. C. A., 120 Fed. 74; *Bauer v. Order of Carthusians*, ib. 78; *Bauer v. Siegert*, ib. 83 (the liqueurs Benedictine and Chartreuse, and the bitters Angostura); *Saxlehner v. Eisner & Mendelson Co.*, 1898, 88 Fed. 61, and 21 Sup. 8 (Hunyadi water); *Fairbank v. Bell Mfg. Co.*, 1896, 77 Fed. 875, 102 Fed. 327 (Gold Dust soap); *Potter D. & C. Co. v. Pasfield S. Co.*, 1900, 102 Fed. 490 (Cuticura soap); *La Republique Francaise v. Schultz*, 1900, C. C. A., 102 Fed. 153 (Vichy water).

#### CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:

*Herbert Spencer*, "Justice," c. XIII, *The Right of Incorporeal Property*, §§ 58-61.

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. XI, § 357, p. 344, § 402, p. 389.

*Thomas E. Holland*, "Elements of Jurisprudence," c. XI, par. V, p. 198.

*John W. Salmond*, "Jurisprudence," § 157.

*Sheldon Amos*, "A Systematic View of the Science of Jurisprudence," c. X, par. E, p. 161.

and affixed to goods, and the length of time during which the trademark has been used. . . .

Sec. 2. That the application prescribed in the foregoing section, . . . must be accompanied by a written declaration verified by the applicant, . . . that no other person, firm, corporation, or association, to the best of the applicant's knowledge and belief, has the right to such use, either in the identical form or in such near resemblance thereto as might be calculated to deceive. . . .

Sec. 5. That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trademark on account of the nature of such mark unless such mark — (a) Consists of or comprises immoral or scandalous matter; (b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation: Provided, That trademarks which are identical with a registered or known trademark owned and in use by another, and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trademark owned and in use by another, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be registered: Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this act: Provided further, That no portrait of a living individual may be registered as a trademark, except by the consent of such individual evidenced by an instrument in writing: And provided further, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived in commerce with foreign nations or among the several States, or with Indian tribes, which was in actual and exclusive use as a trademark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this act. . . .

Sec. 12. That a certificate of registration shall remain in force for twenty years. . . .

Sec. 16. That the registration of a trademark under the provisions of this act shall be prima facie evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trademark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof. . . .

Sec. 23. That nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trademark might have had if the provisions of this act had not been passed. . . .

Sec. 28. That it shall be the duty of the registrant to give notice to the public

that a trademark is registered, either by affixing thereon the words "Registered in U. S. Patent Office," or abbreviated thus, "Reg. U. S. Pat. Off." or when, from the character or size of the trademark, or from its manner of attachment to the article to which it is appropriated, this cannot be done, then by affixing a label containing a like notice to the package or receptacle wherein the article or articles are inclosed; and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice.

174. ANNOTATED CODE OF THE STATE OF IOWA. *Cheating by False Pretences*. (1897. Tit. 24, ch. 13, §§ 5049, 5050.) Every person, or association or union of working men or others, that has adopted or shall adopt for their protection any label, trademark or form of advertisement may file the same for record in the office of the secretary of state by leaving two copies, counterparts or facsimiles thereof with the secretary of state. . . .

Every person, association or union adopting a label, trademark or form of advertisement, as specified in the preceding section, may proceed by action to enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof.

175. REVISED LAWS OF THE COMMONWEALTH OF MASSACHUSETTS. *Labels and Trademarks*. (1902. Ch. 72.) Section 2. When a person uses any peculiar name upon or connected with an article manufactured or sold by him to designate it as an article or a peculiar kind or quality, or as manufactured by him, no other person shall without his consent use the same or any similar name for the purpose of falsely representing an article to have been manufactured by or to be of the same kind or quality as those manufactured or sold by the person rightfully using such name.

Sec. 3. Whoever violates the provisions of the preceding section, and whoever knowingly sells or exposes for sale an article having a name upon or connected with it in violation of the provisions of the preceding section, shall be liable in an action of tort to any party aggrieved thereby for all damages actually incurred. . . .

Sec. 7. Any person may adopt a label, not previously owned or adopted by any other person, and file such label for record, by depositing two copies or fascimiles thereof in the office of the secretary of the Commonwealth. . . .

Sec. 9. The Supreme Judicial Court or the Superior Court shall have jurisdiction in equity to restrain the manufacture, use or sale of counterfeits or imitations of a label, recorded as provided in section seven, shall award damages resulting from such wrongful manufacture, use or sale and shall require the defendant to pay the owner of such label the profits derived from such wrongful manufacture, use or sale.<sup>1</sup>

<sup>1</sup> [Consult the following Report :

*Commissioners appointed to revise the Statutes relating to Patents, Trade and other Marks, and Trade and Commercial Names*, Report, under U. S. St., June 4, 1898 (U. S. Sen. Doc. 20, 56th Cong., 2d Sess., Washington, 1900).]

(1) *Kinds of Goods Protectable by Registration*

176. DAVIS *v.* DAVIS

UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS. 1886

27 Fed. 490

IN EQUITY. Motion for preliminary injunction.

*W. B. H. Dowse* and *E. B. Hale*, for complainants.

*T. L. Wakefield*, for defendants.

CARPENTER, J. This bill is brought to enjoin certain alleged infringements of the trademark of the complainants, registered June 2, 1885, and numbered 12,279. It appears that the trademark of the complainants, and also the alleged infringements thereof, are used in commerce with the Dominion of Canada. The trademark is described as follows in the statement annexed to the certificate of registry:

"Our trademark consists of a label bearing a representation of the device or design produced by the means and arrangement used by us in packing our cakes or bars of soap in boxes. We fold each cake or bar of soap in either a red or yellow wrapper, and pack the cakes or bars thus folded in a box, so that the red and yellow wrappers alternate. . . . As the label is a reproduction of the appearance which the soap presents when packed, as described, in a box, it is obvious that bars or cakes of soap simply wrapped and arranged in a box, as described, is one method of producing our trademark, . . . the essential feature of which is the device produced by the combination and alternate arrangement of red and yellow spaces, substantially as described."

This trademark, although, in the words of the statement, it "consists of a label," is not attached in any way to the soap sold by complainants. In practice the label is made of the same size as the box of soap, measuring on the inside, and is placed in the box on the upper layer of bars of soap, and is by the retail tradesman taken out, and used as a show-card.

The complainants allege that the respondents infringe this trademark in two ways: First, they give to their customers a shallow box containing cakes of soap of the same length and breadth as those sold by them, but much thinner, and enclosed in red and yellow wrappers, and arranged alternately by colors, as in the drawing of the trademark. . . . It is to be observed that there is a very great difference in appearance between a box of soap, and a printed label representing the upper layer of soap therein contained. The most careless observer could not confound one with the other. I therefore conclude that there is no infringement by the use of the advertising box, unless, indeed, it be an infringement of the rights of the complainants to sell soap wrapped in red and yellow wrappers, arranged alternately in the box in which it is packed.

But the complainants claim, in the second place, that their trademark is infringed by the sale of soap wrapped and arranged in boxes in the same manner used by them. Undoubtedly the terms of the statement are broad enough to cover the boxes of soap sold by respondents. The statement expressly says that "bars or cakes of soap simply wrapped and arranged in a box, as described, is one method of producing our trademark." But I am of opinion that the registration, in so far as it can be interpreted to cover the sale of boxes of soap, is entirely void, for the reason that the object or thing thus included in the description is not such a thing as can lawfully be registered as a trademark. A trademark is some arbitrary or representative device attached to or sold with merchandise and serving to designate the origin or manufacture of that merchandise. I do not think that the merchandise itself, or any method of arranging the various packages, can be registered as a trademark. In the very nature of the case, as it seems to me, the trademark must be something other than, and separate from, the merchandise. It is not, of course, claimed that the colors used in the wrappers can be in themselves the subject of a trademark registration; nor is it claimed that the wrappers themselves constitute the trademark. The claim is that the trademark consists in the arrangement of the colors in the wrappers. This seems to me to be no less than a patent for an idea, under the guise of the registration of a trademark. I do not think that, in any possible view, the claim can be sustained. . . .

The motion for preliminary injunction will be denied.

### 177. COLUMBIA MILL COMPANY *v.* ALCORN

SUPREME COURT OF THE UNITED STATES. 1893

150 *U. S.* 460, 14 *Sup.* 151

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania. Affirmed.

In equity. Bill by the Columbia Mill Company against William W. Alcorn and Samuel Alcorn, trading as W. W. Alcorn & Co., for infringement of a trademark. The Court below dismissed the bill (40 Fed. 676), and complainant appeals. Affirmed.

*P. H. Gunckle*, for appellant.

Mr. Justice JACKSON delivered the opinion of the Court.

The complainant, a corporation of Minnesota, engaged in the manufacture of flour at Minneapolis, in that State, brought this bill to restrain the defendants from using the word "Columbia" in a brand placed on flour sold by them. The complainant alleged that it had selected this word as a fanciful and arbitrary name or trademark at least five years prior to the filing of the bill, for the use and purpose of identifying a certain quality of flour of its own manufacture. The complainant's



brand, printed on sacks, and stencilled on the heads of barrels, was in the form of a circle, in the upper arc of which were the words "Columbia Mill Co.," and in the lower arc, "Minneapolis, Minn." These words were printed in blue. On a horizontal line, and in the middle of the circle, was the alleged trademark, "Columbia," in large letters, which was printed in red. Below this word, on separate lines, and in smaller letters, were the words "Roller Process" and "Patent." The bill also alleged that the brand of flour on which the trademark was affixed obtained an extensive sale, and became generally known throughout the country, but that in the years 1887 and 1888 purchasers and consumers thereof were misled and deceived by the defendants, who put up in similar packages an imitation of the flour manufactured by the complainant, which was thus sold by them under the name, brand, and trademark, "Columbia." It was further alleged that the flour thus sold, although inferior in quality to the complainant's article, caused a great diminution in the business of the complainant. The bill prayed for an injunction, and an accounting of the profits on all the flour sold by the defendants under the brand of "Columbia."

The defendants answered that they carried on in Philadelphia a general business of buying outright, and of selling on commission, flour consigned to them, and that, in accordance with the custom of the trade, they had their own brands put on the sacks and barrels of flour handled by them. They admit that one of the brands so used was in the form of a circle, having the words "High Grade" in the upper arc, and under those words "No. 1"; then, on the next line, "Hard Wheat," under which, in large letters, was the word "Columbia," and below that, in letters of the same size, was the word "Patent," and the figures "196" in another line below. On the lower arc of the circle were the words "Minneapolis, Minn." The answer stated that the whole of the brand was printed in black ink. The defendants further averred that "they have never sold any flour not manufactured by the complainant as being the flour of the complainant; that they have not knowingly or actually used, or caused to be used, any brand for flour in imitation of any brand used by the complainant, nor have they ever sold any flour branded in imitation of complainant's flour; that they have never come in competition with complainant's flour, nor has any one ever purchased the respondent's flour, believing it to be of the complainant's manufacture; that they deny any claim on the part of the complainant to any right to the name 'Columbia' as a trademark, averring that the same was used by these respondents and other parties long before the said complainant commenced to use it, and that other mills beside the complainant's manufacture and sell flour branded "Columbia."

Upon the pleadings and proofs, the Court below held that the complainant had not established its exclusive right to the use of the word "Columbia" in a brand for flour, and dismissed the bill. From this decree the present appeal is prosecuted.

We are clearly of opinion that there is no error in the judgment of the Court below. The general principles of law applicable to trademarks, and the conditions under which a party may establish an exclusive right to the use of a name or symbol, are well settled by the decisions of this Court in the following cases: *Canal Co. v. Clark*, 13 Wall. 311; *McLean v. Fleming*, 96 U. S. 245; *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Goodyear India Rubber Glove Manuf'g Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166; *Corbin v. Gould*, 133 U. S. 308, 10 Sup. Ct. 312; *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 537, 11 Sup. Ct. 396; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625.

These cases establish the following general propositions: That to acquire the right to the exclusive use of a name, device, or symbol as a trademark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trademark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trademark. (3) That the exclusive right to the use of the mark or device claimed as a trademark is founded on priority of appropriation; that is to say, the claimant of the trademark must have been the first to use or employ the same on like articles of production. (4) Such trademark cannot consist of words in common use as designating locality, section, or region of country.

The alleged trademark cannot, for many reasons, be made the subject of an exclusive private property: First, because it is clearly shown from the proof in the cause that the word "Columbia," as a brand upon sacks or barrels of flour, was in use long before its appropriation by the complainant. . . .

Second, the word "Columbia" is not the subject of exclusive appropriation, under the general rule that the word or words, in common use as designating locality, or section of a country, cannot be appropriated by any one as his exclusive trademark.

In *Canal Co. v. Clark*, 13 Wall. 311, it was held that the word "Lackawanna," which is the name of a region of country in Pennsylvania, could not be, in combination with the word "coal," constituted a trademark, because every one who mined coal in the valley of Lackawanna had a right to represent his coal as Lackawanna coal. Speaking for the Court, Mr. Justice Strong said:

"The word 'Lackawanna' was not devised by the complainants. They found it a settled and known appellative of the district in which their coal de-

posits, and those of others, were situated. At the time they began to use it, it was a recognized description of a region, and of course of the earths and minerals in the region. . . . It must be then considered as sound doctrine that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation."

The appellant was no more entitled to the exclusive use of the word "Columbia" as a trademark than he would have been to the use of the word "America," or "United States," or "Minnesota," or "Minneapolis." These merely geographical names cannot be appropriated, and made the subject of an exclusive property. They do not, in and of themselves, indicate anything in the nature of origin, manufacture, or ownership; and in the present case the word "Columbia" gives no information on the subject of origin, production, or ownership. The upper part of the brand or label of the trademark discloses the full name of the complainant as the manufacturer of the article, and is in no way supplemented or made clearer by the word "Columbia." It can no more be said that it was intended to designate origin or ownership than to denote the quality of the flour on which the brand was placed, and the proof tends strongly to show that the whole label was intended to indicate the quality or class or character of the flour, as being made of spring wheat instead of winter wheat. . . .

It is also shown by the testimony in this case that the flour manufactured from spring wheat, such as that dealt in both by the complainant and the defendants, is never sold or bought simply on the brand, but usually, if not always, by actual sample; and the proof fails to establish that the brand of the appellees was calculated to mislead, or did actually deceive or mislead, any one into supposing that the flour of the complainant was being bought. So it cannot be said that the defendants were personating the complainant's business by using such a description or brand as to lead customers to suppose that they were trading with the appellant. Even in the case of a valid trademark, the similarity of brands must be such as to mislead the ordinary observer.

For the foregoing reasons, we are clearly of opinion that there was no error in the Court below in dismissing the bill, and the same is accordingly affirmed.

### 178. SCHMALZ *v.* WOOLEY

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1898

57 *N. J. Eq.* 303, 39 *Atl.* 539, 41 *Atl.* 939

APPEAL from Court of Chancery.

Bill by Frederick W. Schmalz, who sues in behalf of an unincorporated association, against Edwin Wooley and Frederick S. Crane. Demurrer to bill sustained (39 *Atl.* 539), and plaintiff appeals. Reversed.

*J. A. Beecher*, for appellant.

*Wm. B. Guild*, for respondents.

DIXON, J. The bill in this case was filed in February, 1897, by the president of the Union Hat Makers' Association of Newark, for the use and benefit of all the members thereof, to enjoin the defendants from using a counterfeit trademark and label made in imitation of a trademark and label which had been adopted and filed by the said association in accordance with the provisions of the several Acts of the Legislature passed in the years 1889, 1892, and 1895 (3 Gen. St. p. 3678 et seq.). The defendants demurred to the bill, and, the demurrer having been sustained, the complainant appeals.

The Act of 1889 is entitled "An Act to provide for the adoption of labels, trademarks, and forms of advertising by associations or unions of workingmen, and to regulate the same." It provides (section 1) that it shall be lawful for associations and unions of workingmen to adopt, for their protection, labels, trademarks, and forms of advertisement, announcing that goods manufactured by members of such associations or unions are so manufactured; (section 4) that every such association or union adopting a label, trademark, or form of advertisement as aforesaid, shall file the same in the office of the secretary of state, by leaving two copies, counterparts, or facsimiles thereof, with said secretary; and (section 5) that every such association or union adopting, etc., may proceed by suit in the Courts of this State to enjoin the manufacture, use, display, or sale of any counterfeit of their label, trademark, or form of advertisement; and that all Courts having jurisdiction thereof shall grant such an injunction. The demurrants do not deny that the bill presents a case in conformity with this Act, except in this respect: That under the Act the bill should be filed by the association, or all its members, and not by one member alone. In our opinion, the Act empowers the association to proceed by suit, making it for this purpose a quasi corporation, and therefore does not of itself entitle a single member to maintain the action. But this objection is obviated by section 4 of the Act of 1892, if valid, which provides for the bringing of such proceedings in the name of any member duly authorized by the association or union for that purpose. We are therefore brought to the main question raised as to these statutes.

The demurrants contend that the Act of 1889 violates that provision of the Constitution (article 4, § 7, par. 11) which forbids the passage of private, local, or special laws granting to any association, corporation, or individual any exclusive privilege, immunity, or franchise whatever. . . . We think this Act is constitutional.

The Act of 1892, with its amendment of 1895, seems not to be exposed to the objection just considered. . . . We therefore conclude that these Acts are valid, so far as they are necessary to sustain the complainant's bill.

We also think that upon general principles the substance of the bill is

sufficient. It alleges: That a company of journeymen hatters, calling themselves "The Union Hat Makers' Association of Newark, New Jersey," have, in common with similar associations formed elsewhere, adopted a certain label or trademark, of which the following is a copy:

. . . That for ten years last past they have used said label or mark to designate and distinguish the hats made by members of the association, by affixing it upon each of those hats, and that for about three years last past the defendants have used a fraudulent imitation of that mark upon the hats made and sold by them, thereby deceiving the public, violating the rights of the members of the association, and depriving them of large profits which they would otherwise have gained. These allegations seem to present a case of inequitable infringement of the association's right of property in its trademark or label. In *McAndrew v. Bassett*, 4 De Gex, J. & S. 380, Lord Westbury said:

"The essential ingredients for constituting an infringement of that right probably would be found to be no other than these: First, that the mark has been applied by the plaintiffs properly (that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representations); secondly, that the article so marked is actually a vendible article in the market; and, thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description."

These views received the approval of Lord Cairns, sitting in the Court of Appeals in *Maxwell v. Hogg*, 2 Ch. App. 307-314, and accord with the great weight of authority on this much-litigated subject. The present bill clearly sets out the adoption and proper application of the mark by the association, and its fraudulent imitation for the interdicted purpose by the defendants. It is not so explicit as to the second ingredient mentioned by the Lord Chancellor, but the Court does not need to be told that hats made by a company of journeymen hatters during ten years were actually vendible articles in the market. So much will be inferred.

But the objection urged by the defendants against the bill is that it does not allege, and the Court cannot infer, that the journeymen owned the hats made by them; and it is insisted that ownership of the article to which the trademark is affixed is necessary to the acquisition of a right in the mark. To support this claim, *Schneider v. Williams*, 44 N. J. Eq. 391, 14 Atl. 812, is cited. Some expressions in the opinion of the able jurist who decided that case certainly give countenance to the present objection, but on consideration I think those expressions will appear to be unwarranted. Thus, in defining the means by which a person will acquire an exclusive right to a trademark, he says:

"First, he must select or adopt some mark or sign not in use to distinguish goods of the same class or kind already on the market, belonging to another trader; second, he must apply his mark to some article of traffic; and, third, he must put his article, marked with his mark, on the market."

Now, it is undisputed that this association has complied with the first two of these requirements. Only in respect to the third has it failed. It did not itself put upon the market its own articles marked with the label. But it is doubtful whether the learned judge intended this third requisite to be so strictly read, for he immediately added:

“Mere adoption of a mark or sign, and a public declaration, by advertisement or otherwise, that a person will at a subsequent time put a particular thing on the market, marked or distinguished in a certain way, create no right. Until the thing is actually on the market, marked by the particular mark of the person intending to acquire a title, no property right in the mark arises.”

This seems to indicate that it was the actual marketing of the marked article, and not the person by whom it was marketed or owned, on which stress was laid. And why should this specific personal element be deemed important? The public object sought in the protection of trademarks is to bring upon the market a better class of commodities, and the means for attaining that object is by securing to those who are instrumental in supplying the market whatever reputation they gain by their efforts towards that end. The workman by whose handicraft the commodity is made is one of these instruments, just as is his employer who furnishes the raw material and owns and sells the finished product; and if the former is permitted by the owner to place upon the commodity a mark to indicate whose workmanship it is, and thereby commend his workmanship to other employers, this license from the owner should be deemed a right against everybody else. His aptitude in his trade is his property, and, if by a mark he can have it identified as his in the market, he may enhance its salable value, and thus secure the same sort of advantage as his employer, by similar means. No reason exists why this advantage should not be protected by the Courts in the same manner and to the same extent as is the like advantage of the employer. The mere fact that one rather than the other of these persons has placed the product upon the market has no rational bearing upon the matter; for both alike have had the market in view in the efforts they have made, and through those efforts the market is supplied. A different objection of a suit of this nature was sustained in *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, namely, that the label did not indicate by what persons the articles labelled were made, but only indicated that they were made by one of many persons who were not connected with each other in any business. The first clause of this objection would unduly restrict the law of trademarks as everywhere recognized; for it is established that, whatever be the quality indicated by a trademark, the mark need not point out the particular person from whom that quality is derived. The law has placed no limit upon the number of persons who may unite for business purposes and jointly acquire property in a trademark; and yet it is evident that, if there be many, some of them may have no personal share in producing the article



identified by the mark. The second clause in the objection assumes what does not appear to be true in the case before us. We understand from the bill that the members of the association represented by the complainant are connected together as journeymen hatters; that their skill in this trade, and their mutual assistance in profiting by its practice, form the motive and chief aim of their association. This connection is as clearly one for business purposes as is that of members in a partnership, or of stockholders in a corporation. Although it is a comparatively novel species of relationship, it has become an established one, and therefore calls for the application of those general principles of law and equity which are applied to other species of business associations. According to these principles, we think a workman, or a number of workmen engaged in the same branch of industry and banded together for their mutual profit, in the pursuit of their common vocation, may acquire a right of property in a trademark designed to distinguish their workmanship from that of other persons, and that a trademark so owned is entitled to the same protection as other trademarks. The decree below should be reversed, and the demurrer overruled.<sup>1</sup>

(2) *Infringement of Registered Right*

179. CHURCH & DWIGHT COMPANY v. RUSS

UNITED STATES CIRCUIT COURT, DISTRICT OF INDIANA. 1900

99 Fed. 276

*Dickerson & Brown*, for complainant.

*Andrew Anderson*, for defendants.

BAKER, District Judge. This is a suit to enjoin the infringement of a trademark or trade symbol, and to recover damages for its infringement. It is alleged that the complainant since July 1, 1896, has been engaged in the State of New York in preparing and marketing baking soda and saleratus used for cooking purposes, and prior to that time its predecessor, under the name of Church & Co., had been engaged in the same business at the same place. On July 1, 1896, the complainant

<sup>1</sup> [ESSAYS :

*W. A. Martin*, "Union Labels" (A. L. R., XLII, 511.)

NOTES :

"Generic words as trade-marks." (C. L. R., II, 406, 420.)

"State seal or coat of arms : Use as trademarks." (C. L. R., VI, 122.)

"Fancy words." (H. L. R., VIII, 511.)

"Descriptive words." (H. L. R., XII, 349.)

"Marks and names subject of ownership: Descriptive words." (H. L. R., XXI, 361, 373.)]

For the cases showing the distinction between the statutory registration right and the common-law right, in respect to generic or geographical trade names, see Book III, Title B, Sub-title (III).]

succeeded to the business of the firm of Church & Co., and to all its interest in said business, including any and all trademarks and trade names used by said firm in its business, and to the rights thereunder which had accrued to that firm. Since the year 1874 the complainant and its predecessor have prepared and put upon the market a new and original preparation of soda and saleratus to be used for cooking purposes, and, to indicate the origin and genuineness of the preparation, it and its predecessor have put upon the packages containing the preparation marketed by them, as a trademark and trade symbol, a representation of a bared arm, the hand grasping the handle of a hammer; the arm being shown raised in the position which it would assume when about to strike with the hammer. . . . The above-specified trademark is the exclusive property of the complainant, and it is entitled to its sole and exclusive benefit and use. The complainant and its predecessor have at all times insisted on its trademark, and have notified the public thereof. This trademark has become universally known as the property of the complainant and its predecessor, and has been uniformly respected as such until its infringement by respondents. For the purpose of further informing the public of the complainant's rights in and to said trademark, it caused it to be registered on January 26, 1897, according to the statutes of the United States. This trademark has been used by the complainant and its predecessor for more than twenty years continuously in connection with packages containing soda and saleratus, in commerce with Canada and other foreign countries, and has been very extensively used throughout the United States. The soda and saleratus prepared and sold by it and its predecessor have been of a superior quality, and have been prepared for the market with care, according to their peculiar methods; and the soda and saleratus have met with great favor since they were placed upon the market, and the demand for them has increased from year to year. The exclusive right to this trademark is of great value in its business, and the respondents' infringement of it has caused great and irreparable loss, to an amount exceeding \$5,000. The respondents are engaged in manufacturing and selling baking powder used for cooking purposes, the active ingredient of which is soda, prepared and put up in packages having a representation exactly similar to the trademark of the complainant. It is further alleged that the respondents, knowing the high reputation and deserved celebrity of the baking soda and saleratus manufactured and sold by the complainant, have pirated its trademark, with the intent to enlarge their sales of baking powder, and to deceive the public into the belief that the baking powder put up in packages having said trademark is manufactured and sold by the complainant, or with its authority and consent. The complainant has notified the respondents of its right to the exclusive use of said trademark, and has requested them to desist from its use, which they have refused to do, and they insist on their right to use such trademark upon

the packages of baking powder sold by them. The respondents admit all the material facts above stated, except that they deny they infringe the complainant's trademark by using the same on their packages of baking powder, because, as they allege, baking powder does not belong to the same class of goods as baking soda and saleratus. They also deny that they intend to, or do, deceive the public by using the complainant's trademark on their baking powder, or that the complainant is damaged by such use. . . . The evidence is conflicting on the question whether the public are, or are likely to be, deceived by the respondents' use of the complainant's trademark. . . .

The tendency of the Courts at the present time seems to be to restrict the scope of the law applicable to technical trademarks, and to extend its scope in cases of unfair competition. *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Laughman's Appeal*, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599; *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576; *Castle v. Siegfried*, 103 Cal. 71, 37 Pac. 210; *Fleischmann v. Starkey (C. C.)*, 25 Fed. 127. As this case falls more appropriately under the head of an infringement of a technical trademark, rather than under the head of unfair competition, it becomes desirable to ascertain as nearly as may be the distinctions, as well as the points of resemblance, between them. The underlying principle of each is the same, namely, the prevention of that which in its operation and results, and usually in intention, is a fraud upon the public, and an injury to the rival trader. That this is the underlying principle is clearly shown in the leading case on technical trademark law (*Canal Co. v. Clark*, 13 Wall. 311, 322, 20 L. Ed. 581, 583), where the Supreme Court say:

"This will be manifest when it is considered that, in all cases where rights to the exclusive use of the trademark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a Court of Equity can have relief. This is the doctrine of all the cases."

But, while the idea of fraud or imposition lies at the foundation of the law of technical trademarks as well as the law of unfair competition, it must be borne in mind that fraud may rest in actual intent shown by the evidence, or may be inferred from the circumstances, or may be conclusively presumed from the act itself. In the case of unfair competition the fraudulent intent must be shown by the evidence, or be inferable from the circumstances, while, in the case of the use by one trader of the trademark or trade symbol of a rival trader, fraud will be presumed from its wrongful use. It is commonly said that there is a right of property in a technical trademark, and an infringement of it is spoken of as a violation of a property right. Whether this view be correct or not is quite immaterial, because it is universally agreed that some of the rights which are incident to property do inhere in a tech-

nical trademark. The cases all agree that no one has a right to use another's trademark in connection with similar goods; and if he does so use it, and persists therein after being requested to desist, the fraud and imposition which constitute the essence of the injury will be presumed to exist, and relief will be granted without further proof. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 548, 549, 11 Sup. Ct. 396, 34 L. Ed. 997. In strict trademark cases, such as the present case is, a fraudulent intent to injure the complainant, or an actual misleading of the public, need not be proved, as it will be presumed. In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, *supra*, the Supreme Court says:

"The jurisdiction to restrain the use of a trademark rests upon the ground of the plaintiff's property in it, and of the defendant's unlawful use thereof. *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69. If the absolute right belonged to the plaintiff, then, if an infringement were clearly shown, the fraudulent intent would be inferred; and, if allowed to be rebutted in exemption of damages, the further violation of the right of property would nevertheless be restrained. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526."

The complainant having acquired the exclusive right to the use of the trademark upon baking soda and saleratus, the remaining question is this: Does the baking powder of the respondents belong to the same class of goods as the baking soda and saleratus of the complainant? The respondents admit that their baking powder consists of 25 per cent of soda, mixed with 75 per cent of corn meal starch and tartaric acid. The greater part of the baking powder consists of the starch, used simply as a drier to absorb the moisture to which the baking powder may be exposed, and thus to prevent the formation of carbonic acid gas by the chemical combination of the soda and acid. Consequently, every time the respondents sell a package of their baking powder, having the complainant's trademark upon it, they are actually selling a package a material part of which consists of baking soda. . . . A decree may be prepared in accordance with the foregoing views.

180. JAMES LOVE HOPKINS. *Law of Trademarks, Trade Names, and Unfair Competition*. (1905. 2d ed., § 108, p. 264.) Mr. Justice Clifford expressed the rule in these words: "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trademark so resembling that of another trader as that ordinary purchasers buying with ordinary caution are likely to be misled."<sup>1</sup> But further, in the same opinion, he bases the decision explicitly upon the ground that the defend-

<sup>1</sup> *McLean v. Fleming*, 96 U. S. 245-251; following the language of Lord Cranworth in *Seixo v. Provezende*, L. R. 1 Ch. D. 192. See also *Popham v. Wilcox*, 14 Abb. Pr. N. S. 206, 38 N. Y. Super. Ct. 274, 66 N. Y. 69, 23 Amer. Rep. 22, Seb. 425; *Dawes v. Davies*, Seb. 426.

ant's package "is well calculated to mislead and deceive the unwary."<sup>1</sup> There are many instances of similar dicta. We have heretofore referred to the assertion of Vice-Chancellor Shadwell, who said that "If a thing contains twenty-five parts, and but one is taken, an imitation of that one will be sufficient to contribute to a deception, and the law will hold those responsible who have contributed to the fraud."<sup>2</sup>

It is at this point that we can secure probably the most striking proof of the manner in which the law of trademarks and the law of unfair competition overlap each other. True, the function of the trademark is to distinguish the goods to which it is applied, and whose origin or ownership it indicates. True that the purpose of an intentional infringement is to draw away the trade secured by the infringed mark for the benefit of the owner of the infringing mark. But that that infringement is to be determined, not by the question whether any substantial part of the trademark is copied or duplicated by the infringing mark, but by the tendency of the pirated mark to deceive (whether the careful, ordinary, or unwary purchaser is immaterial), is an anomaly in our jurisprudence. Yet the Courts have persisted in disregarding the technical composition and detail of trademarks, and have invariably applied the test of tendency of the suspected mark to deceive. The test ignores the absolute right of property which exists in a lawful trademark, and gives the owner of such a mark no other or further rights than are given the plaintiff who uses only generic terms to designate his wares and perforce relies upon the doctrines of unfair competition.<sup>3</sup>

The broad rule as stated above by Mr. Justice Clifford has been elaborated by other Courts.

### 181. REGIS *v.* JAYNES

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1906

191 *Mass.* 245, 77 *N. E.* 774

CASE reserved from Supreme Judicial Court, Suffolk County.

Suit by E. M. Regis and another against J. A. Jaynes and others to enjoin the infringement of a trademark. From a decree enjoining defendants, and ordering the recommitment of the cause to a master for an accounting, defendants appeal. Affirmed.

*Robert F. Herrick* and *Guy Cunningham*, for appellants.

*Arthur F. Hardy*, for appellees.

SHELDON, J. After the decision in this case reported in 185 *Mass.* 458, 70 *N. E.* 480, a decree was entered enjoining the defendants from

<sup>1</sup> *McLean v. Fleming*, 96 U. S. 245, at page 256.

<sup>2</sup> *Guinness v. Ulmer*, 10 L. T. 127. See also *Leather Cloth Case*, 11 H. L. C. 523, 35 L. J. Ch. 53, 11 Jur. N. s. 513, 12 L. T. N. s. 742, 13 W. R. 873; *Popham v. Willcox*, 66 N. Y. 69.

<sup>3</sup> Lord Westbury evidently was impressed with this thought when he said, "Imposition on the public is necessary for the plaintiff's title, but in this way only, that it is a test of the invasion by the defendant of the plaintiff's right of property; for there is no injury if the mark used by the defendant is not such as is mistaken, or is likely to be mistaken, by the public for the mark of the plaintiff; but the true ground of this Court's jurisdiction is property." *Hall v. Barrows*, 4 De G. J. & S. 150.

using the words "Rex" or "Rexall" in connection with the sale of preparations for the cure of dyspepsia, and ordering that, upon the filing of a supplemental bill, the case should be recommitted to the master for an accounting of profits since the filing of the original bill; and the first question which now comes before us is raised by the defendants' appeal from this decree. The plaintiffs' supplemental bill avers that since the filing of the original bill the defendants have sold numerous boxes of dyspepsia tablets under the names "Rexall" and "Rexall Dyspepsia Tablets," and prays for an accounting of the plaintiffs' damages and of the defendants' profits therefrom. The defendants' contention is that, although the injunction was rightly issued under the previous decision (*Regis v. Jaynes*, 185 Mass. 458, 70 N. E. 480), yet no accounting of profits should have been ordered. The facts which were then before the Court were those stated in the master's report. They claim that it appeared by this report that they had acted in good faith, in ignorance of the plaintiffs' rights, until about a month before the filing of the bill; that there had been no actual interference with the sale of the plaintiffs' goods by reason of the similarity of the word "Rexall" to their trademark; that the plaintiffs had not suffered any actual monetary loss; and that it did not appear that the defendants had derived any advantage from the use of the trademark or good will.

The general principle that one who has shown that he is entitled to the exclusive use of a trademark may in equity recover from an infringer, against whom he obtains an injunction, the amount of the profits arising from the sale of goods upon which the trademark had been wrongfully used, is not denied by the defendants and is abundantly sustained by authority. *Saxlehner v. Eisner & Mendelson Co.* (C. C. A.), 138 Fed. 22; *Oakes v. Tonsmierre* (C. C.), 49 Fed. 447; *Société Anonyme v. Western Distilling Co.* (C. C.), 46 Fed. 921; *Benkert v. Feder* (C. C.), 34 Fed. 534; *Atlantic Milling Co. v. Rowland* (C. C.), 27 Fed. 24; *Sawyer v. Kellogg* (C. C.), 9 Fed. 601; *Collins Co. v. Oliver Ames Corporation* (C. C.), 20 Blatchf. 542, 18 Fed. 561; *Stonebraker v. Stonebraker*, 33 Md. 252; *Avery v. Meikle*, 85 Ky. 435, 3 S. W. 609, 7 Am. St. Rep. 604; *El Modello Cigar Co. v. Gato*, 25 Fla. 886, 7 South. 23, 6 L. R. A. 823, 23 Am. St. Rep. 537; *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639; *Cartier v. Carlile*, 31 Beav. 292. And the same rule is applied to cases of unfair competition merely, as well as to cases of the infringement of a trademark properly so called. *N. K. Fairbank Co. v. Windsor* (C. C.), 118 Fed. 96, overruled as to some points 124 Fed. 200, 61 C. C. A. 233; *Walter Baker Co. v. Slack*, 130 Fed. 514, 65 C. C. A. 138; *Williams v. Mitchell*, 106 Fed. 168, 45 C. C. A. 265; *Lewis v. Goodwin*, 36 Ch. D. 1. Equity in such a case holds the infringer as trustee for the benefit of the rightful owner to the extent of the profits realized from the unlawful or wrongful business. Paul, *Trade-Marks*, § 326, and cases cited. . . .



The defendants argue that in such a case as this, while an injunction may be granted to protect the rights of the plaintiffs in their trade name, yet the defendants should not be held for the profits which they have realized by selling articles bearing a name like the one used by the plaintiffs, in the absence of any fraudulent intention on their part, when it was found that they had acted in ignorance of the plaintiffs' rights, and it did not appear that substantial injury had been done to the plaintiffs before the filing of their bill. There is some conflict in the decisions; but we think that the weight of modern authority is in favor of the rule that an account of profits will not be taken where the wrongful use of a trademark or a trade name has been merely accidental or without any actual wrongful intent to defraud a plaintiff or to deceive the public. *Elgin Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365; *Saxlehner v. Siegel Cooper Co.*, 179 U. S. 42, 21 Sup. Ct. 16, 45 L. Ed. 77; *N. K. Fairbank Co. v. Windsor*, 124 Fed. 200, 61 C. C. A. 233; *George T. Stagg Co. v. Taylor*, 95 Ky. 651, 669, 27 S. W. 247; *Beebe v. Tolerton & Stetson Co.*, 117 Iowa, 593, 91 N. W. 905; *North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] App. Cas. 83, 86; *Moet v. Conston*, 33 Beav. 578; *Hodgson v. Kynoch, Limited*, 15 Rep. Pat. Cas. 465. And see 21 Ency. Pl. & Pr. 779, and cases there collected. But we do not think that the defendants are protected by this principle against the taking of the account here in question. The account is ordered to be taken only since the filing of the original bill, upon the charge made in the supplemental bill that during the litigation the defendants have persisted in their infringement. It cannot be said that this conduct on their part was in ignorance of the plaintiffs' rights. They were at least put upon inquiry, and must be charged with knowledge of what they would have learned upon reasonable inquiry. Nor can it be said that their conduct since the filing of the bill was innocent or free from wrongful intent within the meaning of the rule which has been stated. They chose, after full notice and warning, to persist in violating the plaintiffs' rights. If the facts, as they were afterwards proved, could have been made manifest to the Court when the bill was filed, an injunction must have issued then. It does not lie in the defendants' mouths to say that conduct on their part which afterwards was proved to have been wrongful, and as to which they had either full knowledge, or the means of obtaining full knowledge, of the facts, was either lawful or innocent. Their continued use was not, as in *N. K. Fairbank Co. v. Windsor*, 124 Fed. 200, 61 C. C. A. 233, in reliance upon the decision of a competent tribunal. Nor was there here any laches or acquiescence on the part of the plaintiffs, as in *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828. The defendants must be treated as having, after the filing of the original bill, that knowledge of the plaintiffs' prior right which was required in *Edelstein v. Edelstein*, 1 De G., J. & S. 185. In *Ford v. Foster*, L. R. 7 Ch. 611, a case very

similar to this, except that there was in that case considerable fault to be found with the conduct of the plaintiff, an order was made similar to that here in question. We are of opinion that the decree appealed from was correct in ordering an account of the defendants' profits since the filing of the bill to be taken. . . .

But counsel for the defendants argues that only those profits are to be accounted for which are actually shown to be due to the assistance derived from the plaintiffs' trademark. So far as this doctrine finds support in the decisions relied on, it seems to us to rest upon a confusion between damages and profits. It will appear, by reference to the cases which have already been cited, that in England in such cases a plaintiff is ordinarily required to elect between damages and profits, while it has been said in many cases in this country that equity, having once obtained jurisdiction, will, where it has granted an injunction, give both damages and profits, so far as this is necessary to secure full compensation. But in this case the order of reference was limited to an account of profits, no damages being allowed; and no question as to the assessment of damages comes before us. . . .

The result is that the decree appealed from must be affirmed, and the defendants' exceptions to the second report of the master must be overruled, and a final decree entered for the plaintiff accordingly. So ordered.

182. BRADY, J., in *Jurgensen v. Alexander*. (1862. Common Pleas of New York. 14 How. Pr. 269 ; settling the form of injunction in a case of infringement of trademark.) Having in and by said decision determined, as a conclusion of law, that the plaintiff is entitled to the judgment hereinafter set forth, I direct the same to be entered accordingly :

First. That the defendant, James Alexander, his agents, clerks, servants, and all persons employed under or in connection with him, be perpetually enjoined and restrained from disposing of, selling, or causing to be disposed of or sold, any watches bearing the false, simulated, and spurious stamp or mark, "Jules Jurgensen, Copenhagen."

Second. That the said defendant do produce before Nathaniel Jarvis, Jr., Esquire, appointed herein referee for such purpose, the said watches, which at the time of the commencement of this suit were in the defendant's possession, and had upon them the said false, simulated, and spurious trademark, to be erased or liberated therefrom, by or under the direction of the said referee, at the cost and expense of the said defendant.

183. LACOMBE, J., in *N. K. Fairbank Co. v. R. W. Bell Manufacturing Co.* (1896. C. C. A., 2d Circuit. 77 Fed. 869, 878; settling the form of an injunction in a case of unfair trade.) Injunction should issue against putting up and selling or offering for sale "the particular form of package which has been referred to in the bill and put in evidence as 'Defendant's Second Package,' or any other form of package which shall, by reason of the collocation of size, shape, colors, lettering, spacing, and ornamentation, present a general appearance as closely resembling the 'Complainant's Package,' referred to in the bill and marked in evidence, as does the said 'Defendant's Second Package.' "

This would seem to be sufficient; but, since so much has been said about the impossibility of framing any decree which would prevent the sale of the package complained of, and yet not give complainant the monopoly of yellow paper for its wrappers, the following clause may be added: "This injunction shall not be construed as restraining defendant from selling packages of the size, weight, and shape of complainant's package, nor from using the designation 'Buffalo Soap Powder,' nor from making a powder having the appearance of complainant's 'Gold Dust,' nor from using paper of a yellow color as wrappers for its packages, provided such packages are so differentiated in general appearance from said 'Complainant's Package' that they are not calculated to deceive the ordinary purchaser."<sup>1</sup>

### (3) *Relation of the Statutory Registered Trademark Right to the Common-law Right against Unfair Trade.*

184. THAYER, J., in *United States v. Braun*. (U. S. District Court, E. D. Missouri. 1889. 39 Fed. 775.) These are indictments under section 1 of the Act of August 14, 1876, to punish counterfeiting of trademarks that have been registered in accordance with the laws of the United States. The section is as follows :

"Be it enacted that every person who shall, with intent to defraud, deal in or sell . . . any goods of substantially the same descriptive properties as those referred to in the registration of any trademark, pursuant to the statutes of the United States, to which, or to the package in which, the same are put up, is fraudulently affixed said trademark, or any colorable imitation thereof, calculated to deceive the public, knowing the same to be counterfeit or not the genuine goods referred to in said registration, shall, on conviction thereof, be punished," etc. Vide 1 Supp. Rev. St. U. S. 241.

The law was evidently designed to punish those who, with fraudulent intent, pirate a valid trademark which has been duly registered by the commissioner of patents. If a person, by any means, secures the registration of a mark, symbol, word, or device, claiming it to be a trademark, which, according to the rules of the common law, is not a valid trademark, another person who affixes the same mark, symbol, or device to his own goods, and sells them, cannot be punished under the penal statute above quoted. Registration does not create a trademark; nor is it conclusive proof that the person procuring registration has a valid trademark. Property in a trademark can only be acquired by the adoption of some mark, symbol, sign, or word susceptible of being used as a trademark, and by the actual application of the same to goods, wares, or merchandise of a certain class, so that it serves to indicate the origin or ownership of the particular commodity. Congress, by the Act of March 3, 1881, (1 Supp. Rev. St. U. S. 606,) has merely provided for the registration of a certain class of trademarks used in commerce with foreign nations or Indian tribes, when, according to common-law tests, a right to use the mark, symbol,

<sup>1</sup> [ESSAYS :

*Guy Cunningham and Joseph Warren, "A Phase of Accounting in Trademark Cases." (H. L. R., XX, 620.)*

NOTES:

"Infringement of trademark: Measure of damages." (C. L. R., V, 238, 251.)]

or word as a trademark is established to the satisfaction of the commissioner of patents. Admission to registration under the Act of March 3, 1881, is merely an admission on the part of the government that the applicant for registration is the owner of a valid trademark. The certificate of registration granted by the commissioner is only *prima facie* evidence of that fact, but it does not conclude a third party. The certificate is not a grant of any right or privilege; it is merely a recognition on the part of the government of the existence of an asserted exclusive right to affix a certain mark, symbol, word, or device on certain goods, as a trademark. Browne, *Trade-Marks*, §§ 338, 374-378, inclusive.

Necessarily, therefore, in a criminal proceeding under the Act of August 14, 1876, the question whether the trademark involved (it having been admitted to registration) is valid, is an issuable question. . . . An indictment ought to allege facts showing the existence of a valid trademark as well as the fact that registration has been obtained, inasmuch as the registration does not create a trademark; and inasmuch as the certificate of registration is, at best, only convenient *prima facie* evidence that a certain word or symbol has become a trademark. The owner of a trademark acquires the same by acts wholly independent of the registration thereof, and registration is not even necessary to entitle him to protection in a civil proceeding, although it is necessary to secure the protection of the penal statute. . . .

## 185. EDISON *v.* THOMAS A. EDISON JUNIOR CHEMICAL COMPANY

UNITED STATES CIRCUIT COURT, DISTRICT OF DELAWARE. 1904

128 *Fed.* 1013

IN EQUITY.

*Howard W. Hayes*, for complainant.

*William B. Whitney*, for defendant.

BRADFORD, District Judge. The Thomas A. Edison, Jr., Chemical Company, a corporation of Delaware, has demurred to a bill brought against it by Thomas A. Edison, a citizen of New Jersey, for alleged infringement of a trademark. In substance the bill is to the effect that the complainant was, December 15, 1897, and ever since has been, and now is domiciled in the United States, and was on that day, and ever since has been, and now is

"the owner of a trademark for phonographs, phonographic supplies, kinetoscopes, kinoscope films, numbering machines, batteries, X-ray apparatus, electromedical appliances, and other philosophical and scientific apparatus, then and still used by your orator in commerce with foreign nations,' including, among others, Great Britain, France, and Germany, "consisting of the autographic name 'Thomas A. Edison,' the words and letters being formed in characteristic autographic script with the loop of the first letter extending above and over the other letters constituting the mark, the essential feature of which is the word 'Edison' formed in characteristic autographic script";

that the complainant having in all respects complied with the provisions of law and the regulations prescribed by the Commissioner of Patents

relating to the registration of trademarks, duly obtained June 19, 1900, the registration and a certificate of registration of his above-mentioned trademark for use in connection with

“phonographs, parts of phonographs, phonographic blanks, kinetoscopes, kinetoscope-films, numbering-machines, batteries, X-ray apparatus, and electro-medical appliances”;

that since the registration of his trademark the complainant has manufactured and sold large numbers of batteries and electromedical apparatus and other scientific apparatus both in the United States and in many foreign countries, and the defendant, without his license, has manufactured and sold a large number of batteries and electromedical apparatus called the “Magno-Electric Vitalizer,” having substantially the same descriptive properties as the batteries and electromedical apparatus referred to in the registration of the trademark, upon each of which was placed or caused to be placed by the defendant the complainant’s trademark, or a copy, counterfeit or colorable imitation, so nearly resembling it as to be likely to cause confusion or mistake in the mind of the public and to deceive purchasers; that this suit is between citizens of different States; and that the matter actually in controversy exceeds the sum or value of \$2,000, exclusive of interest and costs. The bill contains the usual prayers. The causes of demurrer are that

“the registration of the complainant’s alleged trademark and the certificate of registry of the said alleged trademark issued to the complainant, as set forth in said bill, and each and every part thereof, are void and of no effect in law, because that the statement which the complainant caused to be recorded in the Patent Office did not comply with the conditions and requirements of the law in such case made and provided, and further, because that, without authority of law and contrary to the provisions of the statute in such case made and provided, the said registration was had, and the said certificate of registry was issued, for a trademark for, and comprising more than a single class of merchandise.”

Whatever may be the ultimate determination of this case, I am satisfied that the demurrer should not be sustained. It is confined to the allegations of the bill touching the registration of the trademark. If it be assumed that the registration did not conform to law and was a nullity, it would by no means necessarily follow from that fact that no bill could be maintained for an infringement of the trademark. The Act of March 3, 1881, c. 138, 21 Stat. 502, 1 Supp. Rev. St. p. 322, providing for the registration of trademarks and their protection, does not create any trademark. Upon its face it presupposes the existence of a valid trademark which may be registered on compliance with the requirements of the law. Registration under the Act does not affect in any manner the nature or function of the trademark. Its only effect is to confer upon the owners of trademarks certain benefits or privileges which they would not otherwise possess. If, owing to non-compli-

ance with the provision of the Act, the registration of a trademark be void, the trademark is not thereby nullified or injuriously affected, but still retains the nature and properties of a common-law trademark, for the infringement of which suit may be maintained in the Federal Courts if the requisite diversity of citizenship exists and the requisite jurisdictional amount is involved. Here both appear upon the record. There is no ground of demurrer, nor has it been contended by counsel, that the alleged trademark of the complainant is not in its nature or characteristics a mark, word, or symbol capable of appropriation as a valid common-law trademark. Assuming it to be valid, it could be appropriated and affixed by the complainant as well to many articles as to only one, and could be infringed as well with respect to only one as to many; and the allegations of the bill and its prayers are broad enough to support a decree for the complainant even on the assumption that the registration of his trademark was a nullity. On the whole I think that this case should be decided not on the demurrer but only after a hearing on proper pleading and evidence. The demurrer must, therefore, be overruled with costs, and the defendant required to answer or plead to the bill by the first rule day in May next, with the right to set forth in its pleadings the matters referred to in the causes of demurrer.

### 186. SARTOR *v.* SCHADEN

SUPREME COURT OF IOWA. 1904

125 *Ia.* 696, 101 *N. W.* 511

APPEAL from District Court, Polk County; *James A. Howe*, Judge.

Suit in equity to enjoin defendant from using a trademark or trade name adopted by plaintiff for a brand of cigars manufactured and sold by him in the city of Des Moines and immediate vicinity. The trial Court granted the relief asked, and defendant appeals. Affirmed.

*Henry F. Griffiths* and *S. C. Sweet*, for appellant.

*Orwig & Lane*, for appellee.

DEEMER, C. J. The original petition counted upon a registered trademark adopted by plaintiff for his cigars, being the word "She" in large letters, which was pasted upon the inside lid of cigar boxes containing cigars manufactured by plaintiff. This was amended by claiming that plaintiff had adopted the word as a trade name, under which he had built up a large demand for his goods, and that defendant was guilty of unfair competition or trade in adopting the same name or label, not only with intent to deceive the public, but for the purpose of securing the trade theretofore established by the plaintiff. A great many defences were interposed, to some of which we shall refer during the course of this opinion. The case was tried on an agreed statement of facts and some exhibits introduced by the parties, and a decree for plaintiff was rendered as prayed. From this agreed statement and



the exhibits we extract the following, which are deemed material to a proper decision of the case: Plaintiff did not coin the word "She." The label used by him bearing this name was designed by a printing concern in the State of New York in the year 1893, and was sold by it as a stock label from that time down to the time of the trial of this case. In the year 1894 plaintiff purchased a number of these labels, which he placed upon cigar boxes containing cigars made by him, and sold them to retail dealers doing business in Des Moines and a few surrounding towns. He made his cigars from selected stock, expended large sums of money in advertising this brand of cigars, and established a good trade therein. In 1900 plaintiff discontinued the use of the label made by the New York firm, and procured a somewhat different design, but bearing the same talismanic word "She," from a printing-house doing business in Wisconsin. These labels he used in the same manner as the original stock label. Defendant is not a manufacturer, but a wholesaler in cigars, whose territory covers Des Moines and vicinity, as well as some other towns and cities not reached by the plaintiff. In the year 1902 he purchased from the New York printshop some of the stock "She" labels, and directed a manufacturer at Davenport to make some cigars for him which should be placed in boxes bearing this "She" label; and these cigars so manufactured for him, and others manufactured by others for him, bearing the stock label above described, were sold by him in the territory where plaintiff had established this trade, and to dealers to whom plaintiff had previously sold. Many buyers of cigars handled by defendant under the stock label "She" purchased them believing that they had been manufactured by the plaintiff, and some of these persons complained to the plaintiff of the quality of the cigars so purchased. Defendant sold his cigars at a less price than plaintiff sold the same brand for, and, for one reason or another, did a considerable and increasing business in this brand of cigars. Defendant never expressly stated that the cigars he was handling were made by plaintiff, but he sold to the same dealers who had theretofore purchased plaintiff's goods, and evidently intended to take advantage of the reputation gained by plaintiff for his product. It is also admitted that cigars were sold at various places in Iowa bearing a "She" label from the year 1886 down to the present. Some of these were the identical stock labels first used by the plaintiff, but others bore the name of the maker in addition to the word "She"; and still others contained pictures of reclining human forms, and the name of the manufacturer. But at the time plaintiff adopted the label no one was selling cigars in the territory in which he did business bearing the "She" label, nor did they until about the year 1902, when one Smith commenced the use thereof, as also did the defendant. Plaintiff did not know of the use of the "She" label prior to the time he adopted it, and believed himself to be the only cigar maker or dealer in the State using a label bearing the word "She" as an essential feature. During the year 1899 he became

advised that others in the State were contemplating the use of the same, and he caused the label he had been using to be registered as a trademark with the secretary of state, under our State law. The printers of the label did not consent to this registration, however. It was the custom of these printers not to sell labels to competing cigar manufacturers or dealers in the same locality at the same time. These labels were never copyrighted by the printers, but no one else has ever printed or sold the identical stock label printed by them.

These are all the material facts, and we now come to the law of the case.

Plaintiff has abandoned all claim to a right to the exclusive use of the "She" label on account of his having registered the same as a trademark; hence we shall not have occasion to consider the law on that subject, except incidentally.

The case must turn primarily upon the doctrines applicable to that practically new branch of the law known as "unfair trade." These rules, while new, are nevertheless well settled, and easily stated abstractly. Difficulty only arises in making application thereof to concrete cases. There is a well-marked distinction between what is known as the "infringement of a trademark" and "unfair competition." A trademark is an arbitrary, distinctive name, symbol, or device, to indicate or authenticate the origin of the product to which it is attached. And an infringement thereof consists in the use of the genuine upon substituted goods, or an exact copy or reproduction of the genuine, or in the use of an imitation in which the difference is colorable only, and the resemblance avails to mislead, so that the goods to which the spurious trademark is affixed are likely to be mistaken for the genuine product, and this is upon the ground that the trademark adopted by one is the exclusive property of its proprietor, and such use of the genuine or of such imitation of it is an invasion of his right of property. Consequently in infringement cases we have all sorts of questions regarding what names and devices may be exclusively appropriated, whether or not they have been dedicated to the public or abandoned by the holder, and many other intricate and puzzling problems which are not as yet fully settled. But aside from the law of trademarks, courts will protect trade names or reputations, although not registered or properly selected as trademarks, on the broad ground of enforcing justice and protecting one in the fruits of his toil. This is all bottomed on the principle of common business integrity, and proceeds on the theory that, while the primary and common use of a word or phrase may not be exclusively appropriated, there may be a secondary meaning or construction which will belong to the person who has developed it. In this secondary meaning there may be a property right. *Scheuer v. Muller*, 74 Fed. 225, 20 C. C. A. 161, and excellent note; *Hygeia Dist. Co. v. Hygeia Co.*, 70 Conn. 516, 40 Atl. 534; *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220; *American Waltham Watch Co. v. U. S. Watch Co.*,

173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263. Consequently unfair competition is distinguished from trademark cases in this: that it does not involve necessarily the question of the exclusive right of another to use the name, symbol, or device. A word may not be capable of becoming an arbitrary trademark, and yet there may be an unfair use of the word which will constitute unfair trade. The whole doctrine is based upon the theory of protection to the public whose rights are infringed or jeopardized by confusion of goods produced by unfair methods of trade, as well as upon the right of the complainant to enjoy the good will of a trade built up through his efforts, and sought to be taken from him by unfair methods. Whether or not such facts are shown as to bring a particular case within these rules depends upon the testimony in each particular case in which the issue arises, and if it appear that such confusion has been or is likely to be produced, that there have been actual sales of one product for the other, that there have been actual mistakes of one or the other, or if there be such similarity of the two brands as that one may readily be mistaken for the other, a case is made out. *Fairbank Co. v. Luckel, King, & Cake Soap Co.*, 102 Fed. 327, 42 C. C. A. 376; *G. W. Cole Co. v. American Cement Co.* (C. C. A.), 130 Fed. 703.

With these rules in mind, it appears to us that plaintiff has clearly shown his right to an injunction, unless it be for certain defences interposed by defendant, to which we shall hereafter call attention.

In this connection, it is immaterial that plaintiff had no right to trademark the name, that the printers had the right and authority to sell the label to whomsoever they would, or that the label was in use in other localities at the time plaintiff adopted it for his cigars. It had acquired in the locality in which plaintiff did business a peculiar secondary meaning, and stood for a brand of cigars made by the plaintiff, upon which he had built up a large trade. Defendant had no right to palm off his goods as those made by the plaintiff, or to so use the label adopted by plaintiff as to deceive purchasers who wished to purchase plaintiff's goods. Plaintiff had gone to large expense in building up his trade on these particular cigars, and is entitled to be protected therein.

But defendant contends that plaintiff, on account of his laches, is estopped from now insisting upon an exclusive right to use the label for cigars within the territory in which he does business. . . . There was no such delay as to work an estoppel. If plaintiff's action were bottomed solely upon a trademark, we should have a decidedly different problem to deal with. But as already said, plaintiff has abandoned his claim to a valid trademark. The use of the word in other States or in other parts of this State by persons who did not compete with plaintiff is not controlling on the issue of unfair competition. There cannot be unfair trade unless there be competition, and in many cases, if not in most, this competition is of necessity local. The issue of unfair trade cannot arise until there is such a showing of fraud or deception as we have hitherto indicated.

It is further agreed that plaintiff has himself been guilty of such fraud and deception as to bar him of any relief. Of course, plaintiff must come into a court of equity with clean hands. If he himself has been guilty of unfair competition, or has made false statements on his label, calculated to deceive the public as to the nature of his wares, as to the makers of the article, as to its constituent parts, as to its being patented, or any other statements calculated to mislead or defraud, this will deprive him of his right to complain of the defendant for a fraud practised by him. This is fundamental doctrine, and we need not here cite any authorities in its support. If plaintiff had had notice of a prior appropriation, and had sought to acquire some rights, or even evidence against a prior user, in order to defeat his property rights therein, we would have an altogether different case. But nothing of the kind appears here. Plaintiff was simply endeavoring to protect his own trade as against what promised to be unfair competition with him, and this he had a right to do, so long as by so doing he was not attempting to gain an unfair advantage over others. The mere fact that others were in fact using the same trade name in other jurisdictions is not controlling. One person may have a trademark in one country or jurisdiction, and another the same trademark in some other State or country. *Derringer v. Plate*, 29 Cal. 293, 87 Am. Dec. 170; *Richter v. Reynolds*, 59 Fed. 577, 8 C. C. A. 220; *Carlsbad v. Kutnow*, 71 Fed. 167, 18 C. C. A. 24. This is the rule applied to trademarks, and, when the question of unfair trade is involved, one person may have a property right in the secondary use of a word in one locality, and another in the same word or device in another. This is one of the distinguishing features between a trademark, strictly speaking, and a trade name. One is of necessity geographical, and covers the entire limits of the jurisdiction of the sovereignty granting the right; and the other is of necessity local, not founded upon any authority or right from the State, but based upon usage in the particular locality or localities in which the party is doing or seeks to do business. *Draper v. Skerrett* (C. C.), 116 Fed. 206; *Hainque v Cyclops Works*, 136 Cal. 351, 68 Pac. 1014; *Clark Thread Co. v. Armitage*, *supra*.

But it is argued that the exclusive appropriation of the stock label as a trade name resulted or was likely to result in a fraud upon the printers thereof. Not so we think. The printers had the right to print these labels, and to sell them to whomsoever they saw fit. They are not enjoined from the printing thereof, nor could they be. Defendants are not enjoined from buying them, except inferentially. These printers did not see fit to copyright their design; hence any other person could print it who saw fit to do so. It is the use of the label with intent to deceive and injure the plaintiff which is enjoined. By selling the label to manufacturers, they knew or should have known that each of these might build up a trade thereon which would be entitled to protection under the doctrine of unfair trade. . . . If these printers desired to

protect themselves, they could have done so by contract, or they could have had their design copyrighted. But this they did not do. Every one is presumed to know the law, and of the right of another to secure the exclusive use of a device, symbol, or mark, and they must take the chance on such use becoming exclusive in him in a particular locality. They have no property in the word "She," nor in the designs sent forth by them, except as they copyright these designs. But we need not further elaborate this proposition. The principal points relied upon by appellant are that plaintiff could not obtain an exclusive right to the use of the name "She" upon a stock label, and that he was guilty of such fraud as disentitles him to relief in equity. Neither of these propositions is sound, although both might have been, had plaintiff been relying upon a trademark.

Without further elaborating this opinion, which has already exceeded due bounds, it is sufficient to say that we agree with the trial Court in its conclusions, and its decree is affirmed.

187. *SARTOR v. SMITH ET AL*, (Iowa. 1904. 125 Ia. 665, 101 N. W. 515.) Appeal from District Court, Polk County ; *James A. Howe*, Judge.

Suit in equity for an accounting, and to enjoin defendants from using a trademark, being a cigar label bearing in large letters thereon the word "She," which was pasted on the inside lid of cigar boxes filled with cigars. The trial Court granted the relief prayed, and defendants appeal. Reversed.

*Henry H. Griffiths*, for appellants. *Orwig & Lane*, for appellee.

DEEMER, C. J. This case was submitted on the same agreed statement of facts as *Sartor v. Schaden* (decided at the present term), 101 N. W. 511, with this exception: In this it was agreed that defendants Smith procured labels from the firm of F. M. Howell & Co., of Elmira, N. Y., knowing them to have been stock labels, bearing the word "She," and caused to be added thereto the word "Smith's" before the word "She" thereon, and certain comment stating the cigars in the box to be made by union labor, and of good quality of tobacco. Some of the first goods gotten out by said Smiths did not have such additions to said label, but the goods not bearing the words "Smith's She" were mainly sold outside the city of Des Moines. All of the output of the said Smiths was sold to Mr. John P. Schaden, of Des Moines, Iowa, at wholesale, and he resold them to dealers in his territory until after he was enjoined by plaintiff herein. Defendants had a contract with said Schaden to take their entire product. Upon his being enjoined, as they had their entire means tied up in tools, tobacco, boxes, and some manufactured cigars, they sold some of their cigars to dealers in Des Moines, but did not state to any one that they were made by plaintiff. Both the defendants, who are husband and wife, make cigars, and did work on those so made and sold until enjoined herein by plaintiff. They still continue to make and sell "She" cigars. On a few of the labels they used early in the year 1902, and before this suit, they stamped the word "Original," but afterwards added only the word "Smiths" both before and after the commencement of this suit. The decree was the same in this as in the *Schaden* case, and the defendants appealed.

In oral argument before this Court, plaintiff's counsel conceded that he had no case, unless based upon the theory of unfair trade. He now makes no claim



to a valid trademark, and, unless the issue of unfair trade is in the case, plaintiff must fail. Turning to the petition, which we need not here set out in extenso, it appears that his entire cause of action is bottomed on his having the exclusive right everywhere in this jurisdiction to the use of the label described in the Schaden case, because of his having adopted and registered it as a trademark. He is not relying on any secondary meaning of the word, but upon a property right therein growing out of the fact that it has been registered by him as a trademark. The prayer of the petition is for the protection of his trademark, and there is no suggestion of trade name or unfair competition. When a motion was made to dissolve the temporary writ of injunction issued in the case, he stated in his resistance thereto that he was entitled to the use of the label as a trademark, and relied fundamentally on registration of such trademark in Iowa. The complaint does not make a case of unfair trade, and consequently there is nothing here to consider. Plaintiff has admitted his case away, and has nothing to stand upon. Even if he were insisting upon the rule of unfair trade, the case is so different from the Schaden case in its facts regarding the use made of the label by the defendants that we should hesitate to affirm the decree. The label used by the defendants bore such other marks as to clearly distinguish it from the one used by the plaintiff, and it is doubtful if one in the use of ordinary care could have been deceived thereby. But this matter is not before us for decision. Suffice it to say that plaintiff pleads and relies upon a registered trademark, and now concedes in argument that he has no case for the establishment of exclusive, state-wide rights therein.

The decree must therefore be reversed, and the cause remanded. Reversed.

188. ILLINOIS WATCH-CASE COMPANY *v.* ELGIN  
NATIONAL WATCH COMPANY

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT. 1899

94 *Fed.* 667

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The appellee, the Elgin National Watch Company, filed its bill in equity in the Court below, setting forth that it was a corporation organized under the laws of the State of Illinois, and having its principal place of business at Elgin, and its office at Chicago, in that State; that the defendant, the Illinois Watch-Case Company, is a corporation created and organized under the laws of the State of Illinois, and having its principal place of business at Elgin, in that State; that the other defendants named were citizens of the State of Illinois, and were, respectively, the defendant Duncan, president, treasurer, and superintendent, and the defendant Abrahams, secretary, of the Illinois Watch-Case Company; that prior to April 11, 1868, the complainant engaged in manufacturing watches at Elgin, then a small town containing no other manufactory of watches or watch cases; that the complainant built up a large business in such manufacture; that the watches and watch movements so made by complainant have become known all over the



world, and have been largely sold and used both in the United States of America and in foreign countries; that before that date the complainant had adopted the word "Elgin" as a trademark for its watches and watch movements, which word was marked upon the watches and watch movements, both those which entered into commerce in this country and those exported to and sold in foreign countries, and that the complainant's watches became known all over the world as Elgin watches, which word declared their origin and source as a product of the complainant's manufacture, and they became known from those of all other watches by the distinguishing word or trademark "Elgin," which word, at the time of its adoption, had been appropriated by no other person, firm, or corporation as a trademark or designation of goods; that this trademark the complainant caused to be registered on the 19th day of July, 1892, under the Act of Congress, relating to the registration of trademarks, approved March 3, 1881 (21 Stat. 502); that the defendants have infringed upon the rights of the complainant by engraving or otherwise affixing the word "Elgin" to watch cases made and sold by them; that such watch cases are adapted to receiving watch movements of different construction from those made by the complainant; that inferior watch movements are liable to be, and often are, incased in them, and, when so incased, the entire watch, including both movement and case, appears upon the market with the word "Elgin" upon it, thereby leading the public to believe that such watch, as an entirety, was made by the complainant, and enabling parties unlawfully using the word "Elgin" to profit by the great reputation of the complainant, to palm off other and inferior goods as the goods made by the complainant, to injure the reputation of the complainant as a watchmaker, and to deprive it of a portion of the business and patronage which it would otherwise receive from the public. The prayer of the bill is for an injunction to restrain defendants "from directly or indirectly making or selling any watch case or watch cases marked with your orator's said trademark, and from using your orator's said trademark in any way upon watches or watch cases, or in the defendant's printed advertisements, circulars, labels, or on boxes or packages in which the said watch cases are put up or exposed for sale." A demurrer interposed to this bill being overruled, defendants answered, denying the legality of the registration of the trademark, denying the right of the complainant to the exclusive use of the word as a trademark. . . . By leave of the Court at or immediately after the hearing and before decree, the complainant amended its bill, alleging that the watch cases so manufactured and marked by the defendants in violation of the complainant's right "are intended by the defendants to be sold in foreign countries, and are in fact exported to and sold in foreign countries." A decree passed for the complainant that the use of the word "Elgin," whether alone or in connection with other words, was a violation and infringement of the complainant's exclusive rights in the

premises, and that an injunction issue restraining the use of the word "Elgin" alone or in connection with other words or devices upon watches or watch cases, or upon packages containing watches or watch cases, going into commerce with foreign nations or with the Indian tribes, in such a way as to be liable to cause purchasers or others to mistake said watches or watch movements incased in such watch cases for watches or watch movements manufactured by the complainant. The opinion of the Court below is reported in *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 89 Fed. 487.

*Thomas A. Banning* and *Ephraim Banning*, for appellants.

*Lysander Hill*, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge; upon this statement of the case, delivered the opinion of the Court. . . .

The appellee, the complainant below, by its bill asserts and seeks to maintain its right to the use of the word "Elgin" as a trademark, claiming that right as one arising under Federal law. It is, of course, clear that this bill cannot be sustained, all of the parties to it being citizens of the same State, unless its right can be sustained as one arising under the laws of the United States. The statute does not define what shall constitute a trademark. To determine, therefore, what that trademark is which is protected by this statute, we must be referred to the common law. It is not now a question that no one can acquire an exclusive right to the use of geographical names as trademarks. *Canal Co. v. Clarke*, 13 Wall. 323; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 547, 11 Sup. Ct. 396; *Chemical Co. v. Meyer*, 139 U. S. 542, 11 Sup. Ct. 625; *Mill Co. v. Alcorn*, 150 U. S. 464, 14 Sup. Ct. 151; *Mills Co. v. Eagle*, 58 U. S. App. 490, 30 C. C. A. 386, and 86 Fed. 608; *Iron Co. v. Uhler*, 75 Pa. St. 467; *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 136, 40 N. E. 616. . . . But, while one cannot obtain the exclusive right to use a geographical name as a trademark, and cannot make a trademark of his own name to deprive another of the same name from using it in his business, that other may not resort to artifice to do that which is calculated to mislead the public as to the identity of the business or of the article produced, and so create injury to the other beyond that which results from the similarity of name. There are a large number of cases in which this principle has been declared. *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 13 Beav. 239; *Wotherpoon v. Currie*, L. R. 5 H. L. 508; *Thompson v. Montgomery*, 41 Ch. Div. 35; *Reddaway v. Banham* (1896), App. Cas. 199; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625; *Coates v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 186, 16 Sup. Ct. 1002; *American Waltham Watch Co. v. U. S. Watch Co.* (Mass.; March, 1899), 53 N. E. 141. . . .

This class of cases does not proceed upon the ground of an infringement of a trademark, but upon the ground of fraud, and that equity will not permit one, aside from any question of trademark, to palm off his goods as the goods of another, and so deceive the public, and injure that other. It is not necessary in such cases, in order to give a right to an injunction, that a specific trademark should be infringed (*McLean v. Flemming*, 96 U. S. 245, 250), but that the conduct of the party should show an intent to palm off his goods as the goods of another. The allegations respecting trademarks are in such cases only "regarded as matter of inducement leading up to the question of actual fraud." The Court below sustained this bill upon the ground that the word "Elgin" had acquired a secondary signification, and through a long course of business had come, as applied to watches, to designate the manufacture of the appellee, and as an article of approved excellence, and that therefore the word in that connection performed distinctly the function of a trademark, and could be registered and upheld as a trademark, under the Act of Congress. In this we think there was error. The word "Elgin" was not, and could not be, made a trademark. The fact that the word had acquired that signification might be forceful if the word was shown to be used to palm off the goods of one as the goods of another, which, coupled with other evidence evincing intent to mislead and to defraud, would be operative to move a Court of Equity to prevent the wrong. It is said that the evidence in this case is of that persuasive character which irresistibly leads to the conclusion that here was such gross fraud that a Court of Equity should not stay its hand, but should enjoin the guilty party from further deception and wrong.

Unfortunately, however, if we should concur with counsel to the full extent of his contention, we are, as we think, without jurisdiction to grant relief; or, to say the least, that jurisdiction is of so doubtful a nature and so limited in extent, and under an act of doubtful constitutionality, that we must decline to exercise it. The right of the appellee arises under the Act of Congress, and is limited to a trademark. By the statute, the right of action is given to him to recover damages "for the wrongful use of said trademark," or he may have his remedy, according to the course of equity, "to enjoin the wrongful use of such trademark used in foreign commerce or commerce with the Indian tribes." It is only by virtue of that statute, and for the protection of a right arising under the Federal law, that the appellee has standing in the Federal Court, for all the parties to this suit are citizens of the same State. The remedy in equity for fraud, to which we first referred, is one which existed before the statute, and is not given by it. It was not applied to protect the infringement of a trademark, but, recognizing the invalidity of the supposed trademark, was applied for the prevention of fraud; and, that a Federal Court may have jurisdiction in such a case, we think there must exist and appear from the record

the necessary diverse citizenship of the parties. It may also be remarked that this bill is not framed upon any theory of fraud or fraudulent conduct upon the part of the defendants thereto, except as it is to be inferred from the use of the complainant's registered trademark. It is not alleged that they have ever represented or sold their goods as the goods manufactured by the complainant. The one is a manufacturer of watch movements, the other of watch cases. . . . So that, whether we consider the case from the standpoint of jurisdiction, or from the case made by the bill, we are constrained to the conclusion that the decree below was erroneous. The Courts of the State furnish ample remedy for the wrong, if any, under which the appellee suffers. We have no right to redress or prevent trespass upon the common-law rights of the appellee, the citizenship of the parties forbidding jurisdiction. . . . The decree is reversed, and the cause remanded, with direction to the Court below to dismiss the bill.

#### **Topic 4. Diversion of the Relation by Multiplication of Invented Intellectual Products**

##### **SUB-TOPIC A. COPYRIGHT (AT COMMON LAW)**

##### **(1) *Nature and Duration of Common-law Copyright***

189. EATON S. DRONE. *A Treatise on the Law of Property in Intellectual Productions*. (1879. Introduction, p. 10.) A book consists of two elements, — the corporeal and the incorporeal ; the material, — paper, printing, binding, — and the thoughts, ideas, sentiments, conceptions, which constitute the invisible creation of the mind. The former is simply a channel of communication, a vehicle of conveyance, for the latter. The author impliedly says to the reader : "I will grant you the perpetual privilege of using my literary production in return for a small sum of money, but on condition that you do not injure it and render it worthless, as a source of profit to me, by multiplying and circulating copies. . . . This property and the right of multiplying it I reserve to myself. It is worth twenty thousand dollars ; but I will admit you to a common use of it for one dollar."

These terms are accepted by the buyer, who is willing to pay the named price for the enjoyment, instruction, or information to be derived from reading the book. He thus becomes the owner of the entire property in the material substance of the book ; and with the book, as such material substance, he may do as he pleases. But in the intellectual contents of the book — the literary creation — he acquires a right not of property, but of use. . . . To multiply copies of the work is a violation of the contract, — a direct invasion of the author's rights, an appropriation of his property, which has no warrant in law, no justification in equity. . . .

The rights which vest in the purchaser of a book have been aptly compared with those acquired by the buyer of a ticket to a place of public amusement. The latter is entitled to all the enjoyment, instruction, and information to be derived from witnessing the performance. He may, perhaps, give or sell his ticket to another, who may enjoy the same advantages in his stead. He has

paid for one seat in the theatre, and he may claim the right to use it. But no one will argue that the privilege of using one ticket carries the right to multiply it a thousand-fold; that the holder may print other tickets, and sell them for his own profit; that the right of admission vests any right of property in the theatre or the play. In this case, the ticket-holder is entitled to just what he pays for. So the buyer of the book is entitled to just what he pays for, and no more; and nothing can be clearer than that, in paying for a copy of the book, he does not pay for the copyright.

"All the knowledge which can be acquired from the contents of a book," said Mr. Justice Willes, "is free for every man's use; if it teaches mathematics, physics, husbandry; if it teaches to write in verse or prose; if, by reading an epic poem, a man learns to make an epic poem of his own, — he is at liberty. . . . The book conveys knowledge, instruction, or entertainment; but multiplying copies in print is a quite distinct thing from all the book communicates. . . . And there is no incongruity to reserve that right, and yet convey the free use of all the book teaches."<sup>1</sup>

## 190. MILLAR v. TAYLOR

KING'S BENCH. 1769

4 Burr. 2303

THIS case was a revival of the old and often litigated question concerning Literary Property, and it was the first determination which the question ever received, in this Court of King's Bench.

The declaration was of Michaelmas Term in the seventh year of his present Majesty, 1766. The first argument of the bar was on Tuesday, 30th of June, 1767, when the Court ordered it to stand over to the next term, for a second argument. It was argued a second time at the bar on the 7th June, 1768. The first argument was by Mr. *Dunning*, for the plaintiff; and Mr. *Thurlow*, for the defendant: the second by Mr. *Blackstone*, for the plaintiff, and Mr. *Murphy*, for the defendant. . . .

NOTE. — Mr. Millar died the next morning.

In Hilary Term, 1769, 9 G. III (on Tuesday, 7th February, 1769).

The Court ordered it to be set down in the paper, upon the second paper day of next term, for the opinion of the Court.

It would be tedious and tautologous to repeat the arguments of the counsel at the bar, or the cases and authorities cited by them; as they were, all of them, so very fully and amply taken up again from the bench, and so elaborately expatiated upon, canvassed, and discussed by the judges in delivering their opinions, and the reasons whereupon they formed them.

Let it suffice to say, in general, that the counsel for the plaintiff insisted, "That there is a real property remaining in authors, after publication of their works; and that they only, or those who claim under

<sup>1</sup> Millar v. Taylor, 4 Burr. 2331.

them, have a right to multiply the copies of such their literary property, at their pleasure, for sale." And they likewise insisted, "That this right is a common-law right, which always has existed, and does still exist, independent of, and not taken away by, the statute of 8 Anne, c. 19."

On the other side, the counsel for the defendant absolutely denied that any such property remained in the author, after the publication of his work; and they treated the pretension of a common-law right to it as mere fancy and imagination, void of any ground or foundation. They said, "that formerly the printer, not the author was the person who was supposed to have the right (whatever it might be), and accordingly the grants were all made to printers. No right remains in the author at common law." They insisted, "that if an original author publishes his work, he sells it to the public; and the purchaser of every book or copy has a right to make what use of it he pleases, and may multiply each book or copy to what quantity he pleases; and the sole exclusive right of multiplying such copies does not remain in the author after publication. It would be a monopoly, if it did. The purchaser of the book has the *jus fruendi et disponendi*. The Act of Parliament of 8 Anne, c. 19, for the encouragement of learning, vests the copies of printed books in the authors or purchasers of such copies, during the times therein limited. But it is only during that limited time, and under the terms prescribed by the Act. And the utmost extent of the limited time is, in the present case, expired."

The declaration was as follows: Michaelmas Term, in the seventh year of the reign of King George the Third.

London, to wit: Be it remembered, that on Thursday next after the morrow of All Souls in this same Term, before our Lord the King, at Westminster, comes Andrew Millar, by John Stirling, his attorney, and brings into the Court of our said Lord the King now here, his bill against Robert Taylor, in the custody of the marshal, &c., a plea of trespass upon the case; and there are pledges of prosecuting, to wit, John Doe and Richard Roe. Which said bill follows in these words, to wit, London, to wit, Andrew Millar complains of Robert Taylor, being in the custody of the marshal of the Marshalsea of our Lord the King, himself; for this, to wit, That whereas the said Andrew, on the 20th day of January, in the year of our Lord, 1763, to wit, in the parish of St. Mary le bow, in the ward of Cheap, was, and hath ever since been, and still is, the true and only proprietor of the copy of a certain book of poems, entitled, "The Seasons, by James Thomson." And whereas the said Andrew, after he became and whilst he was proprietor of the said copy as aforesaid, to wit, on the day and in the year above mentioned, in the parish and ward aforesaid, did, at his own proper costs and charges, cause 2000 books of the said copy to be printed for sale, and afterwards, to wit, on the 20th day of May, in the third year of the reign of his present majesty, in the parish and ward aforesaid, had a



great number, to wit, 1000, of the said books so printed of the said copy entitled, "The Seasons, by James Thomson," remaining in his hands for sale; nevertheless, the said Robert, not ignorant of the premises, but contriving, and fraudulently intending to deprive the said Andrew of the whole profit and benefit of the said 1000 books of the said Andrew, entitled, "The Seasons, by James Thomson," then remaining in his hands for sale, and injuriously to prevent the sale thereof, afterwards, to wit, the day and year last above mentioned, to wit, in the parish and ward aforesaid, did publish and expose to sale several other books, entitled, "The Seasons, by James Thomson," to wit, 1000 other books of the like copy, which last-mentioned books, entitled, "The Seasons, by James Thomson," had been injuriously printed by some person or persons without the license or consent of the said Andrew; and then and there sold several, to wit, 20, of the said last above-mentioned books so printed as last mentioned; he, the said Robert, then and there well knowing that the same had been so injuriously printed without the license or consent of the said Andrew; by means whereof, the said Andrew was deprived of the profit and benefit of the said copy and book, entitled, "The Seasons, by James Thomson," and of the said 1000 books so printed at his costs and charges as aforesaid, and then remaining in his hands unsold: whereby the said Andrew is injured, and hath damage to the amount of 200*l.*; and therefore he brings this suit, &c.

The defendant pleaded the general issue, "not guilty." And, upon the trial, the jury found a special verdict. . . .

Mr. Justice WILLES, after stating the case and special verdict, spoke to the following effect. . . . Upon these reasons, I am of opinion, that there is a common-law right of an author to his copy; that it is not taken away by the Act of the 8th of Queen Anne; and that judgment ought to be for the plaintiff.

Mr. Justice ASTON. This case has been so often, so fully, and so ably argued; the citations from history, decrees, ordinances, statutes, and precedents in Westminster Hall, have been stated so accurately in point of time and substance; and the whole arguments have been gone into so largely by my brother Willes, that I shall content myself with alluding to them, as now fully and precisely known, without stating any of them over again (at large) which I shall have occasion to take notice of.

1. The great question in this cause is a general one: "How the common law stands, independent of the statute of 8 Anne, in respect to an author's sole right to the copy of his literary productions." . . .

It has been ingeniously, metaphysically, and subtilely argued on the part of the defendant, "that there is a want of property in the thing itself, wherein the plaintiff supposes himself to be injured, and consequently, if there is no property or right, there is no injury or privation of right."

The plaintiff's supposed property has been treated as quite ideal and imaginary, not reducible to the comprehension of man's understanding; not an object of law, nor capable of protection.

As all the objections to this property or right being allowed or protected by the common law, rests entirely upon arguments which endeavour to show "that such allowance or protection is contrary to right reason and natural principles," the only grounds of common law originally applicable to this question, — I think fit (however abstract they may seem) to consider certain great truths and sound propositions . . . which are most ably illustrated by the learned author of the Religion of Nature Delineated, that is to say . . . "The effect or produce of the labour of B is not the effect of the labour of C; and, therefore, this effect or produce is B's, not C's. It is as much B's as the labour was his, not C's; because, what the labour of B causes or produces, B produces by his labour, or it is the product of his labour. Therefore, it is his, not C's or any other's. And if C should pretend to any property in that which B only can truly call his, he would act contrary to truth."<sup>1</sup>

"That to deprive a man of the fruit of his own cares and sweat, and to enter upon it" (he is here speaking of the cultivation of lands), "as if it was the effect of the intruder's pains and travail, is a most manifest violation of truth; it is asserting, in fact, that to be His, which cannot be His."<sup>2</sup>

There is, then, such a thing as property, founded in nature and truth, or there are things which one man only can, consistently with nature and truth, call his;<sup>3</sup> as proposition 2, 8, 9, demonstrate.

And those things, which only one man can truly and properly call his, must remain his, till he agrees to part with them by compact or donation; because no man can deprive him of them without his approbation; but the depriver must use them as his, when they are not his, in contradiction to truth. For to "have the property" of any thing, and "to have the sole right of using and disposing of it," are the same thing; they are equipollent expressions.<sup>4</sup> . . .

I shall in the next place observe, that the written definitions of property which have been taken notice of at the bar, are, in my opinion, very inadequate to the objects of property at this day. They are adapted by the writers, to things in a primitive (not to say imaginary) state; when all things were in common; when that common right was to be divested by some act to render the thing privately and exclusively a man's own which before that act (so done to separate and distinguish it) was as much another's.

These definitions, too, when examined, will be found, principally, to apply to the necessities of life, and the grosser objects of dominion, which the immediate natural occasions of men call for; and for that

<sup>1</sup> Pp. 127, 128.

<sup>3</sup> Prop. 10, § 6, p. 136.

<sup>2</sup> Prop. 8, § 6, p. 134.

<sup>4</sup> P. 136.

reason, the property so acquired by occupancy, was required to be an object useful to men, and capable of being fastened on. . . . Since those supposed times, therefore, of universal communion, the objects of property have been much enlarged, by discovery, invention, and arts. . . . The rules attending property must keep pace with its increase and improvement, and must be adapted to every case.

A distinguishable existence in the thing claimed as property; an actual value in that thing to the true owner, are its essentials; and not less evident in the present case, than in the immediate objects of those definitions.

And there is a material difference in favour of this sort of property, from that gained by occupancy; which before was common, and not yours; but was to be rendered so by some act of your own. For, this is originally the author's; and, therefore, unless clearly rendered common by his own act and full consent, it ought still to remain his. . . .

The present claim is founded upon the original right to this work, as being the mental labour of the author, and that the effect and produce of the labour is his. It is a personal incorporeal property, saleable and profitable; it has *indicia certa*: for, though the sentiments and doctrine may be called ideal, yet when the same are communicated to the sight and understanding of every man, by the medium of printing, the work becomes a distinguishable subject of property, and not totally destitute of corporeal qualities.

Now, without publication, it is useless to the owner, because without profit; and property, without the power and use of disposal, is an empty sound.<sup>1</sup> In that state, it is lost to the society, in point of improvement, as well as to the author, in point of interest. Publication therefore is the necessary act, and only means, to render this confessed property useful to mankind, and profitable to the owner: in this, they are jointly concerned. Now, to construe this only and necessary act to make the work useful and profitable, to be "destructive at once, of the author's confessed original property, against his express will," seems to be quite harsh and unreasonable. . . . There is no open renunciation of the property in the present case; but a constructive one only, barely from publication. "Renunciation, or not," is a fact. It is not found, and ought not to be presumed. But the contrary is found; it is found here "that it is against his express will."

But it was said at the bar, "if a man buys a book, it is his own." What! Is there no difference betwixt selling the property in the work, and only one of the copies? To say, "Selling the book conveys all the right," begs the question. For, if the law protect the book, the sale does not convey away the right, from the nature of the thing, any more than the sale conveys it where the statute protects the book. The proprietor's consent is not to be carried beyond his manifest intent. Would not such a construction extend the partial disposition of the

<sup>1</sup> V. ante, p. 2338.

true owner beyond his plain intent and meaning? Which, from the principles I have before laid down, is no more to be done in this compact, than in the case of borrowing or hiring.<sup>1</sup> Can it be conceived, that in purchasing a literary composition at a shop, the purchaser even thought he bought the right to be the printer and seller of that specific work? The improvement, knowledge, or amusement, which he can derive from the performance, is all his own; but the right to the work, the copyright, remains in him whose industry composed it. The buyer might as truly claim the merit of the composition, by his purchase (in my opinion), as the right of multiplying the copies and reaping the profits. . . .

2. As to the second question — “whether the copyright is given away by the author’s publication.”

I have already spoken upon this head collectively with the first; and shall only add, that I am of opinion that the publication of a composition does not give away the property in the work; but the right of the copy still remains in the author; and that no more passes to the public, from the free will and consent of the author, than an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it, oppose its sentiments; but he buys no right to publish the identical work. . . . The reprinted book is the very same substance; because its doctrine and sentiments are its essential and substantial parts; the printing of it is a mere mechanical art, and the method only of publishing and promulgating the contents of the book. The composition, therefore, is the substance; the paper, ink, type, only the incidents or vehicle. The value proves it. And, though the defendant may say, “those materials are mine,” yet they cannot give him a right to the substance, and to the multiplying of the copies of it, which (on whose paper or parchment soever it is impressed), must ever be invariably the same. . . .

3. Supposing, then, that the author has such property, and that he has not given away or abandoned it by publication, the next question is — “Whether the statute of Queen Anne has taken it away, or so restrained it, that an author’s right to the copy expires within the term limited by that statute for its protection.” Whoever contends “that this kind of property is not known to the common law,” must also contend “that this statute creates a new kind of property, which it vests for a time only in the authors and their assigns, under the conditions and limitations specified in the Act.”

It must be contended, too, to support the arguments that have been used, “that the Legislature had in view, and intended to abolish or suspend for a time (if the terms required by the Act were complied with) that right of universal communion, which the publication of any work gave indiscriminately to all mankind; or (in case the terms of the Act

<sup>1</sup> V. ante, p. 2338.

were not complied with) that such right might be still freely exercised, without offence."

The idea of such a common right does not appear to have existed at the time of the statute, or to be warranted by any authority. The preamble of the Act reproves the liberty of late frequently taken of printing books and writings without the consent of the author or proprietor; and treats it as an abuse of a right, not as an act done in assertion of any common-law right which the statute intended to put only a temporary restraint to; for the Act declares it to be done "to the detriment of the proprietors, and to the ruin of their families." . . .

This Act was brought in at the solicitation of authors, booksellers, and printers, but principally of the two latter; not from any doubt or distrust of a just and legal property in the works or copyright, (as appears by the petition itself, p. 240, vol. xvi. of the Journals of the House of Commons,) but upon the common-law remedy being inadequate, and the proofs difficult, to ascertain the damage really suffered by the injurious multiplication of the copies of those books which they had bought and published. And this appears from the case they presented to the members at the time. All the sanction they could obtain, was a protection of their right, by inflicting penalties on the wrongdoer. The statute extends to no case where the title to the copy is not entered in the register of the stationers' company: which entry is necessary to ascertain the commencement of the term, during which this protection by penalties is granted. If that requisite is neglected, the benefit of the statute does not attach. The general case of authors who do not comply with this, is still open; and of those too that do, who do not sue within three months. For, if a statute gives a remedy in the affirmative (without a negative, expressed or implied), for a matter which was actionable before the common law, the party may sue at common law and wave his remedy by statute if he pleases. 2 Inst. 200; 2 Roll. 49. . . .

The preamble of the statute, as it was originally brought in and went to the committee, was the fullest assertion of the legal property and undoubted right of authors at common law, that could be, and there was no saving clause at all in the Act. When that florid introduction was abridged, it is most probable, as the fact appears, that a saving clause was guardedly inserted. . . . The proviso, however, is general —

"That nothing in this Act contained, shall extend either to prejudice or confirm any right that the said universities, or any of them, or any person or persons have, or claim to have, to the printing or re-printing any book or copy already printed, or hereafter to be printed." If there was not a common law right previous to this statute, what is this clause to save? . . . This proviso seems to be the effect of extraordinary caution, that the rights of authors, at common law, might not be affected: for if it had not been inserted, I apprehend clearly, they could not have been taken away by construction, but the right and the remedy would still remain unaffected by the statute. . . .

Upon the whole, I conclude, that upon every principle of reason, natural justice, morality, and common law; upon the evidence of the long received opinion of this property, appearing in ancient proceedings, and in law cases; upon the clear sense of the Legislature, and the opinions of the greatest lawyers of their time in the Court of Chancery since that statute — the right of an author to the copy of his works appears to be well founded; and that the plaintiff therefore is, upon this special verdict, entitled to his judgment. And I hope the learned and industrious will be permitted from henceforth, not only to reap the fame, but the profits, of their ingenious labours, without interruption, to the honour and advantage of themselves and their families.

Mr. Justice YATES was of a different opinion from the two judges who had spoken before him. . . .

The general question for the determination of the Court, is, "Whether after a voluntary and general publication of an author's works by himself, or by his authority, the author had a sole and perpetual property in that work; so as to give him a right to confine every subsequent publication to himself and his assigns forever."

Before I enter into the particular discussion of this question, I will lay down one general position, which, I apprehend, cannot be on either side disputed, — "That in all private compositions, (I mean the composition of private authors, as contradistinguished from public prerogative copies,) the right of publication must for ever depend on the claimant's property in the thing to be published." Whilst the subject of publication continues his own exclusive property, he will so long have the sole and perpetual right to publish it; but whenever that property ceases, or by any act or event becomes common, the right of publication will be equally common. . . .

By the counsel, it was argued on these two points — 1st, On the general principles of property; and 2dly, on the peculiar, or at least the supposed usage and law of this kingdom.

First, then, it was contended, "That the claim of authors to a perpetual copyright in their works, is maintainable upon the general principles of property." And this, I apprehend, was a necessary ground for the plaintiff to maintain. . . . In support therefore of this first proposition, several plausible arguments were ingeniously urged by the plaintiff's counsel. In the first place, they observed, property was defined to be "*Jus utendi et fruendi*"; and that an author has certainly that right over his own productions. But this is a definition that merely relates to the personal dominion of a proprietor, and not to the object: it respects an acknowledged subject of property; not the object which is presumed to be so (which is now the question in dispute). . . . And the point contended by the defendant is, "that a literary publication becomes no longer an object of property"; that a literary publication becomes no longer an exclusive private right.

In answer to this, it was contended, on the other side, that "an object



of property is value; and literary compositions have their value, which is measured by the extent of their sale." . . . But laying this observation aside, mere value (all may see) will not describe the property in this. The air, the light, the sun, are of value inestimable: but who can claim a property in them? Mere value does not constitute property. Property must be somewhat exclusive of the claim of another.

It was therefore alleged, "that a literary composition is certainly in the sole dominion of the author, till he thinks proper to publish it: for, no man can lawfully take it from him, or compel him to publish against his will." This is most certainly true. But this holds good no longer than while it is in manuscript. Here the defendant has not meddled with the author's manuscript. The work was published forty years ago. The defendant has printed a set of his own. He has not meddled with any property of the author's; unless the very style and sentiments in the work were his.

It was necessary, therefore, for the plaintiff's counsel to advance this proposition (and which was the only one that affected the cause), namely, "that the author has a perpetual property in "the style and ideas of his work; and therefore that he or his assigns will be for ever entitled to the sole and exclusive right of it." It was argued, that invention and labour are the means of acquiring property; and that literary compositions are the objects of the author's sole pains and labour; therefore, they have the sole right in them. If this argument is confined to the manuscript, it is true; it is the object only of his own labour, and is capable of a sole right of possession. But it is not true, if extended to his ideas.

All property has its proper limit, extent, and bounds. Invention or labour (be they ever so great) cannot change the nature of things, or establish a right, where no private right can possibly exist. The inventor of the air-pump had certainly a property in the machine which he formed; but he did not thereby gain a property in the air, which is common to all. Or did he gain the sole property in the abstract principles upon which he constructed his machine? And yet these may be called the inventor's ideas, and as much his sole property as the ideas of an author. To extend this argument, beyond the manuscript, to the very ideas themselves, seems to me very difficult, or rather quite wild. Indeed, the invention and labour, which are ranked among the modes of acquiring specific property in the subject itself, are that kind of invention and labour which are known by the name of occupancy. In that sense, invention is defining or discovering of a vacant property; and labour is the taking possession of that property, and bestowing cultivation upon it. Property is founded upon occupancy. But how is possession to be taken, or any act of occupancy to be asserted on mere intellectual ideas? All writers agree, that no act of occupancy can be asserted on a bare idea of the mind. Some act of appropriation must be exerted, to take the thing out of a state of

being common, to denote the accession of a proprietor; for otherwise, how should other persons be apprized they were not to use it? These are acts that must be exercised upon something. The occupancy of a thought would be a new kind of occupancy, indeed. By what outward mark must the property denote appropriation? And if these are void of that which the act of occupancy requires, it is a proof to me they cannot be the object of property. . . .

But there is one ground more upon which the plaintiff's counsel contended this claim of right; and which, at first sight, appears the most specious of all. They endeavoured to enforce this copyright of authors, as a moral and equitable right, and to support it by arguments calculated to prove that it is so. For this purpose, Mr. Blackstone observed that the labours of the mind and productions of the brain are as justly entitled to the benefit and emoluments that may arise from them, as the labours of the body are; and that literary compositions, being the produce of the author's own labour and abilities, he has a moral equitable right to the profits they produce; and is fairly entitled to these profits for ever; and that if others usurp or encroach upon these moral rights, they are evidently guilty of injustice, in pirating the profits of another's labour, and reaping where they have not sown. This argument has indeed a captivating sound; it strikes the passions with a winning address; but it will be found as fallacious as the rest, and equally begs the very question in dispute. For the injustice it suggests depends upon the extent and duration of the author's property; as it is the violation of that property that must alone constitute the injury. If therefore his property be determined,<sup>1</sup> no injury is done him.

. . . But it is insisted, "that it conscientiously belongs to the author himself, and his assigns, for ever, as being the fruits of his own labour." "That every man is entitled to the fruits of his own labour" I readily admit. But he can only be entitled to this, according to the fixed constitution of things; and subject to the general rights of mankind, and the general rules of property. He must not expect that these fruits shall be eternal; that he is to monopolize them to infinity; that every vegetation and increase shall be confined to himself alone, and never revert to the common mass. In that case, the injustice would lie on the side of the monopolist, who would thus exclude all the rest of mankind from enjoying their natural and social rights.

The labours of an author have certainly a right to a reward: but it does not from thence follow, that his reward is to be infinite, and never to have an end. Here, it is ascertained. The Legislature have fixed the extent of his property; they have allowed him twenty-eight years, and have expressly declared, he shall have it no longer. Have the Legislature been guilty of injustice? Little cause has an author to complain of injustice, after he has enjoyed a monopoly for twenty-eight years, and the manuscript still remains his own property. It has

<sup>1</sup> [I. e., ended. — Ed.]

happened in the present case, that the author and his assignee together, have enjoyed the emolument of this work between thirty and forty years: and the plaintiff still has the manuscript. If a stranger had taken his manuscript from him, or had surreptitiously obtained a copy of his work, and printed it before him, he might then complain of injustice. And here lies the fallacy of this specious argument: It was put as if the author was totally robbed of the profit of his labour; as if all his emolument was forestalled, without suffering him to reap any emolument whatever. In that case, it would be the highest injustice. But when no such intrusion has been made upon his property; when he and his assigns have enjoyed the whole produce of his labour for twenty-eight years together and upwards, what ground can remain for accusing the defendant of immorality; or for the author or his assigns to say "he is robbed of the fruits of his labour." . . .

As, therefore, this charge of injustice depends upon the event of the author's property (for if no right is invaded, no injury is done), — Let us now consider the general rules concerning property, and see whether this claim will coincide with any one of them.

The claim is to the style and ideas of the author's composition. And it is a well known and established maxim, (which I apprehend holds as true now, as it did 2000 years ago,) "That nothing can be an object of property, which has not a corporeal substance." There may be many different rights, and particular distinct interests in the same subject, and the several persons entitled to these rights may be said to have an interest in them; but the objects of them all, the principal subject to which they relate, or in which they enjoy, must be corporeal. And this, I apprehend, is no arbitrary ill-founded position, but a position which arises from the necessary nature of all property. For, property has some certain, distinct, and separate possession; the object of it, therefore, must be something visible. I am speaking now, of the object to which all rights are confined. There must be something visible, which has bounds to define it, and some marks to distinguish it. And that is the reason why these great marks are laid down by all writers — it must be something that is visibly and distinctly enjoyed; that which is capable of all the rights and accidents, and qualities incident to property; and this requires a substance to sustain them.

But the property here claimed is all ideal; a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension, safe and invulnerable, from their own immateriality; no trespass can reach them, no tort affect them, no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself: and these are

what the defendant is charged with having robbed the plaintiff of. . . . Here, the maxim occurs which I have mentioned before, (a) That nothing can be an object of property, which is not capable of a sole and exclusive enjoyment. . . . The quotation from the Institutes relating to wild animals, is very applicable to this case. They are yours, while they continue in your possession, but no longer. So, from the time of publication, the ideas become incapable of being any longer a subject of property; all mankind are equally entitled to read them, and every reader becomes as fully possessed of all the ideas, as the author himself ever was. . . .

But in the argument, it was contended, "that the author gives nothing to the public but the mere perusal of it, and still preserves the perpetual right to the work"; "that an author's publishing and selling a book is only like giving the buyers so many keys to a gate, or tickets to an opera"; "that those were only given for the parties themselves, but would not entitle them to forge other keys or tickets."

To this the answer is, I think, easy and evident. If the author had not published his work at all, but only lent it to a particular person, he might have enjoined that particular person "that he should only peruse it": because, in that case, the author's copy is his own; and the party to whom it is lent contracts to observe the conditions of the loan; but when the author makes a general publication of his work, he throws it open to all mankind. That is, then, very different from the case of giving keys or tickets to particular persons. The very condition of giving them is the exclusion of all other persons. And these keys or tickets give the party to whom they are given no property to the land they pass through, or to the opera house; they are given them for a particular time, and to give them a transient admission, a temporary privilege only. It is like an author's lending his manuscript to particular friends, who still retains the right over it, to recall it whenever he pleases. But when an author prints and publishes his work, he lays it entirely open to the public, as much as when an owner of a piece of land lays it open into the highway. Neither the book, nor the sentiments it contains, can be afterwards recalled by the author. Every purchaser of a book is the owner of it; and, as such, he has a right to make what use of it he pleases. . . .

Therefore, it appears to me, that this claim of a perpetual monopoly, is by no means warranted by the general principles of property: and from hence I should have thought that it could not be a part of the common law of England.

But I will now consider the second general ground, upon which this perpetual copyright was argued at the bar: namely, the supposed usage and law of this kingdom. . . . It was said, "that this statute of Queen Anne was merely declaratory of a common-law right; and that it was accumulative, and only introduced some additional remedies." But to me, from the title quite to the end of this Act, it seems very clearly

to be a declaration "that no such right exists at common law." The Act seems to me, manifestly designed to vest the property in the author and publisher during the time limited and prescribed by it. The design seems plainly and professedly to be, to give encouragement to learning by some new advantage; namely, by vesting the copy in the author and publisher during a certain time. The title is, "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned," and by the enacting clauses, there is a right given in those already printed, for twenty-one years from the 10th of April, 1710. Does not this plainly imply, that they had no such right before the 10th of April, 1710? . . . The Legislature have provided the proper encouragements for authors and, at the same time, have guarded against all these mischiefs. To give that legislative encouragement a liberal construction, is my duty as a judge; and will ever be my own most willing inclination. But it is equally my duty, not only as a judge, but as a member of society, and even as a friend to the cause of learning, to support the limitations of the statute.

I shall therefore conclude, in the words of the Act of Parliament, "That the author or purchaser of the copy shall have the sole right for the particular term which the statute has granted and limited, but no longer": and consequently, that the plaintiff who claims a perpetual and unbounded monopoly, has no legal right to recover.

Lord MANSFIELD, (not intending to go into the argument) said —

This is the first instance of a final difference of opinion in this Court since I sat here. Every order, rule, judgment, and opinion, has hitherto been unanimous.<sup>1</sup>

That unanimity never could have happened, if we did not among ourselves communicate our sentiments with great freedom; if we did not form our judgments without any prepossession to first thoughts; if we were not always open to conviction, and ready to yield to each other's reasons. . . . We have equally tried to convince, or be convinced, but in vain. We continue to differ. And whoever is right, each is bound to abide by, and deliver that opinion which he has formed upon the fullest examination. . . . From premises either expressly admitted, or which cannot and therefore never have been denied, conclusions follow, in my apprehension, decisive upon all the objections raised to the property of an author, in the copy of his own work, by the common law.

<sup>1</sup> Except in this, and one other case now depending (by writ of error) in the House of Lords, where Mr. Justice Yates differed from the other three, every rule, order, judgment and opinion, has, to this day, been, (as far as I can recollect,) unanimous. This gives weight and despatch to the decisions, certainty to the law, and infinite satisfaction to the suitors: and the effect is seen by that immense business which flows from all parts into this channel; and which we, who have long known Westminster Hall, behold with astonishment: the rather, as during this period, all the other courts have been filled with judges of unquestionable integrity, eminent talents, and distinguished abilities — REP

I use the word "copy," in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters.

It has all along been expressly admitted, "that, by the common law, an author is entitled to the copy of his own work, until it has been once printed and published by his authority"; and "that the four cases in chancery, cited for that purpose, are agreeable to the common law; and the relief was properly given, in consequence of the legal right." The property in the copy, thus abridged, is equally an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever. . . . No disposition, no transfer of paper upon which the composition is written, marked, or impressed (though it gives the power to print and publish) can be construed a conveyance of the copy, without the author's express consent "to print and publish," much less against his will. The property of the copy, thus narrowed, may equally go down from generation to generation, and possibly continue for ever; though neither the author nor his representatives should have any manuscript whatsoever of the work, original, duplicate, or transcript. . . .

If the copy belongs to an author after publication, it certainly belonged to him before. But if it does not belong to him after, where is the common law to be found, which says "there is such a property before"? All the metaphysical subtilities from the nature of the thing, may be equally objected to the property before. It is incorporeal; it relates to ideas detached from any physical existence. There are no indicia; another may have had the same thoughts upon the same subject, and expressed them in the same language verbatim. At what time, and by what act, does the property commence? The same string of questions may be asked upon the copy before publication. . . .

From what source, then, is the common law drawn, which is admitted to be so clear, in respect of the copy before publication? From this argument — because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name without his consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit, he should not only choose the time, but the manner of publication, how many, what volume, what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; to whose honesty he will confide not to foist in additions; with other reasonings of the same effect. I allow them sufficient to show "it is agreeable to the principles of right and wrong, the fitness of things, convenience and policy, and therefore to the common law, to protect the copy before publication."

But the same reasons hold, after the author has published. He can reap no pecuniary profit, if, the next moment after his work comes out,



it may be pirated upon worse paper, and in worse print, and in a cheaper volume. . . . There is no peculiar objection to the property after, except, "that the copy is necessarily made common, after the book is once published." Does a transfer of paper upon which it is printed, necessarily transfer the copy, more than the transfer of paper upon which the book is written? . . . The author does not mean to make it com on: and if the law says "he ought to have the copy after publication," it is a several property, easily protected, ascertained, and secured.

The whole then must finally resolve in this question, "whether it is agreeable to natural principles, moral justice, and fitness, to allow him the copy, after publication, as well as before." The general consent of this kingdom, for ages, is on the affirmative side. The legislative authority has taken it for granted, and interposed penalties to protect it for a time. . . .

I always thought the objection from the<sup>1</sup> Act of Parliament the most plausible. It has generally struck at first view. But, upon consideration, it is, I think, impossible, to imply into this Act an abolition of the common-law right, if it did exist; or a declaration "that no such right ever existed." . . . The word "vesting"<sup>2</sup> in the title, cannot be argued from, as declaratory "that there was no property before." The title is but once read; and is no part of the Act. In the body the word "secured" is made use of.

Had there been the least intention to take or declare away every pretence of right at the common law, it would have been expressly enacted; and there must have been a new preamble, totally different from that which now stands.

But the Legislature has not left their meaning to be found out by loose conjectures. The preamble certainly proceeds upon the ground of a right of property having been violated; and might be argued from, as an allowance or confirmation of such a right at the common law. . . .

Therefore my opinion is — "That judgment be for the plaintiff." And it must be<sup>3</sup> entered as on the day of the last argument of this case at the bar.

A writ of error was afterwards brought; but the plaintiff in error, after assigning errors, suffered himself to be non-prossed. And the Lords Commissioners, after Trinity Term, 1770, granted an injunction.

## 191. DONALDSONS *v.* BECKET

HOUSE OF LORDS. 1774

4 *Burr.* 2408

ORDERED, That the judges be directed to deliver their opinions upon the following questions; viz.

1. Whether at common law, an author of any book or literary com-

<sup>1</sup> 8 Anne, c. 19.

<sup>2</sup> V. title — "by vesting," &c.

<sup>3</sup> V. ante, p. 2303.

position had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed, published, and sold the same without his consent?

2. If the author had such right originally, did the law take it away, upon his printing and publishing such book or literary composition; and might any person afterward re-print and sell, for his own benefit, such book or literary composition, against the will of the author?

3. If such action would have lain at common law, is it taken away by the statute of 8th Anne? And is an author by the said statute precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby?

Ordered, That the judges do deliver their opinions upon the following questions; viz.

4. Whether the author of any literary composition and his assigns, had the sole right of printing and publishing the same, in perpetuity, by the common law?

5. Whether this right is any way impeached, restrained, or taken away by the statute 8th Anne?

Whereupon, the judges desiring that some time might be allowed them for that purpose,

Ordered, That the further consideration of this cause be adjourned till Tuesday next, and that the judges do then attend, to deliver their opinions upon the said questions.

Die Martis, 15 Februarii, 1774.

The Lord Chancellor acquainted the house, that the judges differed in their opinions upon the said questions.

Ordered, That the judges present do deliver their opinions upon the said questions, seriatim, with their reasons. . . .

Then Mr. Justice ASHHURST delivered the opinion of Mr. Justice BLACKSTONE (who was absent, being confined to his room with the gout) upon the said questions. And

1. Upon the first question, delivered his opinion — That at common law, an author of any book or literary composition, had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same, without his consent. And gave his reasons.

2. Upon the second question, delivered his opinion — That the law did not take away his right, upon his printing and publishing such book or literary composition; and that no person might afterward re-print and sell, for his own benefit, such book or literary composition, against the will of the author. And gave his reasons.

3. Upon the third question, delivered his opinion — That such action at common law is not taken away by the statute of 8th Anne; and that an author, by the said statute, is not precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby. And gave his reasons.

4. Upon the fourth question, delivered his opinion — That the author of any literary compositions and his assigns, had the sole right of printing and publishing the same, in perpetuity, by the common law. And gave his reasons.

5. Upon the fifth question, delivered his opinion — That this right is not any way impeached, restrained, or taken away by the statute of 8th Anne. And gave his reasons. . . .

So that of the eleven judges, there were eight to three upon the first question; seven to four upon the second; and five to six upon the third.

It was notorious, that Lord MANSFIELD adhered to his opinion; and therefore concurred with the eight, upon the first question; with the seven upon the second; and with the five upon the third. But it being very unusual (from reasons of delicacy) for a peer to support his own judgment, upon an appeal to the House of Lords, he did not speak.

And the Lord Chancellor seconding Lord CAMDEN's motion "to reverse," the decree was reversed.

The argument upon the third question turned greatly upon the meaning of the proviso in the 8th of Queen Anne, which saves the right of the universities. It is the 9th clause, and runs in these words — "Provided that nothing in this Act contained shall extend, or be construed to extend, either to prejudice or confirm any right that the said universities, or any of them, or any person or persons, have, or claim to have, to the printing, or re-printing, any book or copy already printed, or hereafter to be printed."

192. EATON S. DRONE. *A Treatise on the Law of Property in Intellectual Productions*. (1879. Introduction, pp. 1, 42-48, 54-69, in part.) Parliament passed An Act for the Encouragement of Learning, which declared that an author should have the sole right of publishing his book for a named term of years, and prescribed penalties against piracy. Whether the origin of copyright is to be found in this legislation or in the common law; whether the common-law right, if it existed, was taken away or abridged by the statute; whether since 1710, when the 8 Anne, c. 19, became a law, copyright in a published work has existed only by statute, — are questions which have divided the opinions of jurists and statesmen for more than a century. For half a century after the act of Anne was passed, the chancery courts, in administering the law, did not doubt that, by the common law and independently of legislation, there was property of unlimited duration in printed books. In 1769, this principle was affirmed by the Court of King's Bench.<sup>1</sup> Five years later, the House of Lords, on an equal division of the judges, declared that the common-law right, after publication, had been taken away by the statute of Anne, and that authors had no rights in their published works except under that Act.<sup>2</sup> This has since

<sup>1</sup> *Millar v. Taylor*, 4 Burr. 2303.

<sup>2</sup> *Donaldson v. Becket*, 4 Burr. 2408. Eleven judges were ordered to give their opinions on the same vital questions that had been exhaustively reviewed

been the law of England. The English statute was copied by Congress in 1790, and the construction put upon it by the House of Lords was followed by the Supreme Court of the United States in 1834.<sup>1</sup> Some of the ablest jurists of England and America have contended that this exposition of the law is wrong; others have maintained that it is right.

The discussion of the subject has given rise to four theories concerning the nature of copyright: — First. That intellectual productions constitute a species of property founded in natural law, recognized by the common law, and neither lost by publication nor taken away by legislation. Second. That an author has, by common law, the exclusive right to control his works before, but not after, publication. Third. That this right is not lost by publication, but is destroyed by statute. Fourth. That copyright is a monopoly of limited duration, created and wholly regulated by the Legislature; and that an author has, therefore, no other title to his published works than that given by statute. . . .

The only question decided in *Donaldson v. Becket*, in conformity with the expressed opinions of a majority of the judges, was that the common-law copyright in a book after publication in print was taken away by the statute of Anne. On this point alone the House of Lords can be rightly said to have overruled the judgment in *Millar v. Taylor*. Two-thirds of the judges who advised the Lords, or three-fourths including Lord Mansfield, held to the doctrine that, in the absence of any statute, literary property exists by the common law, and is not lost or prejudiced by publication. There is nothing in the judgment of the House of Lords to unsettle this doctrine, or to overrule the authority of *Millar v. Taylor* as far as it affirmed it. On the other hand, the decision in *Donaldson v. Becket*, that common-law copyright in published works was taken away by the statute of Anne, necessarily implied the existence of that right.<sup>2</sup>

The judgment rendered of the House of Lords in 1774 has continued to

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and settled, five years before, by the King's Bench. Ten were of opinion that at common law the author of an unpublished literary composition had the sole right of publishing it for sale, and might bring an action against any person who published the manuscript without his consent. One dissented from this view.

Eight maintained that by the common law the author's exclusive rights were not lost or prejudiced by publication; in other words, that copyright in a published work existed by the common law. Three believed that publication was an abandonment of the common-law property. . . .

Five maintained that the statute of Anne did not destroy, abridge, or in any way prejudice the common-law property in a published work, and did not deprive the author of his common-law remedies. Six contended that the common-law right, after publication, was taken away by the statute, to which alone the author must look for protection.

<sup>1</sup> *Wheaton v. Peters*, 8 Pet. 591.

<sup>2</sup> Referring, in the House of Lords, to the judgment in *Donaldson v. Becket*, and the different opinions expressed by the judges on the questions, whether there was copyright at common law, and whether it had been taken away by the statute, Lord Brougham said: "This House, however, reversed the decree under appeal, in accordance with the opinion given on the main point by the majority of the judges; and, upon the general question of literary property at common law, no judgment whatever was pronounced." *Jefferys v. Boosey*, 4 H. L. C. 961.

represent the law; but its soundness has been questioned by very high authorities. . . .

In the United States, the authorities have been divided not less than in England, regarding the origin and nature of literary property. Indeed, the doctrines there prevalent have ruled our courts. In 1834, it became the duty of the Supreme Court of the United States, in the case of *Wheaton v. Peters*,<sup>1</sup> to declare the meaning of the law of 1790, and to determine the same question that had been decided by the Court of King's Bench in 1769, and by the House of Lords in 1774; viz., whether copyright in a published work existed by the common law, and, if so, whether it had been taken away by statute. . . .

This judgment, like that of the House of Lords in *Donaldson v. Becket*, which was followed, rests on a divided opinion of the judges. Three agreed with Mr. Justice McLean, who delivered the opinion of the Court, two dissented, and one was absent. . . .

The judgment of the Court was based on two grounds: 1. That the common law [copyright] of England did not prevail in the United States; 2. that in England it had been decided that the common-law property in published works had been taken away by statute. 1. The first position rested on a foundation of sand, which has since been swept away. . . . The doctrine is now well settled in this country, that a complete property in unpublished works is secured by the common law. This was admitted by the Supreme Court in *Wheaton v. Peters*. It has since been repeatedly affirmed by the same tribunal, by the Circuit Court of the United States, and by every State Court in which the question has been raised.<sup>2</sup> If the common law thus prevails in the United States with reference to unpublished productions, there is no principle, independently of the statute, by which it can be held not to prevail in the case of published works. 2. The controlling question in *Wheaton v. Peters* was whether this common-law right, after publication, had been taken away by the statute of 1790. The doctrine had been settled in England, that copyright in a published work existed by the common law. *Donaldson v. Becket* decided simply that this right had been taken away or superseded in England by the Act of Anne. But this statute did not change or affect the common law in the United States, for the obvious reason that the statute had no operation here. Whether Congress intended to take away this right, whether the statute of 1790 could rightly be construed to take it away, was an open question in this country. . . . In holding that the common-law right, if it existed in this country, had been taken away by statute, the Court simply followed the doubtful and disputed precedent of the House of Lords, without testing its soundness.

193. CHARLES READE. *Readiana: The Rights and the Wrongs of Authors*. (1882. 2d, 3d, and 6th Letters, in part.) Copyright and stageright, and many other recent rights, grew out of two old principles of common law. . . . The first old principle is this: Productive and unsalaried labor, if it clash with no property, creates a property. All the uncaught fish in the sea belong to the public. Yet every caught fish comes to hand private property, because productive labour, when it clashes with no precedent title, creates property at common law.

The second old principle is this. Law abhors divestiture, or forfeiture of property. . . .

<sup>1</sup> 8 Pet. 591, 654.

<sup>2</sup> See post, p. 101.

By the first principle — viz., that productive labour not clashing with property creates property — a writer or his paymaster acquires the sole right to print the new work for sale. All lawyers out of Bedlam go thus far with me.

By the second the proprietor acquires nothing at all ; he merely retains for ever that sole right to print which he has acquired by productive labour. . . .

There are three theories of copyright at common law: —

The washerwoman's theory.

The lawyer's theory.

The mad sophist's theory.

The Washerwoman's Theory. — That there can be no incorporeal property at common law. An author's manuscript is property. If another misappropriates it, and prints the words, that is unlawful; but the root of the offence is misappropriating the material object, the author's own written paper. Thus, if a hen is taken unlawfully, to sell the eggs she lays after misappropriation is unlawful.

The Lawyer's and the Sophist's theory both rest on a fundamental theory opposed to the above, viz., that an author's mental labour, intellectual and physical, creates a mixed property, words on paper; that the words are valuable as vehicles of ideas, and are a property distinct from the paper; and only the author has a right to print them under any circumstances. Examples: — Pope wrote letters to various people: they paid the postage; the paper, and the inked forms of the letters, became theirs, and ceased to be Pope's. Curll possessed this corporeal property lawfully. Yet Pope restrained the printing. "Pope v. Curll." . . .

The Mad Sophist's theory rejects with us the washerwoman's theory, and concedes that an author has, as common law, intellectual property, or copyright, thus abridged — he has the sole right, under any circumstances whatever, to print his unprinted words. But, when he publishes, he sells the volumes without reserve; he cannot abridge his contract with the reader and retain the sole right under which he printed. He has abandoned his copyright by the legal force of his act. . . .

The four main delusions that set the public heart against authors' rights are:

1. The Aetherial Mania. — That an author is a disembodied spirit, and so are his wife and children. That to refuse an unsalaried fisherman an exclusive title to the fish he has laboured for in the public sea would starve the fisherman and his family; but the same course would not starve the unsalaried author, his wife, and his children. . . .

2. An Historical Falsehood. — That intellectual property is not founded on the moral sense of mankind, nor on the common law of England, but is the creature of modern statutes, and an arbitrary invasion of British liberty. This falsehood is as dangerous as it looks innocent. It crosses the Atlantic, and blunts the American conscience: and it even vitiates the judicial mind at home. It works thus down at Westminster. The judges there hate and despise Acts of Parliament. . . . Therefore, when once they get into their heads that a property exists only by statute, that turns their hearts against the property, and they feel bound to guard common-law liberties against the arbitrary restrictions of that statute. . . .

3. That the laws protecting intellectual property enable authors to make more money than they deserve. . . .

4. The worst delusion of all is, that what authors, and the Legislature, call intellectual property is neither a common-law property nor a property created by statute, but a monopoly created by a statute.



This confusion of ideas, unknown to our ancestors, and at variance with the distinctive terms they used, was first advanced by Mr. Justice Yates in the year 1769. He repeated it eight times in *Millar v. Taylor*; and, indeed, without it his whole argument falls to the ground. The fallacy has never been exposed with any real mental power, and has stultified senatorial and legal minds by the thousand. It was adopted and made popular by Macaulay in the House of Commons, February 14, 1841. He was on a subject that required logic; he substituted rhetoric, and said striking things. He said, "Copyright is monopoly, and produces all the effects the general voice of mankind attributes to monopoly." . . . But only consider the effect — Here is a property the great public never reads about nor understands, and is therefore at the mercy of its public teachers. It hears the mouthpieces of law, and the mouthpieces of opinion, declare from their tribunals that the strange, unintelligible property called by the inhuman and intelligible name of "copyright" is a monopoly. The public has at last got a word with a meaning. It knows what monopoly is, knows it too well. This nation has groaned under monopolies, and still smarts under their memory. It abhors the very sound, and thinks that whoever baffles a monopoly sides with divine justice and serves the nation. Therefore to call an author's property a monopoly is to make the conscience of the pirate easy, and even just men apathetic when an author is swindled; it is to prejudice both judges and juries, and prepare the way to false verdicts and disloyal judgments. I pledge myself to prove it is one of the stupidest falsehoods that muddleheads ever uttered, and able but unguarded men ever repeated. . . .

The two great properties of authors are "copyright," or the sole right of printing and reprinting for sale the individual work a man has honestly created and "stagelight," or the sole right of representing the same for money on a public stage. The men who violate these rights have for ages been called pirates. The terms "copyright" and "stagelight" are our calamities. . . . I implore the reader of these letters to be very intelligent, to open his mind to evidence that under these unfortunate and technical words lie great human realities; that both rights mean property, and that to infringe either property has just the same effect on an author as to rob his house; but to infringe them habitually by defect of law or judicial prejudice is far more fatal. . . . Piracy unchecked, the ruin and starvations of authors, and the extinction of literature follow as inevitably as sunset follows noon. To give the reader a practical insight into this, I will select literary piracy, or infringement of copyright, and show its actual working. The composition is the true substance of a book; the paper, ink, and type are only the vehicles. The volumes combine the substance and the vehicles, and are the joint product of many artisans, and a single artist, the author. The artisans, to wit, the paper-makers, compositors, pressmen, and binders are all paid, whether the book succeeds or fails. . . . But the author and the publisher take their turn last, and can only be paid out of profits. Where there is a loss it must all fall on author or publisher, or both. Now, books not being so necessary to human life as food or clothing, publishing is a somewhat speculative trade. It is calculated that out of, say, ten respectable books, about half do not pay their expenses, and of the other five four yield but a moderate profit both to author and publisher, but that the tenth may be a hit and largely remunerative to publisher and author, supposing those two to share upon fair terms. But here comes in the pirate. That caitiff does not print from manuscripts nor run risks. He holds aloof from literary

enterprise till comes the rare book that makes a hit. Then he and his fellows rush upon it, tear the property limb from jacket, and destroy the honest shareholders' solitary chance of balancing their losses. The pirate who reprints from a proprietor's type, and reaps gratis the fruit of the publisher's early advertisements, and does not pay the author a shilling, can always undersell the honest author or the honest publisher, who pays the author, and buys publicity by advertising, and sets up type from manuscript, which process costs more than reprinting. This reduces the honest author's and publisher's business to two divisions: the unpopular books — often the most valuable to the public — by which they lose money or gain too little to live and pay shop, staff, &c.; and the popular book, by which they would gain money, but cannot, because the pirates rush in and share, and undersell, and crush, and kill. . . . Therefore, piracy drives out both capital and brains, and marks out for ruin the best literature, and would extinguish it if not severely checked. This is evident, but it does not rest on speculation. History proves it. . . . There are many sad and public proofs that piracy can break an honest trader's heart, or an honest workman's. I will select two out of hundreds. . . .

The composer of our National Anthem surely deserved a crust to keep body and soul together. Well, piracy would not let him have one. His immortal melodies sold for thousands of pounds, but the pirate stole it all and never give the composer a farthing. At eighty years of age he hung himself in despair to escape starvation. . . . The malpractice, which could murder the composer of our National Anthem, has surely some little claim to national disgust, and the legal restraints upon that malpractice to a grain of sympathy.<sup>1</sup>

## (2) *What constitutes Publication*

### 194. BARTLETT v. CRITTENDEN

UNITED STATES CIRCUIT COURT, DISTRICT OF OHIO. 1849

5 *McLean* 32, *Fed. Cas. No.* 1076

IN EQUITY. Bill by R. M. Bartlett to restrain A. F. Crittenden and others from infringement of copyright. Injunction granted.

*Walker & Kebler*, for complainant.

*Storer & Gwynne*, for respondents.

MCLEAN, J. This bill is brought to protect the copyright of the complainant, in a manuscript work on book-keeping, of which he claims to be the author; and the defendant is alleged to have published a work on the same subject, which the complainant charges was copied from his manuscript. For twelve years and upwards, the complainant has been engaged in teaching the art of keeping books, and has used

<sup>1</sup> [ESSAYS:

*Samuel Elder*, "Our Archaic Copyright Laws." (A. L. Rev., XXXVII, 206.)

*Carter, A. T.* "Curiosities of Copyright Law." (L. Q. R., IV, 172.)

*Warwick H. Draper*, "Copyright Legislation." (L. Q. R., XVII, 39.)

*Samuel Elder*, "The Duration of Copyright." (Y. L. J., XIV, 417.)]

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT; see the citations in the footnote to No. 172, ante.

his work, which is still in manuscript, in his school, with the view of rendering it more perfect, and with the intention of publishing it. The work of the defendant contains two hundred and seven pages, ninety-two of which are alleged to have been taken from the plaintiff's manuscript, with only colorable alterations. The answers deny the allegations in the bill.

A reference was made to a master, with special instructions, who reports, "that the book of the respondents contains a portion of plaintiff's manuscript, with only slight alterations; and he says that it is impossible that the book and the manuscript could have been composed by two persons, neither having for his guide the entries of the other. The balance sheets are the same in both. As regards the plan and arrangement, they are the same. The book contains explanations, which are valuable to the learner, that are not in the manuscript. Both works consist of a series of brief sets of mercantile books by double entry." The master reports, that the plan of the work in the manuscript and in print, is substantially the same; that in the book there are explanations interspersed through the series of sets, which the manuscript does not contain; that these explanations are of great use to the learner, but that they may be verbally given with equal advantage. The system in the manuscript, the master states, is superior to any he has seen, except that of the book published by the defendant, which is the same in substance, "that, unlike all the systems he had seen, the manuscript is made up of a few brief sets of mercantile books, which show the entire process of ordinary double entry book-keeping, and in a compass of very little magnitude"; and he says, that "he discovers in other treatises nothing bearing a resemblance to the manuscript plan. He therefore concludes that the plan is original." "The manuscript, in its present state, (the master says,) contains substantially a system of book-keeping, suitable to be used by a teacher in his school." "As the system, when published, becomes its own teacher, it should be accompanied with such precise explanations as may be necessary to a proper understanding and use of it by the uninitiated. It should also be accompanied with forms of the auxiliary books."

Jonathan Jones, of St. Louis, a witness, states, that in 1841 he opened a school in St. Louis, as the partner of the complainant, for instruction in book-keeping on Bartlett's plan, which consists "of eleven sets of books, with a balance sheet for each set, and an inventory attached, showing property on hand, and that Bartlett was the author of them; that his manuscript contains a perfect system of book-keeping, and differs from all others in arrangement, being composed of short exercises." The defendant, Crittenden, entered the school, ignorant of book-keeping; and after completing the course, he took charge of the writing department for a short time. In 1846, Crittenden called on the witness with a copy of his work, which, on examining, the witness found to be Bartlett's system. And Crittenden then told him, that when he was in

Bartlett & Co.'s school, he took a precise copy of the manuscript, with the view of publishing it; and that he did publish it in 1845. And the witness says, if all of Bartlett's manuscript were struck from Crittenden's book, there would not be enough left for a title-page. A copy of Bartlett's manuscript was used at the St. Louis school, and witness never prohibited any of the learners from copying it. Crittenden knew that it was Bartlett's manuscript, and that he intended to publish it as soon as he could make the necessary arrangements. Witness has heard Bartlett frequently say so. Witness gave Crittenden a letter to Bartlett, referring to the published work, that Bartlett might see it. To Josiah Bliss, a witness, Crittenden said, that his system was the same as Bartlett's. Nine other witnesses, who are book-keepers, being sworn, state, that Bartlett's system of book-keeping is new; and that its plan and arrangement are preferable to any other. And they say that Crittenden's book is the same in substance. . . .

The complainant claims relief on two grounds: 1. At common law. 2. Under the Act of Congress 3d February, 1831 (4 Stat. 438).

In the case of *Wheaton v. Peters*, 8 Pet. 655, the Supreme Court say:

"That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted."

And again, page 661,

"An author has, by the common law, a property in his manuscript; and there can be no doubt that the rights of an assignee of such manuscript would be protected by a court of chancery."

In combating the argument in the same case, that an author had a common-law right to republish his own works, and to prohibit others from doing so, the Court showed that after the statute of Anne there was no such right in England, and that if such right were shown to exist there, it did not follow that it exists to the same extent in Pennsylvania. That the common law in this country exists in the different States, as modified by them by statutory enactments and judicial decisions. But the question under consideration is very different from the one decided in the above case. We have to say whether the writer has a right of property in his own manuscripts. That he has such a property in his own literary labor, until he shall relinquish it by contract or by some unequivocal act, would seem to be clear. This is laid down in *Maugh. Lit. Prop.* 74, 137; *Webb v. Rose*, 4 Burrows, 2330; *Pope v. Curl*, 2 Atk. 342; *Manley v. Owen*, 4 Burrows, 2329; *Southey v. Sherwood*, 2 Mer. 435; 2 Story, Eq. Jur. § 943. Lord Mansfield, and some others, distinguished for their great learning and ability, have considered the publication of a work not as such a dedication of it to the public by the author at common law, as to deprive him of an exclusive right to republish it. With the greatest respect for these opinions, we think there is a difference in principle between the right to republish

a printed work, and the exclusive right of an author to publish his own manuscript. A man may write without any intention to publish. He may treat of principles and characters without restraint — with a view to his mental improvement, or from some other motive, without incurring any responsibility so long as the manuscript remains unpublished. It is, therefore, essential, in all proceedings for a libel, to prove publication. And there is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property. They are valueless to all the world except to the author and his representatives; or to such persons as he shall transfer them. But the author who publishes his work, dedicates it to the public. He voluntarily incurs all the responsibility of a publisher. His object is to instruct or amuse mankind, and the more his work is circulated, the greater is the compliment to his ability as a writer. There is no reason, then, against a republication of the work by any one, except that it may reduce the profits of the author. And, on this ground, he cannot complain, as he has failed to secure the right under the statute. If the common law protects the rights of an author, as contended for, the statute was useless. An action for damages and an injunction, would as effectually protect the rights of an author, as any provisions of the statutes. But there is another view, which is still more conclusive, against the exclusive right to republish a printed work. The statute limits the right to a term of years. The common-law right, if it exist, is without limitation. To hold, then, that there is a common-law right, independently of the statute, is to disregard the statute. Whilst the common law protects the right of the author to his manuscripts, it cannot be made to extend to the republication of a published work. As well might it be contended that the inventor of a machine, after it has gone into general use, by the acts of the inventor, may, by the common law, claim the exclusive right of making and selling it. But we think this case is within the Act of Congress referred to. The section 9 of that Act — 4 Pet. St. 438 [4 Stat. 438] — provides:

“That any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained, shall be liable to suffer, and pay to the author or proprietor, all damages occasioned by such injury, to be recovered by a special action on the case founded on this Act.” “And the several courts of the United States empowered to grant injunction to prevent the violation of the rights of authors and inventors, are hereby empowered to grant injunctions,” &c.

That the complainant is the author of the manuscript in question, is proved. And it also appears, from the statement of the experts, and by the reports of the master, that the manuscript contains a new and useful system of book-keeping. . . . Was there a publication of the manuscript of the complainant by the defendant? He has denied in his answer, somewhat equivocally, the charge of publication, as made

in the bill. He confessed to Jones, that he took a copy of the manuscript, with a view of publishing it, and that he did publish it in 1845. After the publication of his book, he admitted, to other witnesses, that the system of his work was the same as Bartlett's. It seems Crittenden became a student in the school of Bartlett and Jones, conducted by Jones at St. Louis, and in which he acquired his knowledge of book-keeping. The manuscript of Bartlett was used in that school, and it was there that the defendant made out his copy. . . .

It is argued, to bring the case within the ninth section, that the whole of any manuscript must be published; that the principle of law in relation to colorable alterations of a printed book, or a fair abridgment of it, does not apply under this section to a manuscript. If the whole of the manuscript must be published, will the omission of a line or a word, evade the statute? That it will, would seem to be the argument of the counsel. Under such a construction, the question might well be asked, of what value to an author is the statute? It purports to protect him against a fraudulent use of his manuscript; but practically it gives him no protection. It has been passed in mockery of his right. He is the sport of every man who has the disposition and the opportunity to pirate his manuscript. No such rule of construction is admissible. Has a substantial part of the manuscript been published? Does the book of the defendant contain Bartlett's system of book-keeping? Of this there can be no doubt. Such a publication is within the above section. It renders the manuscript valueless.

Was there an abandonment of the manuscript by Bartlett? This is the only remaining point to be considered, and it is the one most relied on in the defence. It satisfactorily appears from the evidence, that Bartlett intended to publish his manuscript. And this is only material on the question of abandonment. His right of property in no way depends on his intention in this respect. His manuscript was used in the school taught by himself in Cincinnati, and by the partnership school taught by Jones in St. Louis. In both these schools the manuscript was studied by the pupils, and they were required to copy certain parts of it, and were at liberty to copy the whole. These schools, and especially the one at Cincinnati, have been in operation several years. And under these circumstances, it is contended, there was an abandonment of the manuscript.

Bartlett's right of property in his manuscript may be transferred or abandoned, the same as any other right of property. Where the copyright of a published work is secured, under the statute, the author, by using the work in imparting instruction to his pupils, or by disposing of it to a friend, does not thereby transfer his exclusive right to publish it, or incur a suspicion that he intends to abandon it. And how does this differ from the case under consideration? In both cases the law gives a right of property to the author, and a remedy to enforce that right. And in both cases he may transfer or abandon that right. The evidence



of a transfer or abandonment must be as clear and as specific in the one case as in the other. An acquiescence in the publication of his manuscript, or in the republication of his printed book, would authorize the presumption of an assignment or of an abandonment. To make a gift of a copy of the manuscript is no more a transfer of the right or abandonment of it, than it would be a transfer or an abandonment of an exclusive right to republish, to give the copy of a printed work. In his treatise on Equity (section 943), Mr. Justice Story says:

“In cases of literary, scientific, and professional treatises in manuscript, it is obvious, that the author must be deemed to possess the original ownership, and be entitled to appropriate them to such uses as he shall please. Nor can he justly be deemed to intend to part with that ownership by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited, in point of right, use, and effect, to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication, to which the receiver may choose to devote them.”

And he says, to prevent the publication of manuscripts, without the consent of the author, an injunction should be issued. . . . Sparks had procured, from the representatives of Washington, the right of publishing his letters and other writings, and had done so in twelve volumes. Upham, in his *Life of Washington*, had taken many of these letters from Sparks, they never having been published before. On a bill filed, Mr. Justice Story said: “Unless there be a most unequivocal dedication of private letters and papers by the author, either to the public or some private person, I hold that the author has a property therein, and that the copyright thereof exclusively belongs to him.” And he granted an injunction. *Folsom v. Marsh* [Case No. 4901]. The manuscript of Bartlett was used in his school at Cincinnati, and in the school at St. Louis, for the purpose of imparting instruction to the pupils, and it does not appear, from the evidence that copies were required or permitted to be taken of it for any other purpose. There is nothing in the testimony from which an implication can arise, that Bartlett consented to the publication of his manuscript by the defendant, or that he ever abandoned it. It seems he was much excited when he was informed of the publication of Crittenden, and shortly afterwards instituted this suit.

An injunction will be granted to restrain the defendants from a further publication of the first ninety-two pages of the work, or sale of it; and a reference is made to a master to ascertain the number of copies sold, and the number on hand, &c., and that he report at the next term.

195. MONROE *v.* PRESS PUBLISHING COMPANY

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT. 1896

73 *Fed.* 196

THIS case comes here on writ of error to review a judgment of the Circuit Court, Southern District of New York, entered December 16, 1894, upon a verdict for \$5,000, in favor of defendant in error, who was plaintiff below.

The action was for damages for unlawfully publishing in the World newspaper a poem written by the plaintiff to be delivered on the occasion of the Dedication of the Columbian Exposition, or World's Fair, in Chicago. The facts appear in the opinion.

LACOMBE, Circuit Judge. At the time when preparations were being made for the opening ceremonies of the World's Fair, or Columbian Exposition, in Chicago, plaintiff, a resident of that city, who was engaged in the literary profession, had published poems and prose writings and had an excellent reputation as an authoress, was invited by the committee on ceremonies to write and deliver a poem at the dedicatory exercises. That invitation was given March, 1891. The dedicatory exercises were had on October 21, 1892, in the presence of a vast concourse of people. They included the delivery of addresses by orators of well-known ability, no effort was spared to make them effective, and they were, by reason of the event which they commemorated, of exceptional interest to the country at large. For the public utterances of orator or poet, who had been selected to speak on that day and in that place, the occasion was unique.

The plaintiff accepted the invitation and after many months of careful work produced an ode of some 400 lines. After it had been shown to the committee on ceremonies and suggestions made as to changes she revised it, reducing its length to about 375 lines and delivering the final revised version to the committee on September 20, 1892. Fifty-six lines of the ode were lyrical songs, intended to be sung; the original version of the ode was shown to a Mr. Chadwick, who wrote the music for these songs, and the fifty-six lines were published with the music so composed in order to properly rehearse the chorus. Except of these fifty-six lines there had, down to this time, been no publication of the ode by the plaintiff or by any one else. The copies which were given to the members of the committee on ceremonies and to a so-called literary committee, were delivered to them solely to enable them to decide whether the poem was one suitable and worthy of their acceptance as the ode to be delivered at the opening exercises. Such a delivery of copies of a literary production is not a publication and could not prejudice the owner's common-law rights. *Bartlett v. Crittenden*, 4 McLean, 300; 5 *id.* 32.

On September 23, 1892, plaintiff met the acting chairman of the

committee on ceremonies, who informed her that the poem was satisfactory and the matter arranged, and paid her \$1,000. Whereupon she signed the following receipt:

"Received, Chicago, the 23rd day of September, 1892, from the World's Columbian Exposition, one thousand dollars, (\$1,000,) in full payment for ode composed by me.

"It is understood and agreed that said Exposition Company shall have the right to furnish copies for publication to the newspaper press of the world and copies for free disposition if desired, and also may publish same in the official history of the dedicatory ceremonies; and subject to the concession herein made, the author expressly reserves her copyright therein.

"HARRIET MONROE."

The first question to be determined, and it is the important question in the case, is what property rights to the ode remained to the plaintiff after September 23, 1892? The evidence indicates that the receipt quoted above expressed item by item the conditions of the contract between Miss Monroe and the committee, which was not otherwise reduced to writing. The defendant contends that by the first clause of this receipt she transferred to the committee her entire common-law right of property in the manuscript; that the residue of the receipt is a nullity; that it can not be construed as impairing, in any way, the full rights of ownership given by the first clause; that the second paragraph was intended only as a reservation of the right to take out a copyright under the United States statute, and was powerless to secure even that, since publication without the statutory copyright notice is authorized, and the poem being once thus published, all right to restrain future piracy would be lost.

We are unable to accept this construction; the whole instrument is to be construed together and manifestly it contemplates something short of a complete transfer of all rights to the committee. A reservation by the author "subject to the concession herein made" of her copyright in the poem imports a reservation of common law as well as of statutory copyright; and it must be made clear either upon the face of the instrument itself, or otherwise by competent proof, that the word "copyright" was used in some more restricted sense. To the committee was given not only the right to have the poem delivered on the occasion of the dedicatory ceremonies, but also the right to publish it in the official history thereof, and the right to furnish copies for publication to the newspaper press of the world, and the right to furnish copies for free distribution. This was all the committee needed for its purposes, and having secured all it needed, there is nothing surprising in its leaving all other rights to the author. When the committee chose to avail of its concession and publish the poem, that act would terminate the common-law copyright; but until publication that right survived, and by the terms of the agreement was not conveyed to the committee, but reserved to the author. Any unauthorized publication would be

a trespass upon that right of property, and right of action therefor would still be in the author.

The contention of the plaintiff in error, that the passage by Congress of the copyright statutes has abrogated the common-law right of an author to his unpublished manuscript, is unsupported by authority. The statutes secure and regulate the exclusive property in the future publication of the work, after the author shall have published it to the world. But this is a very different right from the ownership and control of the manuscript before publication.

"That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its publication, cannot be doubted. . . . The argument that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted, . . . [at least until] he shall have sold it publicly." *Wheaton v. Peters*, 8 Peters, 657, 658.

And that common-law right may be enforced in the Federal Courts, whenever diversity of citizenship gives those Courts jurisdiction of the parties, irrespective of whatever additional means of redress are provided by sec. 9 of the Act of Congress of February 3, 1831, now sec. 4967, U. S. Revised Statutes; *Bartlett v. Crittenden*, 4 McLean, 300; 5 id. 32; *Keene v. Wheatley*, 9 Am. Law Reg. 33; *Palmer v. De Witt*, 47 N. Y. 532. The various assignments of error, therefore, which cover both the refusal of the Court to direct a verdict in favor of defendant, and also so much of the charge as instructed the jury that plaintiff had property rights which would be trespassed upon by an unauthorized publication of her ode, are unsound.

On September 23d, the day the money was paid and the receipt signed, the New York World, a newspaper published by defendant, received a telegram from one Fay, its agent in Chicago, saying that a copy of the ode could be obtained for \$150, and asking whether it should be paid and the ode procured. On the next day, the managing editor of the World directed its purchase and ordered it sent that afternoon and night to the World by telegraph. While the ode was in transit, a message was received from the Associated Press to the effect that it was understood that a copy of the ode had gotten out somehow, and that its publication was forbidden on the ground that it was copyrighted. Fay was thereupon communicated with, and replied that the copy which he had did not have any copyrighting words upon it, and that there was no indication upon it that it was copyrighted. Thereupon, and on September 24th, the following dispatch was sent to Fay in Chicago:

"We will take our chances on it. Interview Miss Monroe to-morrow and get a good talk with her about Ode and literature generally. Explain to her that the World could not miss an opportunity to give the public such a grand poem, and tell her how much better to have the World treat it as it will to-morrow, making it the great feature of the day, than to have it peddled around among the little papers.

THE WORLD."

The Ode was printed in full in the issue of the paper of Sunday, September 25, with comments upon it, a sketch of Miss Monroe, and what purported to be a portrait of her. Fay was not put on the witness stand, nor was any evidence offered to show how the copy which he bought had been obtained. The Court instructed the jury that if they found 'it was obtained and sold to the defendant against the mind and will, and without the authority and consent of both the Exposition Company and Miss Monroe, the act of publication was a wrongful violation of her rights, 'and that' upon that issue the plaintiff had the burden of proof." The jury were further instructed that in actions of trespass to personal property or in actions for injury to personal property, when the circumstances showed gross or wanton or malicious disregard by the defendant of the rights of the plaintiff, the jury would have a right to give exemplary damages in excess of any actual loss which was suffered.

The testimony in the case warranted the jury in finding that the defendant had reason to know that the poem had not theretofore been published; that it was the wish, and intention, both of the exposition committee and of the plaintiff, to withhold it from publication until, in the language of the circuit judge, "it should be presented to the audience with all the advantages which the enthusiasm of the occasion could give, and unmarred by criticism or comment either polite or impolite."

The managing editor testified that he knew the ode belonged to the World's Fair, and that he made no inquiry of the World's Fair committee as to whether he had any right to buy it or not. That as to the question whether an editor of a newspaper has the right to publish a literary work unless the owner consents to it, he left that matter to be settled by the lawyers, and added "under some circumstances I believe that I have the right as an editor to publish the manuscript of a person without that person's consent." This is a re-statement of the proposition so frequently advanced when newspapers happen to be defendants, that the personal or property rights of individuals are entitled to receive no consideration at the hands of the public press whenever a violation of those rights may in the opinion of the editor promote the entertainment of the purchasers of his paper. Testimony such as this was abundantly sufficient to warrant the jury in finding that the publication of the plaintiff's ode in the World newspaper was the result of "that wanton and reckless indifference to the rights of others which is equivalent to an intentional violation of them." *Milwaukee R. R. Co. v. Arms*, 91 U. S. 489. In view of the testimony of the principal witness for the defendant, it seems to have escaped on this occasion with a light verdict.

Plaintiff in error contends that the Court erred in instructing the jury that it might award exemplary damages. That in certain classes of cases juries are authorized to give punitive or exemplary damages to punish a wrongdoer and to deter others from the commission of a

like wrong is well-settled law in the Federal Courts and in the Courts of this State. *Day v. Woodworth*, 13 How. 370; *Milwaukee, etc. R. R. Co. v. Arms*, 91 U. S. 489; *Voltz v. Blackmar*, 64 N. Y. 440. In such cases exemplary damages may be given in addition to what may be proved to be the actual money loss of the plaintiff.<sup>1</sup>

### SUB-TOPIC B. REGISTERED COPYRIGHT (BY STATUTE)

196. EATON S. DRONE. *Treatise on the Law of Property in Intellectual Productions*. (1879. pp. 73-72, in part.) The duration of copyright granted by the Parliament of Anne in 1710, — fourteen years absolute, with a contingent term of the same length, — continued without change till 1814, when it was enlarged to the absolute term of twenty-eight years, without provision for extension, except that, if the author were living at the end of that period, his copyright was to continue during his life.<sup>2</sup>

Early in the reign of Victoria, it was thought to be "high time that literature should experience some of the blessings of legislation," and earnest efforts were made to secure an extension of the term during which authors might enjoy the profits of their works. The movement was begun in Parliament, under the lead of Sergeant Talfourd, in 1837, and ended with the passing of the copyright law of 1842.<sup>3</sup> . . . The term of copyright was fixed at forty-two

#### <sup>1</sup> [PROBLEMS:]

A dental society committee, after investigating several tooth-powders, etc., the defendant having been invited with others to exhibit his powders, etc., to them, reported on the whole subject at the Society's annual meeting (where it was discussed), and incidentally commended the defendant's powder paste; the defendant obtained a copy of the report from the staff of the professional magazine to which it had been handed, though not yet published, and used extracts as an advertisement; the report had been ordered to be retained by the Society as the Society's property; was the reading and discussion before the Society a publication? (1898, *New Jersey S. D. Society v. Denticura Co.*, 57 N. J. Eq. 593, 41 Atl. 672.)

Is the hanging of a picture in a salon, for exhibition to the art-loving public, a publication upon which photographic copies may be taken? (1894, *Werckmeister v. Lithographic Co.*, 63 Fed. 808.)

The plaintiff, a publisher of lithograph advertising pictures, owned an original painting, "Girl in summer dress with roses in large hat," from which he intended to print copies for sale. R., in the plaintiff's employ, surreptitiously copied the picture and sold the copy as his own to the defendant, who was ignorant of the fraud and proceeded to print and sell copies of this picture. The original picture had never been registered for copyright. The defendant is willing to cease further printing, but denies that he is liable in damages for what he has thus far done. Is he right? (*Mansell v. Valley Printing Co.*, 1908, 1 Ch. 567, 2 Ch. 441.)

#### NOTES:

"Manuscript, unpublished." (C. L. R., VIII, 54, 589.)

"Copyrights: What constitutes publication." (H. L. R., XII, 51, 436, XVI, 226.)

"Copyrights: Doctrine of 'publication.'" (H. L. R., XVII, 268.)]

<sup>2</sup> 54 Geo. III, c. 156.

<sup>3</sup> 5 & 6 Vict. c. 45.



years, or during the life of the author, and seven years after his death, in case this should be a longer period than forty-two years. . . .

Copyright in prints and engravings was first granted in 1735 by the 8 Geo. II, c. 13, whose provisions have been modified by several later acts. By 7 Geo. III, c. 38, passed in 1767, the term of protection was extended from fourteen to twenty-eight years.

The first statute for the protection of sculpture was the 38 Geo. III, c. 71, passed in 1798; but this was so defective that the law was revised in 1814 by the 54 Geo. III, c. 56, by which copyright is granted for fourteen years, with provision for an extension of fourteen years.

It was not until 1862 that statutory copyright was conferred upon authors of paintings, drawings, and photographs. By the 25 & 26 Vict. 68, passed in that year, such authors, provided they are British subjects or resident within the dominions of the crown, may acquire the "sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means, and of any size, for the term of the natural life of such author, and seven years after his death."

Until 1833, there was no statute securing the exclusive right of representing a dramatic composition, and the few cases which had arisen in the courts gave dramatists little hope of protection for their common-law rights from these tribunals. The Act of 3 & 4 William IV, c. 15, was passed in 1833 to meet this want. . . .

In order to afford to literary property, as well as to useful inventions and discoveries, adequate protection throughout the United States by a general law, the Federal Constitution, framed in 1787, empowered Congress "to promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."<sup>1</sup> Pursuant to this provision, the first copyright law of the United States was passed May 31, 1790. It was entitled, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned."<sup>2</sup> This statute gave to authors who were citizens or residents of the United States, their heirs and assigns, copyright in maps, charts, and books for fourteen years; and provided for a second term of the same length, if the author should be living at the expiration of the first. . . .

In 1831, the Acts of 1790 and 1802 were repealed, and the law relating to copyright was embodied in one statute.<sup>3</sup> The term of protection was extended from fourteen to twenty-eight years with provision for a renewal for fourteen years to the author, his widow or children. . . . In 1865, photographs and negatives were brought within the provisions of the copyright laws.<sup>4</sup>

Until 1856, there was no statute giving to dramatists control over the public representation of their plays. This want was met by the Act of August 18 of that year. . . .

All statutes relating to copyright were repealed in 1870, and the entire law on the subject embodied in one act.<sup>5</sup> No change was made in the duration of copyright. To the things protected by previous statutes were added paintings,

<sup>1</sup> Art. 1, s. 8, cl. 8.

<sup>2</sup> 1 U. S. St. at L. 124.

<sup>3</sup> 4 id. 436.

<sup>4</sup> 13 id. 540.

<sup>5</sup> Act of July 8, 1870, ss. 85 et seq.; 16 U. S. St. at L. 212.

drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of the fine arts. A printed copy of the title of every book was required to be filed with the Librarian of Congress before publication; and two copies of the book, to be delivered, within ten days after publication, to the same officer. In the case of paintings and certain other works of art, a description must be filed before and a photographic copy delivered after publication.

In 1873-74, the copyright, with all other statutes of the United States, was revised.<sup>1</sup>

In 1874, it was provided that the copyright notice appearing in a book or on a work of art might be in the form previously in use, or in the words "Copyright, 18—, by A. B."<sup>2</sup> . . .

Property in intellectual productions is recognized and protected in England and the United States, both by the common law and by the statute. But, as the law is now expounded, there are important differences between the statutory and the common-law right. The former exists only in works which have been published within the meaning of the statute; and the latter, only in works which have not been so published. In the former case, ownership is limited to a term of years; in the latter, it is perpetual. The two rights do not coexist in the same composition; when the statutory right begins, the common-law right ends. Both may be defeated by publication. Thus, when a work is published in print, the owner's common-law rights are lost; and, unless the publication be in accordance with the requirements of the statute, the statutory right is not secured.

197. PARLIAMENT OF GREAT BRITAIN AND IRELAND. *An Act for the Encouragement of Learning by vesting the copies of printed books in the authors or purchasers of such copies during the time therein mentioned.* (1709. 8 Anne, c. 19. Pickering's Statutes at Large, vol. 12, p. 82.) Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it please your Majesty, that it may be enacted, and Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the tenth day of April, one thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of

<sup>1</sup> U. S. Rev. St. ss. 4948-4971.

<sup>2</sup> 18 U. S. St. at L. 78.

printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer; and that if any other bookseller, printer, or other person whatsoever, from and after the tenth day of April, one thousand seven hundred and ten, within the times granted and limited by this Act, as aforesaid, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed or reprinted without the consent of the proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books, without such consent first had and obtained, as aforesaid; then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or proprietors of the copy thereof, who shall forthwith damask and make waste paper of them; and further, That every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published, or exposed to sale, contrary to the true intent and meaning of this Act. . . .

II. And whereas many persons may through ignorance offend against this Act, unless some provision be made, whereby the property in every such book, as is intended by this Act to be secured to the proprietor or proprietors thereof, may be ascertained, as likewise the consent of such proprietor or proprietors for the printing or reprinting of such book or books may from time to time be known; be it therefore further enacted by the authority aforesaid, That nothing in this Act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties therein mentioned, for or by reason of the printing or reprinting of any book or books without such consent, as aforesaid, unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register book of the company of stationers, in such manner as hath been usual, which register book shall at all times be kept at the hall of said company, and unless such consent of the proprietor or proprietors be in like manner entered as aforesaid, for every of which several entries, six pence shall be paid, and no more; which said register book may, at all seasonable and convenient time, be resorted to, and inspected by any bookseller, printer, or other person, for the purposes before mentioned, without any fee or reward. . . .

IX. Provided, That nothing in this Act contained shall extend, or be confirmed to extend, either to prejudice or confirm any right that the said universities, or any of them, or any person or persons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed. . . .

XI. Provided always, That after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.

198. PUBLIC LAWS OF THE UNITED STATES OF AMERICA. *An Act to amend and consolidate the Acts respecting Copyright.* (1909, March 4, c. 320. 35 Stats. at Large, 1075.) Sec. 1. [Copyright — exclusive rights conferred.] That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right :

(a) [To print, vend, etc., copyrighted works.] To print, reprint, publish, copy ; and vend the copyrighted work ;

(b) [Translate, dramatize, etc.] To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work ; to dramatize it if it be a non-dramatic work ; to convert it into a novel or other non-dramatic work if it be a drama ; to arrange or adapt it if it be a musical work ; to complete, execute, and finish it if it be a model or design for a work of art ;

(c) [Deliver in public as lecture, etc.] To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production ;

(d) [Perform, exhibit, etc., if drama.] To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof ; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced ; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever ;

(e) [If a musical composition — mechanical reproduction — royalty to owner by manufacturer.] To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit ; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced. . . .

Sec. 2. [Rights at common law not impaired.] That nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor. . . .

Sec. 9. [Affixing notice of copyright.] That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act ; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section twenty-one of this Act.

Sec. 10. [Certificate of deposit of copies.] That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act.

Sec. 11. [Works not reproduced for sale.] That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic or musical composition ; of a photographic print if the work be a photograph ; or of a photograph or other identifying reproduction thereof if it be a work of art or a plastic work or drawing. . . .

Sec. 12. [Deposit of two copies.] That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the

mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published. . . .

Sec. 20. [Effect of accidental omissions of notice.] That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person, who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice. . . .

Sec. 23. [Duration of term.] That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: Provided, That . . . the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. . . .

Sec. 25. [Infringement — liability.] That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable ;

(a) To an injunction restraining such infringement ;

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement. . . .

Sec. 28. [Penalty for infringement.] That any person who wilfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and wilfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the Court. . . .

Sec. 41. [Distinction between copyright and material object copyrighted.] That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.<sup>1</sup>

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<sup>1</sup> [ESSAYS:

*G. H. Putnam*, "The Question of Copyright" (reprinted in U. S. House Rep. 2401, 1890.)

*R. R. Bowker*, "Copyright, its Law and Literature."

*T. Solberg*, Report on Copyright Legislation (in Report of Librarian of Congress for 1903, Washington, 1904.)

(1) *What Things are Copyrightable*199. *BANKER v. CALDWELL*

SUPREME COURT OF MINNESOTA. 1859

3 Minn. 94

APPEAL from judgment of District Court, Ramsey County.

The appellant brings the action. The complaint alleges that the plaintiff is the owner of a certain set of abstract books and books of indexes containing complete abstracts of title to all the lands in the County of Ramsey, with the incumbrances and liens upon the same; that they had been prepared at great cost, labor, and skill, of plaintiff and others, and were of the value of five thousand dollars, and were chiefly valuable on account of the labor, care, skill, and expense, bestowed in preparing them. It then alleges the rendition of a judgment against the plaintiff, the issuance thereon of an execution to the defendant, as sheriff of the county, the levy of it, by defendant, upon the books of abstracts and indexes; and that, after the books came into his custody under said levy, the defendant, surreptitiously and clandestinely, and without the knowledge and consent of the plaintiff, caused copies of them to be made, and that defendant intends to sell said copies to one Heenan. It therefore prays for an injunction restraining the sale of the copies, and for a judgment that they be delivered to plaintiff.

To this complaint the defendant demurred, on the ground that it does not state facts sufficient to constitute a cause of action.

The Court sustained the demurrer, and judgment was entered for defendant, from which this appeal is brought.

Points and authorities for appellant. The demurrer makes these points: 1. That plaintiff has no exclusive or right property in the books of abstracts and indexes. 2. That defendant, being legally in possession, under the execution had a right to copy them for any purpose. 3. That it does not appear that plaintiff has been or will be damaged by the acts of defendant. 4. That he is not entitled to the relief demanded.

1. First, the complaint states the plaintiff to be the owner of books

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*American Bar Association, Reports of the Committee on Copyright and Trademark (Proceedings, 1906, 1907, 1908.)*

## NOTES:

"Common-law copyright." (C. L. R., VIII, 54.)

"Copyrights: Common-law rights: Distinguished from statutory rights." (H. L. R., IV, 198-204.)

"Copyrights: Nature and basis." (H. L. R., IV, 204-205, 210, 212; XII, 553-556.)

"Statutory copyright: Nature of right created." (H. L. R., XII, 553-556.)

"Common-law rights: Distinguished from statutory." (H. L. R., XX, 143, 56.)]



of abstracts and indexes, that they contain complete and perfect abstracts of titles to all the lands in Ramsey County, with the liens and incumbrances thereon, that they had been prepared at great care, labor, and skill, of plaintiff and others (those from whom he purchased), that they were chiefly made valuable because of such care, labor, and skill, and were of the value of \$5,000. From these facts, the nature, character, and arrangement, of the contents of the books fully appear. The phrase, "abstract of title," has a well-settled legal signification. It signifies a "brief account of the title to real estate." Bouv. Law Dict. 42; Preston on Abstracts; 2 Sugden on Vendors, 57 to 88; Wharton Law Dict. 10. Second, the books, therefore, contain brief statements of everything affecting title to all the lands in Ramsey County, prepared (not copied), compiled and condensed, from original sources of information — the original deeds or the records of the county. Plaintiff's rights are those of the author or compiler of an original work. . . . Seventh, the fact that the work is composed of materials not originated by the author, but which are accessible to everybody, does not prevent his having property in it, if the arrangement, compilation, condensing, and preparation, of such materials in the work are the product of his labour, care, and skill, and give value to the work. This is the case with maps, charts, scientific and text books, reporter's notes, translations, and works of the like kind. . . . Eighth, the books of abstracts and indexes are on a par with the works before referred to. It is not necessary that the method of arranging the materials should be invented by the author. It is enough that the work is the result of his care, labor, and skill, and is not copied from another work. . . .

Points and authorities for respondent: . . .

4. Because it appears from the complaint that the books and indexes in question were copied and the contents thereof taken from the public records of the county in the register of deeds' and clerk's offices, and that the same only contained such facts and information as are contained in the public records of said county, which are by law open and accessible to the public, and, inasmuch as it does not appear that the plaintiff had acquired and possessed, or could acquire or possess, any exclusive right to, or property in, or control over, the information, facts, and matters therein contained, to the exclusion of others. 5. Because the defendant, having lawfully and rightfully become possessed, and being in the rightful possession, of the said books and indexes, might rightfully copy the same, or cause them to be copied, without any actual injury to the same, or impairing or detracting from the information and matters contained therein, for the purposes stated in the complaint, or for any other lawful purpose whatever. . . . 7. That the common-law doctrine of copyright for the protection of authors and literary writers does not apply to this case, inasmuch as it is not stated or pretended that the books, or their system, style, or matter, is the original or intellectual production of the plaintiff.

*Brisbin & Bigelow, and F. & C. D. Gilfillan, for appellant.*

*M. E. Ames, for respondent.*

FLANDRAU, J. The character of the books for which a copyright or exclusive property at the common law is claimed in this case, is thus given in the complaint: "A certain set of abstract books and books of indexes, containing complete abstracts of title to all the lands situated in the said County of Ramsey, with the incumbrances and liens upon the said lands, prepared at great cost and expense, and labor, and skill, of the plaintiff and others, of the value of five thousand dollars."

The Court below decided that the books were not of a character which entitled them to the protection given to works of originality, as "it may be inferred that said books are copies, condensed it may be, of the public records of the county."

I do not know of a technical expression that is susceptible of, or has obtained, a more definite and certain signification than the one used to designate the nature of these books; "abstracts of title" has been the subject of treatises by learned commentators, and finds a place in almost all law dictionaries. See Preston on Abstracts; Lee on Abstracts. In Burrill's Law Dictionary, vol. I, p. 12, the following apt and clear definition of the term may be found:

"In conveyancing, an abstract or summary of the most important part of the deeds and other instruments composing the evidences of a title to real estate, arranged usually in chronological order, and intended to show the origin, course, and incidents, of the title, without the necessity of referring to the deeds themselves. It also contains a statement of all charges, incumbrances, liens, and liabilities to which the property may be subjected, and of which it is in any way material for purchasers to be apprised. Abstracts of title constitute an important part of the learning of conveyancing, and in England have been illustrated by treatises expressly devoted to the subject."

In describing a book which contained complete abstracts of title to all the lands in a county, it would seem to me tautological after stating such to be their contents, to enter into detail and give the particular arrangements of title and incumbrances, &c.; because, no matter what plan the compiler had adopted, if the books were abstract books, and presented a complete history of the title and incumbrances of the land comprised within them, the manner in which it was presented would not affect their character one way or the other. I think the description of the books as "abstract books and books of indexes," &c., given in the complaint, must be understood to mean that they were books of the character defined in the law dictionaries under the head quoted, and not mere copies of the records. That the making of a perfect abstract of the title to a piece of land, with all the incumbrances which affect it, involves a great exercise of legal learning and careful research, I presume no lawyer will dispute. The person preparing such an abstract must understand fully all the laws on the subject of conveyancing, descents, and inheritances, uses and trusts, devises, and,

in fact, every branch of the law that can affect real estate in its various mutations from owner to owner, sometimes by operation of law, and again by act of the parties. But the preparation of a set of abstract books which contain histories of all the titles in a county, with indexes, not only involves all the legal learning requisite to the arrangement of a single abstract, but, in addition, a great amount of skill in methodizing them into a harmonious whole, convenient of access; which skill alone, independent of the making of the abstracts, is the proper subject of protection by copyright.

Indexes to works may be copyrighted. An index to the Constitution of the United States, or the Holy Bible, may be a very valuable contribution to the number of literary productions. Certainly any one who has examined Cruden's Concordance of the Bible would never deny to him the fame of having conferred upon the world a work of inestimable value, yet it is but an index after all.

It has been a very difficult question in the courts to determine what is original and what borrowed or pirated, in a literary production. It cannot be necessary that the matter contained in a work, the thought, sentiment, and language, should be all original, to entitle the author to the protection of a copyright, because if such was the case, in the present advanced state of the sciences, learning, and literature, we might look for very few additions which would fall within the privileged sphere. It would exclude critiques upon the literary performances of others, abridgments of works beyond the reach of many, which now form a large portion of the means through which knowledge is conveyed to the people — Encyclopædias, Gazetteers, Anthological Dictionaries, and a thousand other works — which, although in the great part composed of extracts from the works of others, are, by their peculiar arrangement, most valuable acquisitions to the general store of knowledge, and in many cases exhibit a degree of research and learning quite equal to that displayed by authors of works purely original. It would be unfair to say that the mind that devotes a lifetime to culling the fruit and flowers from the wilderness that many laborers in an uncultivated field have caused to spring up and obscure a subject, and succeeds in rendering its otherwise forbidding approaches attractive and facile to the student, is not entitled to the same protection as he who dropped some of the original seed. In Story's Equity Jurisprudence, 940, where this subject is largely discussed, he cites as examples of works which may be considered as entirely original, those of Milton, Pope, and Sir Walter Scott, although he says they have freely used the thoughts of others.

“Of others, again, the original ingredients may be so small and scattered that the substance of the volumes may be said to embrace little more than the labors of sedulous transcription and colorable curtailments of other works. There are other examples of an intermediate class, where the intermixture of borrowed and original materials may be seen in proportions more nearly approaching to each other, and there are others again, as in cases of maps, charts, translations,

and road books, where the materials being equally open to all, there must be a close identity or similitude in the very form and use of the common materials."

The case of maps and charts bears a very strong resemblance to the case at bar; there the material from which the map is taken, like the records of a county, is open to all. If the combined labors of the surveyor, the topographer, the historian, and the artist, furnish a map by which at one view a perfect knowledge may be had of the district or country represented, including climate, soil, productions, surface, distances, views, cities, &c., surely the compiler and delineator of such a chart should be protected and secured in the profits of his labors, against those who would appropriate them by mere transcription. Yet notwithstanding this, any other person may use the same material and produce another map of the same country, which, if the first was perfect, must for its merit depend upon its resemblance to it; and should the second map be a facsimile of the first, if it was bona fide the result of the original efforts of the author, it would be entitled to equal protection. A map is but a transcript of the region which it portrays, narrowed in compass so as to facilitate an understanding of the original. It may be said to be an abstract of the original, in the only way that the subject is susceptible of being condensed and abridged. It is a key to nature's record, as the plaintiff's abstracts were keys to the records of the titles of Ramsey County; the one is as much entitled to protection for originality of construction as the other.

There are numerous cases reported, illustrating the nature of those original works that are entitled to the privileges of copyright, which are cited, with lengthy extracts from the opinions of the judges who decided them, in note 2, p. 271, vol. 2 of Story's Eq. Jur.; and I think the principle which runs through the reported cases would include the plaintiff's abstract books within the privileged class of works. . . .

The Court erred in sustaining the demurrer to the plaintiff's complaint, and the judgment should be reversed.

## 200. CALLAGHAN *v.* MYERS

SUPREME COURT OF THE UNITED STATES. 1888

128 *U. S.* 617, 9 *Sup.* 177

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

This was a suit in equity, brought in the Circuit Court of the United States for the Northern District of Illinois, on the 17th of December, 1877, by Eugene B. Myers, against Bernard Callaghan, Andrew Callaghan, Andrew P. Callaghan, and Sheldon A. Clark, composing the firm of Callaghan & Co., Marshall D. Ewell, and Van Buren Denslow. The bill sets forth that the firm of E. B. Myers & Chandler, composed

of the plaintiff and Horace P. Chandler, became the proprietors of volumes 32 to 38, both inclusive, of the reports of the Supreme Court of the State of Illinois, known as "Illinois Reports," prepared by Norman L. Freeman; that, as such proprietors, said firm, desiring to secure a copyright for the several volumes, under the statutes of the United States, deposited in the office of the clerk of the District Court of the United States for the Northern District of Illinois, before publication, a printed copy of the title of the several volumes; and that they afterwards, and within three months of the publication of the volume, deposited in said office a copy of the work. . . .

The bill further alleges that all the volumes were prepared by Mr. Freeman, and each contained a large amount of matter original with him, and a great number of the decisions and opinions of the Supreme Court of Illinois; that, among other original matter, Mr. Freeman prepared for each case a syllabus or head-notes, and for many cases in each volume a statement of the facts of the case; that, also, in many of them he copied, or copied and arranged, the instructions ruled upon by the Court below; that he also prepared and inserted, or gave, in all or many of them, the stipulations made, or made and filed, therein, and in many of them he gave the errors assigned; that he also prepared, for each of them, a table of the cases cited therein, and a table of the cases decided, and other original matter, and so arranged said decisions and the matter therein contained, or the matter in connection with the decisions, as to make each of the books, or each of the books and the matter therein contained, convenient and valuable to the persons using the decisions; that, in respect of volumes 32 to 38, the firm of E. B. Myers & Chandler, and in respect of volumes 39 to 46, the plaintiff, purchased from Mr. Freeman all his proprietary rights in the volumes, and paid him a large consideration therefor, and for his labor and care in preparing them, and used the labor and matter of Mr. Freeman in publishing the books. . . .

The bill also alleges, as to all of the volumes, that the plaintiff had the exclusive right to the arrangement of each of them, and the exclusive right to publish the head-notes, or syllabuses, and to the arrangement of the pages of the books, and to the division of the opinions into separate volumes, and to the table of cases cited and table of cases decided, as published in each of them, and to the arrangement of the decisions, as accompanied with the head-notes, stipulations, errors assigned, instructions, table of cases cited, table of cases reported, and indexes accompanying the same, and the exclusive right to all of said works, except to the matter contained in the opinions of the judges; that the defendants had full knowledge of the exclusive rights of the plaintiff, and attempted to buy them from him, but refused to pay the price charged by him, and thereupon proceeded to reprint and publish volumes 32 to 38, and, in doing so, used the decisions of the Supreme Court of Illinois only as published by the plaintiff, and prepared the volumes

from the books of the plaintiff, and did not procure the matter from original sources, and in all of the books used the works of the plaintiff, and copied the title-pages thereof, and used the division and arrangement of the plaintiff in the volumes, and the paging thereof, and copied the table of cases cited and the table of cases reported from each of the books of the plaintiff, and also copied from the same the stipulations, errors assigned, and instructions given by the Court; that, in publishing the statements of the cases, and in preparing the syllabuses, the defendants used the books of the plaintiff, and the changes they made were merely colorable, and were made only for the purpose of avoiding the claim of the plaintiff; that the books, as printed and published by the defendants, were all and each merely imitations of the volumes of the plaintiff, corresponding in number; that all and each of said republications by the defendants are piracies on the copyrights of the plaintiff, and the books have been made by them to take the place of, and, as far as they can, to supersede the books of the plaintiff; that the defendants are selling them to the persons who would otherwise buy the books of the plaintiff, to his great damage and loss; that the defendants threaten to republish volumes 39 to 46; and that the aggregate value of the copyrights of the plaintiff is not less than \$20,000, and his damage is not less than that sum. . . .

The members of the firm of Callaghan & Co. put in an answer to the bill. It sets up that a printed copy of volume 32 was not deposited until more than three months after publication. It avers that but a small amount of original matter was prepared by Mr. Freeman for any of the volumes 32 to 46, and that but few statements of cases were prepared by him, and those few were drawn by him from the opinions of the Court in the cases reported. It denies that he prepared any tables of cases cited for any of those volumes, and denies that he so arranged the decisions and matter contained in the volumes as to make the volumes convenient and of value to the persons using them. It avers that all matters contained in the volumes are public and common property, forming part of the law of the State of Illinois, and as such not susceptible of copyright, or in any manner literary property, in which a private citizen can have a monopoly under the Act of Congress regulating the subject of copyright; that whatever labor, literary or otherwise, was done upon the volumes by Mr. Freeman, was done in his official capacity as reporter of the decisions of the Supreme Court of Illinois, a public office then existing under and by virtue of the laws of that State, and to which Mr. Freeman had been duly appointed; and that all labor, literary or otherwise, by Mr. Freeman, in his capacity as official reporter, upon the volumes, was public and common property, not susceptible of copyright or of private literary ownership. . . .

The answer also admits that, in republishing volumes 32 to 38, the defendants have used the opinions of the Supreme Court of Illinois, as published by the plaintiff, but avers that they have corrected errors



in names, citations, and other matters therein, and denies that they have prepared the books from those of the plaintiff, or used the work of the plaintiff, except in so far as plaintiff's books are free to the use of any and all persons, or have copied his title-pages, or have used his paging, or have copied his tables of cases cited or reported, or the stipulations, errors assigned, or instructions given. . . .

On the 9th of July, 1885, a final decree was entered, adjudging that the plaintiff recover \$340.70 as profits on the resales of the 156 volumes, in addition to the \$4,433.44 reported by the master, Mr. Bennett, and the \$6,986.05 reported by the master, Mr. Bishop, the three sums amounting to \$11,760.19, and the costs of the suit. The decree granted a perpetual injunction as to volumes 32 to 46. It also restrained the defendants from selling or disposing of the stereotype plates of those volumes, and dismissed the bill as to Denslow and Ewell, without costs. . . . The report of the decision of the Circuit Court on the exceptions to the reports of the masters is found in 24 Fed. Rep. 636. From such final decree the defendants composing the firm of Callaghan & Co. have appealed to this Court.

*James L. High*, for appellants. . . .

I. Law reports are public property; are not susceptible of private ownership; and are not the subject of copyright under the Act of Congress.

The framers of the Constitution plainly had in view the necessity of affording protection to the literary productions of private authors, and never intended that by virtue of such legislation a public officer could claim private dominion and ownership, or assert a monopoly in the result of his official labors, for which he was employed and paid by the State. Mr. Freeman, in the preparation of his reports, was not an author within the meaning of this Constitutional provision.

It was decided by this Court in *Wheaton v. Peters*, 8 Pet. 591, and is now universally conceded, that the opinions of the judges are public property, and not the subject of copyright by the reporter. This necessarily results from the relation sustained by the judges toward the people, they being public officers employed and paid to render a purely public service. The result of the labors of the judges is, therefore, the property of the people by whom and for whom they are employed; and if any such element of literary property attaches to their labors as to render them susceptible of copyright, the people alone are entitled to such copyright. In like manner the reporter being a public servant or agent, the product of his labor is likewise the property of the people; and if copyrighted at all, it can only be done in the name of, and for the benefit of the people. . . .

The early English cases under these letters patent afford strong support for the position that the laws are not private property, and are not susceptible of private ownership, the right to their publication resting in the sovereign. See *The Stationers v. The Patentees* about the printing

of Rolls' Abridgment, Carter, 89; s. c. Bac. Abridg. tit. Prerogative, F. 5; Millar v. Taylor, 4 Burrow, 2304, 2383; Basket v. University of Cambridge, 1 W. Bl. 105; Manners v. Blair, 3 Bligh, n. s. 391.

Whether the theory of the royal prerogative, or of a private property in the crown be accepted, in either event the sole right of publication is recognized in the sovereign, and in either event the analogy is equally striking in the case at bar. If the right of publishing the laws in England pertained to the sovereignty here; that is to the public, to the people, or to their government, and no element of private literary property can attach to such publications; and if, as in this case, appellants as private citizens are asserting the right to publish the laws of the State; the State alone can complain.

It is true that while publishing volumes 32 to 46 the reporter received no direct salary from the State. Under provisions of law, the State purchased of him a large number of copies of those volumes at a price affording a large profit on each, which was equivalent to a salary. But it is confidently submitted that the nature of the reporter's functions and the question of copyright in his reports, are wholly independent of the method by which he receives compensation for his services, or whether, indeed, he is compensated at all. Private citizens are frequently designated to the performance of public duties, without compensation, and in the performance of such duties they may, and do, make written reports of their proceedings for the benefit of the State. It has never yet been asserted that such reports are the private literary property of the persons by whom they are made. The sole test in determining the right of private dominion and ownership in literary productions is, whether the writer is engaged in a private enterprise, and therefore an author within the meaning of the Constitution, or whether he is engaged in a public service, which dedicates the result of his labors to the public.

The doctrine of exclusive literary ownership in law reports contended for by appellee is also contrary to public policy. The decisions of the Supreme Court of Illinois are part of the law of the land. The reports of those decisions by the official reporter are made by statute evidence of the law. They are, therefore, publications of the laws of the State, in like manner as are the published statutes and acts of the Legislature.

*G. W. Kretzinger*, for appellee.

BLATCHFORD, J. The volumes of law reports of which the plaintiff claims a copyright are in the usual form of such works. Each volume consists of a title-page, of a statement of the entry of copyright, of a list of the judges composing the Court, of a table of the cases reported in the volume, in alphabetical order, of a head-note or syllabus to each opinion, with the names of the respective counsel, and their arguments in some cases, and a statement of facts, sometimes embodied in the opinion and sometimes preceding it, and of an index, arranged alphabetically, and consisting substantially of a reproduction of the head-

notes. Of this matter, all but the opinions of the Court and what is contained in those opinions is the work of the reporter, and the result of intellectual labor on his part.

The broad proposition is contended for by the defendants that these law reports are public property, and are not susceptible of private ownership, and cannot be the subject of copyright under the legislation of Congress. It is urged that Mr. Freeman, the reporter, was a public officer, whose office was created by chapter 29 of the Revised Statutes of Illinois of 1845, which enacted as follows, in regard to the Supreme Court and the reporter:

"Sec. 20. The Court shall appoint some person learned in the law to minute down and make report of all the principal matters, drawn out at length, with the opinion of the Court, in all such cases as may be tried before the said Court; and the said reporter shall have a right to use the original written opinion after it shall have been recorded by the clerk.

"Sec. 21. The reporter, before entering upon his duties, shall be sworn by some one of the justices of the Supreme Court faithfully to perform the duties of his said office. He may, for misconduct in office, neglect of duty, incompetency, or other cause shown, to be entered of record, be removed from office.

"Sec. 22. It shall be the duty of the reporter to deliver to the secretary of state, as soon as convenient after publication, such number of copies of the respective volumes of the reports of said Court as may be necessary to enable the said secretary to distribute the same in the manner provided in the following section, together with one hundred copies in addition, to be deposited in the secretary's office for the use of the State."

Section 23 provided for the distribution of the volumes by the secretary of state, and section 24 provided that, upon the delivery of the requisite number of any volume, the secretary of state should deliver to the reporter a certificate specifying the number of copies which had been so delivered, and that such certificate should entitle the reporter to a warrant drawn by the auditor of public accounts upon the treasury for an amount, for those volumes, at the price for which the books should be sold to individuals, provided, the price should not exceed the ordinary price of law books of the same description, to be determined by the auditor, treasurer, and secretary of state. These statutory provisions were amended in 1863, by making the term of office of the reporter six years, and in 1865 it was enacted that the price of the volumes to be delivered to the secretary of state should be \$6 each. The reporter was given a salary, by law, in 1877, of \$6,000 a year.

It is further contended that Mr. Freeman, in preparing the official edition of the reports, was not an author, within the meaning of the Act of Congress, and that it was not intended by that Act that he should assert a monopoly in the result of his official labors.

But, although there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges (*Banks v. Manchester*, ante, 36), yet there is no ground of public policy on

which a reporter who prepares a volume of law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copyright for the volume which will cover the matter which is the result of his intellectual labor. In the present case there was no legislation of the State of Illinois which forbade the obtaining of such a copyright by Mr. Freeman, or which directed that the proprietary right which would exist in him should pass to the State of Illinois, or that the copyright should be taken out for or in the name of the State, as the assignee of such proprietary right. Even though a reporter may be a sworn public officer, appointed by the authority of the government which creates the Court of which he is made the reporter, and even though he may be paid a fixed salary for his labors, yet, in the absence of any inhibition forbidding him to take a copyright for that which is the lawful subject of copyright in him, or reserving a copyright to the government as the assignee of his work, he is not deprived of the privilege of taking out a copyright which would otherwise exist. There is, in such case, a tacit assent by the government to his exercising such privilege. The universal practical construction has been that such right exists unless it is affirmatively forbidden or taken away, and the right has been exercised by numerous reporters, officially appointed, made sworn public officers, and paid a salary, under the governments both of States and of the United States.

This question was, it is true, not directly adjudged in *Wheaton v. Peters*, 8 Pet. 591. In that case the owners of the copyrights of *Wheaton's Reports* of the Supreme Court of the United States brought a suit in equity against Mr. Peters for publishing and selling a volume of his *Condensed Reports* of the Supreme Court. The bill was dismissed by the Circuit Court. On an appeal by the plaintiffs to this Court one of the points urged by the defendants was that reports of the decisions of this Court, published by a reporter appointed under the authority of an Act of Congress, were not within the provisions of the law for the protection of copyrights. This Court held (1) that the plaintiffs could assert no common-law right to the exclusive privilege of publishing, but must sustain such right, if at all, under the legislation of Congress; (2) that, under such legislation, there must have been, in order to secure the copyright, a compliance with the provisions of the statute in regard to the publication in a newspaper of a copy of the record of the title of the book, and in regard to the delivery of a copy of it, after publication, to the secretary of state. The Court remanded the case to the Circuit Court for a trial by a jury as to whether there had been a compliance with the above-named requisites of the Act of Congress. . . .

If this Court had been of opinion that there could not have been a lawful copyright in the volumes of *Wheaton's Reports*, it would have been useless to send the case back to the Circuit Court for an inquiry whether the conditions precedent to the obtaining of a lawful copyright, under the Act of Congress, had been complied with, especially in view

of the fact that the opinion of the Court concludes (page 668) with this statement:

"It may be proper to remark that the Court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this Court, and that the judges thereof cannot confer on any reporter any such right."

Therefore, the only matter in Wheaton's Reports which could have been the subject of the copyrights in regard to which the jury trial was directed was the matter not embracing the written opinions of the Court, namely, the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index. Such work of the reporter, which may be the lawful subject of copyright, comprehends also the order or arrangement of the cases, the division of the reports into volumes, the numbering and paging of the volumes, the table of the cases cited in the opinions (where such table is made), and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various head-notes, and cross-references, where such exist. A publication of the mere opinions of the Court, in a volume, without more, would be comparatively valueless to any one. The case of *Wheaton v. Peters* was decided at January term, 1834. In *Gray v. Russell*, 1 Story, 11, in 1839, Mr. Justice Story, in speaking of the question as to how far a person was at liberty to extract the substance of copyrighted law reports, says (page 20):

"In the case of *Wheaton v. Peters*, 8 Pet. 591, the same subject was considered very much at large. It was not doubted by the Court that Mr. Peters' Condensed Reports would have been an infringement of Mr. Wheaton's copyright, supposing that copyright properly secured under the Act, if the opinions of the Court had been or could be the proper subject of the private copyright by Mr. Wheaton. But it was held that the opinions of the Court, being published under the authority of Congress, were not the proper subject of private copyright. But it was as little doubted by the Court that Mr. Wheaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work. The cause went back to the Circuit Court for the purpose of further inquiries as to the fact whether the requisites of the Act of Congress had been complied with or not by Mr. Wheaton. This would have been wholly useless and nugatory unless Mr. Wheaton's marginal notes and abstracts of arguments could have been the subject of a copyright, (for that was the work which could be the subject of a copyright;) so that, if Mr. Peters had violated that right, Mr. Wheaton was entitled to redress."

This seems to us to be a proper view of the decision in *Wheaton v. Peters*, and that decision is as applicable where a reporter receives a compensation or salary from the government as where he does not, in the absence of any restriction against his obtaining a copyright.

In the present case, although Mr. Freeman, during the period of his preparation of volumes 32 to 46, received no direct salary from the State, it is contended by the defendants that he received from the State

compensation for his services, through the purchase by it, under a statute, of copies of his volume at a stated price of \$6 per copy for 553 copies of each volume, and that this was substantially the payment of a salary to him by the State. But, as stated before, in the view we take of the case, the question of a salary or no salary has no bearing upon the subject. The general proposition that the reporter of a volume of law reports can obtain a copyright for it as an author, and that such copyright will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published, is supported by authority. *Curt. Copyr.* 131, 132; *Butterworth v. Robinson*, 5 Ves. 709; *Cary v. Longinan*, 1 East, 358, and note, 362; *Mawman v. Tegg*, 2 Russ. 385, 398, 399; *Hodges v. Welsh*, 2 Ir. Eq. 266, 287; *Lewis v. Fullarton*, 2 Beav. 6; *Saunders v. Smith*, 3 Mylne & C. 711; *Sweet v. Benning*, 16 C. B. 491; *Jarrold v. Houlston*, 3 Kay & J. 708, 719, 720. . . .

On the whole case we are of opinion that the final decree was correct, except in respect of volume 32. The amount of damages reported by the master, Mr. Bishop, as to that volume, and allowed by the final decree as part of the \$6,986.05, was \$926.66. That sum is disallowed, and must be deducted. The other items of recovery in the decree were proper. The injunction as to volume 32 must be vacated, and the appellee will recover his costs of this Court. The decree of the Circuit Court is reversed as to volume 32, and is affirmed in all other respects; and the case is remanded to that Court, with a direction to correct the decree in the particulars above indicated, and to take such further proceedings as may be according to law, and not inconsistent with this opinion.

## 201. CHILTON *v.* PROGRESS PRINTING AND PUBLISHING COMPANY

COURT OF APPEAL OF ENGLAND, FROM CHANCERY DIVISION. 1895

*L. R.* [1895] 2 Ch. 29

THE plaintiff was the publisher of a sporting journal, published weekly at the price of 1s., called Chilton's Special Guide, which was entered at Stationers' Hall in the Registry of Copyrights. Among other items of sporting news the plaintiff gave, under the heading of "One Horse Selections," a list of the horses which in his opinion would win in races in the ensuing week. The defendant company published on each day of every race-meeting a small sheet or card at the price of 1d. called Sporting Snips. They had recently adopted the system of publishing in their sheet short notices headed "The Specials — One Horse Finals," under which they give a list of horses selected as likely to win at the races of the day, with the names of the periodicals or other authorities which selected them.



On Monday, August 13, 1894, the plaintiff published in his paper the following announcement:

“One Horse Selections.

Tuesday . . . . .	Keelson.
Wednesday . . . . .	Priestholm.
Thursday . . . . .	Coelus.
Friday . . . . .	Dromonby.”

On Tuesday, August 14, the defendants had in their sheets this notice:

“The Specials, One Horse Finals.

The Jockey . . . . .	Rusina.	Chilton . . . . .	Keelson.
Racing World . . . . .	Keelson.	Grant’s Opinion . . . . .	Juda.
Gale’s . . . . .	Keelson.	Turf Marvel . . . . .	Kenney.”

On the following day, Wednesday, they gave a notice in a similar form containing, among other names, the words “Chilton . . . Priestholm.”

The plaintiff complained of this practice as an infringement of his copyright, and brought the present action against the defendants to restrain them publishing or selling any copies of Sporting Snips containing any article or passage copied from, or only colourably altered from, Chilton’s Special Guide.

The defendants contended that the words complained of were not in law the subject of copyright, and that the publication of them was not an infringement of the plaintiff’s copyright in Chilton’s Special Guide, and that the plaintiff had sustained no damage.

The plaintiff moved for an injunction, and the hearing of the motion was treated by consent as the trial of the action.

*Kekewich*, J., before whom the motion was heard, held that there was nothing in the words complained of in the nature of copyright, and gave judgment for the defendants.

The plaintiff appealed from this judgment.

*Warmington*, Q. C., and *Waggett*, for the plaintiff. There are two questions here: first, whether this particular portion of the plaintiff’s publication is copyright; and, secondly, if so, whether the defendant’s publication is an infringement of that copyright. Upon the first question, that which the plaintiff has published is an expression of his opinion, for which he is entitled to charge. That opinion cannot be appropriated for publication by other persons, otherwise its value to the plaintiff is destroyed. Accordingly, he can have a copyright in that opinion, just as a man may have a copyright in a recipe for a dish or a medicine. [Lord HALSBURY. What you want to protect is, not your newspaper, but your opinion.] The question is, Do the defendants, by their publication, appropriate the result of that for which the plaintiff has protection by statute? A person may say, orally, “I have seen Chilton, and he says so-and-so”; but, if he puts that upon paper and publishes

it, then it becomes a matter of copyright. The form of expression in which news is conveyed is subject of copyright, and the appropriation by one paper of even a very small part of another will be restrained. *Walter v. Steinkopff*;<sup>1</sup> *Trade Auxiliary Co. v. Middlesborough and District Tradesmen's Protection Association*.<sup>2</sup> *Miller v. Wane*<sup>3</sup> is a somewhat similar case to the present; but there the interim injunction was refused because the Court was not satisfied from the evidence that the decline in the sale of the plaintiff's publication had arisen from the sale of the defendant's: the question of copyright was not decided. In *Sweet v. Benning*<sup>4</sup> it was held that the head-notes of law reports in the *Jurist* were copyright, and that an action would lie for pirating them. So in *Butterworth v. Robinson*<sup>5</sup> an injunction was granted against pirating cases from the *Term Reports*, the difference being merely colourable. [Lord HALSBURY. The question is whether there is a literary composition within the meaning of the copyright Act, 1842 (5 & 6 Vict. c. 45). The object of the Act as stated in the preamble is "to afford greater encouragement to the production of literary works of lasting benefit to the world."] That preamble has never been held to control the words in the 18th section protecting articles in periodical publications. The author of a book or the publisher of a periodical is entitled to protection against the piracy of his work, not only on the ground of its being a literary composition, but because it is an unauthorized use of the published results of labours. . .

*Marten*, Q. C., and *Gatey*, for the defendants, were not called on.

LORD HALSBURY, L. C. I have not been able to entertain a doubt that there is no copyright in this thing, notwithstanding the ingenious argument pressed upon us. It is really difficult to know by what name to describe it. What is really sought to be restrained is the publication of the fact that this gentleman, who is supposed to have good judgment as to winning horses, has expressed an opinion that this horse or that horse will win. It is idle to speak of this as something in the nature of literary composition such as is intended to be protected by the Copyright Act. It is not the form of printed words into which this gentleman has cast the result of his investigation which is sought to be protected. What is really sought to be protected is his opinion; and he has published his opinion, which is susceptible of being handed down from one person to another in any way, as it is admitted, except in writing. But it is contended by the applicant that if any person chooses to print it and thereby make a copy of it that is an infringement. We must ask, first, whether the thing intended to be protected by the Act is such a subject-matter as this is. I am of opinion it is not. This is nothing in the nature of literary composition. Although I quite agree that the preamble of the Act cannot control the enacting part of the

<sup>1</sup> 1892, 3 Ch. 489, 496.

<sup>2</sup> 11 Times L. R. 136.

<sup>3</sup> 5 Ves. 709.

<sup>4</sup> 40 Ch. D. 425.

<sup>5</sup> 16 C. B. 459.

section in the Act itself, yet the preamble may well point out what is the subject-matter with respect to which the Act is intended to operate for the protection of a book. I can find no word in the Act which properly points out that such a matter as we are now dealing with is to be a subject-matter of protection. I therefore think there is nothing here which ought to be protected, and that there is no subject-matter of copyright. . . .

202. WALTER *v.* LANE

COURT OF APPEAL OF ENGLAND, FROM CHANCERY DIVISION. 1899

*L. R.* [1899] 2 *Ch.* 749

THIS was a motion by the proprietors of The Times newspaper for an interim injunction to restrain the defendant from infringing their copyright by publishing or selling a book called "Appreciations and Addresses delivered by Lord Rosebery," containing copies of some articles or reports which had been published in The Times, or any substantial portions thereof, or extracts therefrom. During the years 1896 and 1898 reporters on the staff of The Times attended and composed descriptions of meetings on various occasions, including verbatim reports of speeches delivered by Lord Rosebery. These were published in The Times under the titles "Lord Rosebery on Free Libraries," a speech which had been made at the opening of the Passmore Edwards Library on June 25, 1896; "Lord Rosebery and Sir Walter Besant on London," at a meeting held on December 7, 1896; "Lord Rosebery on Great Britain and America," at a lecture delivered on July 7, 1898; "Lord Rosebery on Burke," at the unveiling of a memorial on July 9, 1898; and "Etonian Dinner—Lord Rosebery and Lord Curzon," at a dinner which took place on October 28, 1898.

The defendant published a book called "Appreciations and Addresses delivered by Lord Rosebery," which contained practically verbatim copies of the reports in The Times of these five speeches. He admitted that he had used cuttings from The Times, but he alleged that the proofs of the book were corrected, with Lord Rosebery's consent, by a comparison with a book of his speeches revised by himself. This book was a collection of newspaper cuttings, and in four of the articles in question The Times reports had not been altered in any way.

The proprietors of The Times brought this action, claiming a declaration that they were entitled to the copyright of the articles or reports in question, and an injunction to restrain the defendant from further publishing any book containing copies of them. The reporters had assigned such copyright as they had to the plaintiffs. One of them (a barrister) made an affidavit, in which he stated that he had composed or assisted in composing four of the reports the subject of the action and he added:

"In the course of our duty the reporters of The Times have to exercise their judgment and skill so as to represent in a form fit for publication the features of the meetings, and the material parts of and the sense of, the speeches made at them. This involves considerable skill and labour. Notes of the proceedings and speeches are taken in shorthand, which are afterwards carefully corrected and revised and written out, and punctuated fit for publication. This was the course of procedure in the cases of the reports" in question.

Lord Rosebery made no claim to copyright in any of the speeches, and had not taken the necessary steps to secure the copyright to himself.

The motion came on for hearing before NORTH, J., on July 14, 1899.

*H. Terrell*, Q. C., and *MacSwinney*, for the motion. There is no authority on the precise point, but it is settled that there is copyright in law reports: *Butterworth v. Robinson*;<sup>1</sup> *Sweet v. Maugham*;<sup>2</sup> *Sweet v. Benning*;<sup>3</sup> *Hodges & Smith v. Welsh*.<sup>4</sup> . . . No distinction can be drawn between a report of a speech at a meeting, and a report of a case in court. Reports are literary works giving a right of copyright; they are not mechanical copies. Reporters have to exercise a great deal of literary skill in taking down and editing what is said by a speaker, and making a report of a meeting. Such work requires much more skill than making a list of names and addresses for a directory, yet that was held in *Kelley v. Morris*<sup>5</sup> to enable the compiler to assert a copyright. Printed list of Stock Exchange prices and quotations have been held to be literature and the subject of copyright: *Exchange Telegraph Co. v. Gregory & Co.*<sup>6</sup> So also have lists of registered bills of sale: *Trade Auxiliary Co. v. Middlesborough and District Tradesmen's Protection Association*.<sup>7</sup> Translations into English of books in foreign languages are protected: *Wyatt v. Barnard*;<sup>8</sup> *Scrutton on Copyright*, 3rd ed. p. 116. The work of a reporter is very similar to that of a translator; he has to take down the speech in shorthand, and then transcribe his hieroglyphics into ordinary English characters; but the principle would apply if a fast writer took down in longhand a speech delivered by a slow speaker.

*T. E. Scrutton*, for the defendant. No questions are raised of ownership or registration; but the defendant submits that there is no copyright in verbatim reports of public speeches, and that he is entitled to copy those reports. Copyright can only be acquired by the author or publisher of the original matter. Reporters are not authors: they simply copy from dictation. There is no difference between that and copying a document. It is clear that if Lord Rosebery had written out his speeches the reporter could not by copying the manuscripts, either before or after the speeches were delivered, obtain the copyright. . . .

<sup>1</sup> (1801) 5 Ves. 709.

<sup>2</sup> (1855) 16 C. B. 459.

<sup>3</sup> (1866) L. R. 1 Eq. 697.

<sup>7</sup> (1889) 40 Ch. D. 425, 435.

<sup>3</sup> (1840) 11 Sim. 51.

<sup>4</sup> (1840) 2 Ir. Eq. Rep. 266.

<sup>6</sup> (1896) 1 Q. B. 147, 157.

<sup>8</sup> (1814) 3 V. & B. 77.

Literary merit has nothing to do with copyright, but the form and the words must be original. *Walter v. Steinkopff*.<sup>1</sup> . . .

Aug. 1. NORTH, J., stated the facts, and continued: I see from the evidence, where reports from other persons are referred to, that other reporters were present; and, therefore, I take it that these meetings were held under circumstances in which reporters were invited to attend for the purpose of publishing the speeches that they heard. If that is so, they were intended to be made public, and the case is quite different from those of *Abernethy v. Hutchinson*,<sup>2</sup> *Nicols v. Pitman*,<sup>3</sup> and *Caird v. Sime*,<sup>4</sup> which were cited during the argument. The speaker himself makes no claim at all. No doubt he might possibly have had some property before publication, and it is suggested that he might have had some property after making speeches under 5 & 6 Will. 4, c. 65; but he is not making any claim here, and the question, therefore, is not one between him and the person who makes the report. The speaker, of course, has no copyright in the matter; copyright is the right to multiply copies of some original, and there is no original here in respect of which he could have held any copyright. Then, if he has not, the question is whether the reporter has any. It is admitted before me that if the reporter has any copyright, *The Times* has it in this case. All the necessary evidence on that point was given, and the only question left to me to decide was whether the reporter had a copyright in the public reports in *The Times*.

Now, we must just recollect what the position of matters is. A speech is made — an oral speech — not read from writing, but made off-hand. That speech can only be heard by the persons who are the audience on the particular occasion; and the address will only linger in the minds of those persons for a longer or shorter time, and will reach no one else. It is not heard by anybody outside the room, and the only way in which it can reach anybody outside the room is by a reporter taking a note of it and the report being published. The result is that what the reporter does is to put it into a form in which it can be kept and perpetuated, and also to afford to readers who are not present on the occasion when the speech is given an opportunity of seeing what they could not see in any other way. . . .

It was said that a reporter cannot have any copyright because he is not an author of any original published matter; and it is said that a publisher of a work which had been previously published is not himself the author of that which has been previously published. That seems to me to be rather a confusion of terms. No doubt the reporter is not the author of the speech; but the reporter is the author of the public report of the speech, and of the writing containing the speech, and that is the only thing with respect to which copyright can exist. . . .

<sup>1</sup> (1892) 3 Ch. 489, 495.

<sup>2</sup> 3 L. J. (O. S.) (Ch.) 209; 1 H. & T. 28.

<sup>3</sup> 26 Ch. D. 374.

<sup>4</sup> 12 App. Cas. 326.

Then another case was cited — *Leslie v. Young & Sons*<sup>1</sup> — and it is instructive. There the parties had taken and published certain time-tables and information in connection with Perth. The time-tables and the times for the trains to start were, of course, taken both by the plaintiff and the respondents from the tables issued to the public by the railway companies. As to this, it was held that, as far as the plaintiff had only taken the contents of the time-tables from the public time-tables, he could not by printing them over again have any copyright in them. But he had done more. He had also collected information, and given various excursions which were recommended to travellers, and, in the report of that case in the House of Lords, it is pointed out why the distinction is drawn. Lord Herschell, L. C., says :<sup>2</sup>

“The information in these time-tables was of course derived by the pursuer from sources which were as open to the defenders as to himself, and he does not and cannot claim any right to the information as such; he can only claim copyright in them, if they are the result in some respect or other of independent work on his part, and if advantage has been substantially taken by the defenders of that independent labour.”

Then a little further on he says:

“The real truth is, that although it is not to be disputed that there may be copyright in a compilation or abstract involving independent labour, yet when you come to such a subject-matter as that with which we are dealing, it ought to be clearly established that, looking at these tables as a whole, there has been a substantial appropriation by the one party of the independent labour of the other, before any proceeding on the ground of copyright can be justified.”

Then he went on to deal with the second part of the case, and said:

“It appears to me the only part of the work which can be said to indicate any considerable amount of independent labour, and be entitled to be regarded as an original work.”

Then he referred to certain points contained in the information as to excursions and so on, and then he says:

“It seems to me that this was a compilation containing an abridgment of information of a very useful character, and such as was likely to be taken advantage of by those who were travelling in the neighbourhood of Perth.”

Therefore, that was a case where the common material did not itself give a right of copyright, but when it was made the basis of giving to the public something that was not found in the tables themselves, it was held that it might do so. In the case before me there is, as I say, no copy at all; reporting is the taking down what is spoken, and that seems to me for this purpose to be an original work and not a copy.

Then it is said that there might be a dozen reporters who would all do the same thing, and I was asked whether they could all have a copyright. On this it is rather singular that here it appears incidentally

<sup>1</sup> (1894) A. C. 335.

<sup>2</sup> (1894) A. C. 340-2.



that the reports differ a good deal, and I do not see why each person should not have copyright, not in the speech, but in the version of the speech which he has made. Take the case of a translation. Mr. Terrell suggested that in this case converting the words of the speaker into a shorthand note, and then extending the shorthand into long-hand, was itself a translation. I do not follow that, and I do not use the word "translation" in that sense. You may have several translations of one work; it often happens that you have, and one might ask how many different translations there are of Dante's "Inferno," for instance. In every translation each person uses his own head and brains and time, and he produces a result which may be more or less like the result produced by others. In cases of merely prose translations they often come pretty close to one another. In cases of the turning of a poem in a foreign language into English poetry, of course there is far more room for divergence; but as regards the position of a translation, Story, J., in *Emerson v. Davies*,<sup>1</sup> says this:

"A man has a right to a copyright in a translation, upon which he has bestowed his time and labour. To be sure, another man has an equal right to translate the original work, and to publish his translation; but then it must be his own translation by his own skill and labour; and not the mere use and publication of the translation already made by another."

. . . I do not look upon newspaper reports as translations, but they are in *pari materia* with translations. Different persons may go to the common source and make their own translations or take their own notes, and there is no reason why there should not be a copyright in them when the requirements of law as to obtaining copyright have been duly performed.

Then there was another case which I think is analogous — a case of a directory. There the materials were within a very narrow limit. There was a good deal of trouble in getting them, and a good deal of labour and expense; but what might be got was common to all, and it was so narrow in form that it would be very difficult for one person to get it in a shape different from the shape in which it was got by another. It is quite clear that one man may publish a directory, and another man may publish another, but he must not take it from the first. He must have recourse to the means which the first man adopted, and he may then make a second of his own. The point as to the directory is put very clearly by Lord Hatherley, when Vice-Chancellor, in *Kelly v. Morris*.<sup>2</sup> He says:

"The defendant has been most completely mistaken in what he assumes to be his right to deal with the labour and property of others. In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the

<sup>1</sup> (1845) 3 Story, Circuit Ct. Rep. 768, 780.

<sup>2</sup> L. R. 1 Eq. 697, 701.

first compiler has done. In case of a road-book, he must count the milestones for himself. In the case of a map of a newly discovered island (the illustration put by Mr. Daniel), he must go through the whole process of triangulation just as if he had never seen any former map; and, generally, he is not entitled to take one work of the information previously published without independently working out the matter for himself so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained."

So applying the principle of those cases here, it seems to me that a reporter may make a report of a speech, delivered in public and intended to be reported, and then may have a copyright in his own publication if he procures the material himself, but he must not set to work by taking the report that another man has made and insert it in his own work, simply copying that report. . . . It seems to me, all the legal requirements having been duly satisfied, and The Times having established the right to whatever copyright the reporters have, that the reporters have a copyright, and that it is now vested in The Times. That being so, I think the plaintiffs are entitled to the injunction as asked omitting the words "or extracts therefrom."

The defendant appealed. The appeal came on for hearing on October 30, 1899. . . .

Nov. 9. LINDLEY, M. R., read the judgment of the Court (LINDLEY, M. R., Sir F. H. JEUNE, and ROMER, L. J.), in which (after stating facts) he continued: The case turns on the true construction of the copyright Act of 1842. That Act defines "copyright" and "book" (by s. 2), and confers copyright on every "author" of a book and his assigns by s. 3). Periodical publications are dealt with in s. 18. The Act contains no definition of "author," but it confers copyright on the authors of books first published in this country. There can be no copyright in what is not published in a book; but it does not follow that the first person who publishes a book acquires a copyright in it. The meaning of the word "author" as used in the Act must be gathered from its own language and the decisions upon it. The word occurs constantly throughout the Act, but nowhere is it used in the sense of a mere reporter or publisher of another man's verbal utterances. It is plain that a person who is not the author of a work may nevertheless be the proprietor of the copyright in it; for example, in the ordinary case of an assignment of copyright. The author is one person, the proprietor of the copyright is another. . . . The more closely the Act is studied the more clearly it appears that, in order that the first publisher of any composition may acquire the copyright in it, he must be the "author" of what he publishes, or he must derive his right to publish from the author by being the owner of his manuscript, or in some other way.

It was contended, and NORTH, J., took the view, that, although the reporter had no copyright in the speech, he was entitled to copyright in his report of it. But we cannot follow this. The report and the

speech reported are, no doubt, different things; but the printer or publisher of the report is not the "author" of the speech reported, which is the only thing which gives any value or interest to the report. The printer or reporter of a speech is not the "author" of the reported speech in any intelligible sense of the word "author." To hold that every reporter of a speech has copyright in his own report would be to stretch the Copyright Act to an extent which its language will not bear, and which the Legislature obviously never contemplated. The Act was passed to protect authors, not reporters. Moreover, although it may be that reporters and their employers ought to be protected from the unauthorized appropriation of their labours by others, it by no means follows that Parliament would place reporters and their employers on the same footing as authors. It is only by treating reporters as authors of what they report — which they clearly are not — that they can be brought within the existing Copyright Act. Although we have no sympathy with the defendant, we are quite unable to decide in favour of the plaintiffs. Plausible as are the arguments addressed to the Court on their behalf, those arguments are all based on the untenable doctrine that, for the purposes of copyright, reporters are authors.

The analogy of directories, road-books, maps, &c., is, in our opinion, wholly misleading. There, each man who himself makes a directory, &c., and publishes it, is the author of what he publishes. The reporter of a speech is not. The distinction is all-important, but it is only by wholly ignoring it that the decisions on directories, &c., can be invoked by the plaintiffs. If the reporter of a speech gives the substance of it in his own language; if, although the ideas are not his, his expression of them is his own and not the speaker's, with immaterial differences, the reported speech would be an original composition, of which the reporter would be the author, and he would be entitled to copyright in his own production. This is the ground on which copyright in law reports is based. They are by no means mere transcripts of judgments delivered in court. But we have not to deal with speeches recast by the reporter. He has reproduced to the best of his ability not only the ideas expressed by the speaker, but the language in which the speaker expressed those ideas. In other words, we are dealing with the most accurate report of the speaker's words which the reporter could make. No doubt it requires considerable education and ability to make a good report of any speech. But an accurate report is not an original composition, nor is the reporter of a speech the author of what he reports.

The appeal must be allowed, and the action dismissed with costs here and below.<sup>1</sup>

<sup>1</sup> [NOTES :

"Copyright without ownership of original." (C. L. R., VI, 204.)

"Photograph: As subject of copyright." (C. L. R., IX, 549.)

"Shorthand newspaper reports of public speeches." (H. L. R., XIII, 517.)

"Encyclopedia articles: Who entitled to copyright." (H. L. R., XV, 747.)]

(2) *Infringement*203. STORY *v.* HOLCOMBE

UNITED STATES CIRCUIT COURT, DISTRICT OF OHIO. 1847

5 *West. L. J.* 145, 4 *McLean*, 306, *Fed. Cas. No.* 13,497

COMPLAINANTS are executors of Joseph Story, deceased, who was the author and proprietor of the copyright of "Commentaries on Equity Jurisprudence." Defendants are the authors and publishers of "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries." The bill alleges that the latter is an infringement upon the former in three respects: (1) That the work is derived from the Commentaries; (2) that its plan, combination, and arrangement of materials are copied therefrom; (3) that the one is pirated from the other. The prayer is for an injunction, account, surrender of copies, and general relief. Defendants answer, admitting title in plaintiffs, but denying the charge of infringement. They allege that their work is a fair and bona fide abridgment of the Commentaries, such as they have a right to make. General replication. At the July term, 1846, after argument, on motion for a preliminary injunction, the case was referred to E. D. Mansfield, a special master commissioner, to report upon the usual matters required in such cases, in order to enable the Court to determine how much, if any, of defendants' work, is a piracy from the plaintiffs' work. The master reported, and the complainants filed exceptions, denying that the facts were correctly found, and alleging that the report was indefinite and argumentative. But these exceptions were waived at the hearing.

The two principal questions presented by the argument were: (1) Whether, in this country, even a fair abridgment of a scientific work is the subject of copyright. (2) If so, whether the work of defendants is a fair abridgment of the work of complainants.

*T. Walker* and *J. C. Wright*, for complainants.

*J. P. Holcombe* and *W. Y. Gholson*, for defendants.

MCLEAN, Circuit Justice. The plaintiffs in this case complain that the defendants, in printing and publishing "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries, etc., by James P. Holcombe," have infringed the copyright in Judge Story's "Commentaries on Equity Jurisprudence," and they pray that the defendants may be enjoined, etc. The defence set up is, that the work complained of is a bona fide abridgment of the Commentaries. The special master, to whom both works were referred, reports, that "the chapters and the subjects are the same in both." He states that the "Equity Jurisprudence" of Judge Story contains one thousand eight hundred and fifty-six octavo pages, including notes; and that the "Introduction to Equity,"

by Mr. Holcombe, contains three hundred and forty-eight octave pages, including notes. That

“a page in Holcombe contains a little more than one of Story; that, reduced to the same sized page, the ratio in the amount of matter in Holcombe’s book to that of Story, is about in the relation of two to nine; that, in the entire work of Story, there are two hundred and twenty-six pages, constituting nearly an eighth part, on which there is some matter which has been extracted in the same language, or very nearly so, into the book of Mr. Holcombe. This matter comprises eight hundred and seventy-nine lines of Mr. Holcombe’s book, which is about equivalent to twenty-four pages of Holcombe and thirty of Story, which makes one-fifteenth part of Holcombe and one-sixtieth of Story. This matter is found in scattered paragraphs in the first third of Holcombe’s book.”

And the master states, that “all the other portions of the ‘Equity Jurisprudence’ of Judge Story have been abridged by Mr. Holcombe without any transcription of the common language or words of Story. The part so abridged by Holcombe comprehends two-thirds of his book.” The first hundred pages of Mr. Holcombe’s book, which comprises ten chapters, contain about two thousand lines, exclusive of notes, about nine hundred of which are copied from Judge Story’s Commentaries. From the succeeding chapters of Story, Mr. Holcombe has copied certain passages; but generally he has abridged the matter so as to reduce it, in his own language, to a small space. Very few, if any of the notes are taken from Story. After a very able and laborious examination of the two works, the special master comes to the conclusion that there is no infringement; but that the work of Holcombe is a fair abridgment of the Commentaries of Judge Story. It was agreed that the cause should be argued and decided on its merits, and not on exceptions to the report of the master.

This controversy has caused me great anxiety and embarrassment. On the subject of copyright, there is a painful uncertainty in the authorities; and indeed there is an inconsistency in some of them. That the complainants are entitled to the copyright which they assert in their bill, is not controverted by the defendants. The decision must turn on the question of abridgment.

If this were an open question, I should feel little difficulty in determining it. An abridgment should contain an epitome of the work abridged — the principles, in a condensed form of the original book. Now it would be difficult to maintain that such a work did not affect the sale of the book abridged. The argument that the abridgment is suited to a different class of readers, by its cheapness, and will be purchased on that account by persons unable and unwilling to purchase the work at large, is not satisfactory. This to some extent may be true; but are there not many who are able to buy the original work, that will be satisfied with the abridgment? What law library does not contain abridgments and digests, from Viner’s and Comyns’ down to the latest

publications? The multiplication of law reports and elementary treatises creates a demand for abridgments and digests; and these being obtained, if they do not generally, they do frequently prevent the purchase of the works at large. The reasoning on which the right to abridge is founded, therefore, seems to me to be false in fact. It does, to some extent in all cases, and not unfrequently to a great extent, impair the rights of the author — a right secured by law.

The same rule of decision should be applied to a copyright as to a patent for a machine. The construction of any other machine which acts upon the same principle, however its structure may be varied, is an infringement on the patent. The second machine may be recommended by its simplicity and cheapness; still, if it act upon the same principle of the one first patented, the patent is violated. Now an abridgment, if fairly made, contains the principle of the original work, and this constitutes its value. Why, then, in reason and justice, should not the same principle be applied in a case of copyright as in that of a patented machine? With the assent of the patentee, a machine acting upon the same principle, but of less expensive structure than the one patented, may be built: and so a book may be abridged by the author, or with his consent, should a cheaper work be wanted by the public. This, in my judgment, is the ground on which the rights of the author should be considered.

But a contrary doctrine has been long established in England, under the statute of Anne, which, in this respect, is similar to our own statute; and in this country the same doctrine has prevailed. I am, therefore, bound by precedent; and I yield to it in this instance, more as a principle of law, than a rule of reason or justice.

The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that in which its chief value consists. This may be done to a reasonable extent by a reviewer, whose object is to show the merit or demerit of the work. But this privilege cannot be so exercised as to supersede the original book. *Bramwell v. Halcomb*, 3 Mylne & C. 737; *Folsom v. Marsh* [Fed. Cas. No. 4901]. In the language of Godson (page 352), the extracts must not be made too freely. Sufficient may be taken to form a correct idea of the whole; but no one is allowed, under the pretence of quoting, to publish either the whole or the principal part of another man's composition; and therefore a review must not serve as a substitute for the book reviewed. If so much be extracted, that the article communicates the same knowledge as the original work, it is an actionable violation of literary property. *Wilkins v. Aikin*, 17 Ves. 422; *Roworth v. Wilkes*, 1 Camp. 97. In *Folsom v. Marsh* [supra] it is said:

“No one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passage for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites



the most important parts of the work, with a view not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy."

This doctrine seems to consider the intention with which the citations are made as necessary to an infringement. In *Cary v. Kearsley*, 4 Esp. 170, Lord Ellenborough takes the same view. But I cannot perceive how the intention with which extracts are made can bear upon the question. The inquiry is, what effect must the extracts have upon the original work. If they render it less valuable by superseding its use, in any degree, the right of the author is infringed: and it can be of no importance to know with what intent this was done. Extracts, made for the purpose of a review, or a compilation, are governed by the same rule. In neither case can they be extended so as to convey the same knowledge as the original work.

But the great question in the case is, whether the book of Mr. Holcombe is a fair abridgment of that of Judge Story. The word "abridged" means "to epitomize," "to reduce," "to contract." In *Strahan v. Newberry* [In re Newbery], Lofft, 775, Chancellor Apsley said:

"to constitute a true and proper abridgment of a work, the whole amount must be preserved in its sense, and then the act of abridgment is an act of the understanding, employed in carrying a larger work into a smaller compass."

In this view Mr. Justice Blackstone concurred, who seems to have been consulted by the chancellor. Mr. Justice Story says, in *Folsom v. Marsh*:

"So it has been decided, that a fair and bona fide abridgment of an original work, is not a piracy of the copyright of the author; but then, what constitutes a fair and bona fide abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can arise for judicial discussion. It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts, constituting the chief value of the original work."

In *Gyles v. Wilcox*, 2 Atk. 143, Lord Hardwicke said:

"Where books are colorably shortened only, they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment."

A fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment. It is only new in the sense that the view of the author is given in a condensed form. Such a work must not only contain the arrangement of the book abridged, but the ideas must be taken from its pages. It must be in good faith an abridgment, and not a treatise, interlarded with citations. To copy certain passages from a book, omitting others, is in no just sense an abridgment

of it. It makes the work shorter, but it does not abridge it. The judgment is not exercised in condensing the views of the author. His language is copied, not condensed; and the views of the writer, in this mode, can be but partially given. To abridge is to preserve the substance, the essence of the work, in language suited to such a purpose. Gould's Abridgment of Allison's History of Europe gives all the material facts of the original work, covering the whole line of the narrative: and this, in a legal sense, may be called an abridgment.

In the argument it was insisted, that an elementary work is not a proper subject for abridgment. There may be works which are not susceptible of this process. Treatises on the exact sciences may constitute an exception; but works on law, elementary or otherwise, are not within the exception. Hale's Pleas of the Crown, Blackstone's Commentaries, and Kent's, have been abridged, and other works of a similar character. What is the character of the work complained of? Upon its title-page it does not purport to be an abridgment, but "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries"; and in the preface the author says:

"It is not intended to supply the place of the Commentaries, with any class of readers, but to serve simply as an introduction, a companion and a supplement to their study. The text is substantially an abridgment of that work. The same general plan and arrangement has been pursued, and the elementary principles which are supposed to possess most practical value, selected and presented, with appropriate illustrations, in a greatly condensed form. The author has felt at liberty to make very considerable alterations and additions (entirely, however, of an elementary character), believing that this course would not diminish, but increase the adaptation of his own work, to be a companion to the study of the Commentaries."

If this book were intended to be a mere abridgment of the Commentaries, the fact is not indicated in the title. Within my knowledge no abridgment has been made of any book which has not been so entitled. An introduction may be an exordium, a preface, or the preliminary part of a book; but it is not an abridgment. The author says "the text is substantially an abridgment of the Commentaries." But he also says, that "he has felt at liberty to make very considerable alterations and additions." Alterations of the original work, and additions to the text, are not appropriate to an abridgment. In saying, therefore, that "the text is substantially an abridgment," Mr. Holcombe could have meant nothing more than that, in writing his book, he followed the arrangement of the Commentaries, extracting certain parts, condensing others, with "very considerable alterations and additions" of his own. . .

To compile is to copy from various authors into one work. In this the judgment may be said to be exercised to some extent in selecting and combining the extracts. Such a work entitles the compiler, under the statute, to a right of property. This right may be compared to that of a patentee, who, by a combination of known mechanical struc-

tures, has produced a new result. Between a compilation and an abridgment there is a clear distinction; and yet it does not seem to have been drawn in any opinion cited. A compilation consists of selected extracts from different authors: an abridgment is a condensation of the views of the author. The former cannot be extended so as to convey the same knowledge as the original work: the latter contains an epitome of the work abridged and consequently conveys substantially the same knowledge. The former cannot adopt the arrangement of the works cited; the latter must adopt the arrangement of the work abridged. The former infringes the copyright, if matter transcribed, when published, shall impair the value of the original book; a fair abridgment, though it may injure the original, is lawful. 1 Brown, Ch. 451; *Gyles v. Wilcox*, 2 Atk. 141. There is, then, a right which the abridger may exercise, far beyond that of a mere compiler. His labor is of a different kind, and of a higher order. . . . It is said that in many parts of the Commentaries there are citations from other works. This is true. And who could write a book entirely new upon jurisprudence? Principles, not familiar to the profession, could be of little value and of no authority. No author, by copying from others, can withdraw from general use, that which has been given to the public. Judge Story did not intend his book to be an abridgment, but a treatise on jurisprudence; and the approbation of this work by the profession, in this country and in England, is high evidence of its merit, and of the great learning and ability of the author.

Whatever doubts may have been formerly entertained, it is now clear, that a book may, in one part of it, infringe the copyright of another book, and in other parts be no infringement; and in such a case, the remedy will not be extended beyond the injury. Lord Hardwicke once laid down a doctrine contrary to this; but that opinion has been overruled by subsequent decisions. Nearly one-half of the text, in the first hundred pages of Mr. Holcombe's book, appears to have been extracted from Story. That this was done by him under a conviction that he was exercising a common right, no one acquainted with his legal talent and honorable bearing, can doubt. But these constitute no criterion for the division of the case. That the view of Mr. Holcombe, in this respect, is not without a seeming sanction, in the opinion of some judges, is admitted. To class these extracts under the head of "Abridgment," would seem to be a perversion of terms. Whatever else this part of Mr. Holcombe's book may be called, it is not an abridgment. With greater propriety it may be called a compilation, as the extracts contained in it are taken from various authors. As a compilation, this part of the book must be considered an infringement of the right of the plaintiffs, by the copious extracts made from the Commentaries, and the classification of the subjects copied from them. So far as citations are made in the Commentaries, Mr. Holcombe had a right to go to the original works, and copy from them; but he could not avail

himself of the labor of Judge Story, by copying the extracts as compiled by him. This is a well-established principle. Nor could he copy the plan or arrangement of the subjects in the Commentaries. It is said there can be no copyright in a plan, distinct from the work itself, any more than there can be a copyright in an idea. This is admitted: but the words in which an idea is expressed, is a subject of property; and so is the classification of the subject discussed. . . .

It would seem from the considerations stated, that the first third part of Mr. Holcombe's book, including one hundred pages, cannot be justly and legally called an abridgement, as it does not possess the essential ingredients of such a work; and that, viewing it as a compilation, it is an infringement of the plaintiffs' right, on the ground that the plan of the Commentaries is copied; and also for the reason that the extracts extend beyond the proper limit for such a work. The remaining two-thirds of the book may be comprehended under a liberal construction of an abridgment. The matter is greatly condensed by Mr. Holcombe in his own language, and in a manner highly creditable to him.

The prayer of the bill as to the first hundred pages is granted. I have been brought to this result reluctantly, being sensible that the motives of Mr. Holcombe were honorable, and that there was no intention on his part, unjustifiably, to appropriate the labors of Judge Story to his own advantage. In this view, I cannot refrain from saying, that an adjustment of the controversy by the parties themselves would be extremely gratifying to me; and, from my intimate knowledge of the eminent qualities of my lamented brother, and I will add, of his unbounded respect for talent and high character, that I cannot be mistaken in saying, if he were living, an amicable adjustment would be most gratifying to him.

204. EATON S. DRONE. *Treatise on the Law of Property in Intellectual Productions*. (1879. p. 440.) The only American case, then, which directly supports the doctrine that a bona fide abridgment of a copyright book is not piratical is Story's *Executors v. Holcombe*. The authority of this will readily be set aside, when it is remembered that the decision was rendered under protest, so to speak, was contrary to the opinion of the judge who pronounced it, and was based on no other ground than that of supposed precedents, which have been shown to have had no force.

## 205. CALLAGHAN *v.* MYERS

SUPREME COURT OF THE UNITED STATES. 1888

128 U. S. 617, 9 Sup. 177

[*The facts are stated ante in No. 200*]

BLODGETT, J. . . . It is also contended by the defendants that each of the volumes as published by them was a new and independent work,

not copied from that of the plaintiff, but prepared by the original labor of the editors employed by the defendants. While it is admitted that volumes 32 to 38, as published by the defendants, were, with the exception of the foot-notes, prepared entirely from the plaintiff's volumes, it is contended that volumes 39 and 41 to 46 were, with the exception of the opinions of the judges, prepared from the records and files of the Supreme Court of Illinois.

The evidence on the subject of infringement is very full and minute. It is impossible for us to discuss it at length, and we must content ourselves with stating, as a general result, that we concur in the views stated by Judge *Drummond*, in his decision in the Circuit Court, in regard to volumes 32 to 38. He says (10 Biss. 139, 147, 5 Fed. Rep. 726):

"In considering the question of infringement of the copyright by the defendants, it must be borne in mind what is the character of the work. They are reports of the decisions of the Supreme Court of this State, to which no one can have a copyright; but he may have to the head-notes and statements of each case, and of the arguments of counsel. These head-notes and statements which have been made are in themselves an abridgment; the one of the opinions of the Court, consisting of the principles of law decided, and the other an abstract of the facts and of the arguments. It should also be stated that the volumes of the defendants, as edited by those employed by them, are very much condensed, as compared with Mr. Freeman's reports, and yet the paging of the volumes is substantially the same throughout, so that the cases in the corresponding volumes appear on the same page. The list of cases which precedes each report is the same.

"The defendants Ewell and Denslow, who were employed by the other defendants to annotate these decisions or reports, both state, upon examination, that their work was independent of that of Mr. Freeman; but it appears from the evidence that all the volumes of Mr. Freeman were used in thus editing or annotating; and although it may have been their intention to make an independent work, it is apparent, from a comparison of the Freeman volumes and those of the defendants, that the former were used throughout by the editors employed by the defendants. It is true that in each volume, perhaps in the majority of cases, there is the appearance of independent labor performed by them, without regard to the volumes of Mr. Freeman; but yet, in every volume, it is also apparent that Mr. Freeman's volumes were used, — in some instances words and sentences copied without change, in others, changed only in form, — and the conclusion is irresistible that for a large portion of the work performed in behalf of the defendants the editors did not resort to original sources of information, but obtained that information from the volumes of Mr. Freeman. Undoubtedly it was competent for an editor to take the opinions of the Supreme Court, and, possibly, from the volumes of Mr. Freeman, and make an independent work; but it is always attended with great risk for a person to

sit down, and, with the copyrighted volume of law reports before him, undertake to make an independent report of a case. It is not difficult to do this, going to the original sources of information, to the decisions of the Court, the briefs of counsel, the records on file in the clerk's office, without regard to the regular volumes of reports. Any one who has tried it can easily understand the difference between the head-notes of two persons, equally good lawyers, and equally critical in the examination of an opinion where they are made up independent of each other, and, bearing in mind this fact, it seems to be beyond controversy that, although in many, and perhaps most, instances there is a very considerable difference between the headnotes of the defendants' volumes and those of the plaintiff, the latter have been freely used in the preparation of the former. I conclude, therefore, that the defendants have, in the preparation of those volumes, from 32 to 38 inclusive, of the Illinois Reports, used the volumes of the plaintiff so as to interfere with his copyright."

So, also, we concur with the conclusions of Judge *Drummond* in regard to volumes 39 to 46. He says (20 Fed. Rep. 441): "The present inquiry is limited to what is alleged to be an infringement by the defendants of volumes 39 to 46, inclusive, of Mr. Freeman's Illinois Reports. Volume 40 seems never to have been regularly published like the other volumes, although the evidence of the infringement of the plaintiff's copyright in that volume is perhaps stronger than that applicable to any of the other volumes named. Upon comparing parts of each of the volumes, those of the complainant and of the defendants, one with the other, I think there can be no doubt that in some respects, in each case, the Freeman volume has been used by the defendants in the headnotes, the statements of facts, and the arguments of counsel; that is, there are certain unmistakable indicia that in every volume prepared by the defendants they have not confined themselves solely to the original sources of information, namely, the opinions of the judges, the records, and the arguments of counsel." He also says (page 442): "The fact appears to be, and, indeed, it is not a subject of controversy, that in arranging the order of cases, and in the paging of the different volumes, the Freeman edition has been followed by the defendants; but, while this is so, I should not feel inclined, merely on that account, and independent of other matters, to give a decree to the plaintiff, although it is claimed that the arrangement of the cases and the paging of the volumes are protected by a copyright. Undoubtedly, in some cases, where are involved labor, talent, judgment, the classification and disposition of subjects in a book entitle it to a copyright. But the arrangement of law cases and the paging of the book may depend simply on the will of the printer, of the reporter, or publisher, or the order in which the cases have been decided, or upon other accidental circumstances. Here the object on the part of the defendants seems to have been that there should not be confusion in the references and examina-



tion of cases; but the arrangement of cases and the paging of the volumes is a labor inconsiderable in itself, and I regard it, not as an independent matter, but in connection with other similarities existing between the two editions, when I say, taking the whole together, the Freeman volumes have been used in editing and publishing the defendant's volumes." It may be added that one of the most significant evidences of infringement exists frequently in the defendants' volumes, namely, the copying of errors made by Mr. Freeman.<sup>1</sup> . . .

(3) *Relation of Statutory Copyright to Common-Law Copyright*

206. JEWELERS' MERCANTILE AGENCY, LIMITED, *v.*  
JEWELERS' WEEKLY PUBLISHING COMPANY

COURT OF APPEALS OF NEW YORK. 1898

155 N. Y. 241, 49 N. E. 872

APPEAL from Supreme Court, general term, First department.

Action by the Jewelers' Mercantile Agency, Limited, against the Jewelers' Weekly Publishing Company, now the Trades' Weekly Company, and others. From a judgment of the general term (32 N. Y. Supp. 41) affirming a judgment of the special term, defendants appeal. Reversed.

The judgment appealed from enjoined the defendant from making any use of the plaintiff's reference books or confidential sheets, and from copying, appropriating, printing, publishing, or using, in any way, information taken therefrom, or furnishing such information to others. The plaintiff, a domestic corporation, has, ever since its incorporation, in 1883, been engaged in the business of a mercantile agency, which consisted in obtaining information regarding the business, street addresses, kinds and extent of business, commercial standing and mercantile credit of individuals, firms, and corporations engaged in the jewelry

<sup>1</sup> [NOTES:

"Reasonable use, not an infringement." (C. L. R., VIII, 54.)

"Use of plaintiff's book as basis of new work as infringement." (H. L. R., XVII, 133.)

The following are some of the more notable copyright cases concerning law books: *Wheaton v. Peters*, 1834, 8 Pet. 591 (reports of the Federal Supreme Court's opinions); *Lawrence v. Dana*, 1869, 4 Cliff. 1 (Lawrence's notes to *Wheaton's International Law*); *Banks v. McDivitt*, 1875, 13 Blatchf. 163 (annotations to statutes); *Little v. Gould*, 1851, 2 Blatchf. 165 (reports of decisions); *Little v. Hall*, 1855, 18 How. 165 (reports of decisions); *Saunders v. Smith*, 1838, 3 My. & Cr. 711 (Smith's *Leading Cases*); *West Publishing Co. v. Lawyers' Coöpn. Pub. Co.*, 1897, 64 Fed. 360, 79 Fed. 756 (digests); *Edward Thompson Co. v. American Law Book Co.*, C. C. A., 121 Fed. 907, 122 Fed. 922 (legal cyclopedia); *Banks Law Pub. Co. v. Lawyers' Coöpn. Pub. Co.*, 1909, C. C. A., 169 Fed. 386 (report of cases); *West Publishing Co. v. Edward Thompson Co.*, 1909, C. C. A., 169 Fed. 833 (legal cyclopedia).]

trade in the United States and Canada. This information is printed twice a year in the form of a reference book. A duplicate of smaller form is also printed. The plaintiff also issues weekly a confidential sheet of changes and corrections. These books and confidential sheets are furnished and lent to subscribers subscribing therefor, upon a contract which reads as follows:

"The undersigned employs the Jewelers' Mercantile Agency, Limited, from —, 189—, to —, 189—, to aid in answering inquiries by verbal or written reports, reference books, and correction sheets, as to the responsibility, character, and standing of persons and firms in the jewelry and kindred trades, within the United States and Canada; said inquiries not to exceed one hundred and to be made within the period of this contract. For such aid and service, including the loan of —, 189—, and —, 189—, volumes of reference book, the undersigned will pay to said company seventy-five dollars at the commencement of this subscription, and for each inquiry exceeding the one hundred, thirty cents on demand. All information which may have been or may be obtained by agents of said company, who are appointed our sub-agents, and communicated to us, shall be strictly confidential between the parties hereto, and the sub-agent's name or names are not to be disclosed by said company to the subscriber or other person, and the communicated information is not to be disclosed to the person or persons reported on. No information is guaranteed as to correctness, and the said company is not responsible for act or negligence of the sub-agent or agents. Title to the reference books to remain in said company, and books are to be returned upon expiration of subscription. On return of amount of unexpired term of subscription, said company reserves the right to terminate this contract, and the reference books are then to be returned to it. Dated —, 189—. Signature: —." "(The conditions of this subscription are absolute, and no verbal or other understanding will be considered or allowed by the company.)"

The plaintiff's reference book in the larger form bears upon the cover thereof, distinctly printed, the statement: "This is the property of the Jewelers' Mercantile Agency, Limited. Confidential Reference Book." And within, conspicuously printed, appears the following: "This book is the property of the Jewelers' Mercantile Agency, Limited, and is held by —, under agreement of —, eighteen —, with them." It does not appear that the reference book was confined exclusively to the jewelry trade, nor does it appear but that any one could obtain a copy of the same by subscribing for it according to the terms of such contract. The defendant is also a domestic corporation, organized in January, 1891. It took the business which had before been carried on by the defendant Rothschild, and earlier by both Rothschild and Ulmann. The defendant took and appropriated from the plaintiff's reference book certain material information therein contained, and made use of it in a publication of its own, which came into competition with the plaintiff's publication. It also appeared that on the 28th day of June, 1890, the plaintiff, in pursuance of the copyright laws of the United States, deposited in the copyright office, with the librarian of Congress, the title of the plaintiff's book of July, 1890.

And on the 28th day of June, 1890, the plaintiff, in further pursuance of said copyright law, deposited in the office of the librarian of Congress two copies of said reference book. And the said plaintiff printed on the page following the title-page in the said book of July, 1890, the following notice: "Entered according to Act of Congress, in the year 1890, by the Jewelers' Mercantile Agency, Limited, in the office of the librarian of Congress at Washington." The plaintiff, however, insists the copyright failed because of its omission to make publication of the reference book, and stands upon its common-law right that there has never been such a publication as to entitle the general public to the use of the book. The acts which defendant urges amounted to a publication where the delivery of the book to such subscribers as cared for it, and were willing to become parties to the contract, *supra*, and the deposit of two of the books in the library of Congress.

*Wheeler H. Peckham*, for appellants. *Howard Mansfield*, for respondents.

PARKER, C. J. (after stating the facts). Thus far in the progress of this suit the plaintiff has succeeded in its attempt to convince the Court that the original common-law right in the "reference books," so called, has not been divested, and, therefore, it is entitled to invoke the restraining power of the Court to prevent the defendant from using in any way any information obtained therefrom. To the claim of the defendant that the plaintiff divested itself of its common-law right by copyrighting the reference books pursuant to the provisions of the Revised Statutes of the United States, the plaintiff makes answer that it had not, in fact, perfected a copyright of the book, and, therefore, its common-law right remains. It is true that plaintiff recorded the title of the book before publication; caused a copyright notice to be printed on the title-page, and then delivered to the librarian of Congress two printed copies of the book, with the notice of copyright printed on the title-page, in pursuance of the statute which requires that such a number of copies shall be delivered to the librarian within ten days after publication. So far as the record discloses, therefore, it would necessarily appear to any one making an examination of it for the purpose of ascertaining whether the plaintiff had secured to itself the benefit of copyright as to the reference book, that it had succeeded. But the plaintiff insists that its attempt, or pretended attempt, to secure a copyright was ineffectual, because of the omission on its part to publish the reference book.

We are not concerned in inquiring whether the plaintiff's steps, apparently looking to a copyright of the book, were taken for the purpose of procuring a copyright in good faith, or merely for the purpose of securing such advantage as might accrue from the appearance of copyright. It, of course, cannot have at the same time the benefit of the copyright statute and also retain its common-law right. No proposition is better settled than that a statutory copyright operates to divest a

party of the common-law right. If, then, what the plaintiff did amounted to such a publication of the reference book as was requisite in connection with the other steps taken to perfect a copyright, its common-law rights were divested, and its remedy against violators of the rights thus secured would have been by suit in the United States courts.

But publication also operates to destroy the common-law rights, whether a copyright be secured or not. An invention, a painting, or a book is the property of its creator. He may keep it for his own exclusive use or enjoyment if he sees fit. The public has no greater right to it, however useful it may be, than it would have to any other part of his personal property. But, if he once publishes it, his property right in it is gone, and every one may make use of it. A person who writes a book may keep the manuscript without printing it, and prevent any one from seeing it. He may take a still further step, and cause the book to be printed, and then determine that it shall not be seen by the public, and store all the printed copies away, and still he has not made a publication of it within the meaning of the law. It continues to be his property, as he has not yet offered it to the public. If, while the books are thus stored away, a copy should be obtained surreptitiously, and printed, or should the author loan one of the books to a friend to read and return, and in that manner a copy of the book should fall into the hands of some one who should attempt to print it, the author would be entitled to restrain publication, for the reason that he had not undertaken to put within the reach of the general public such thoughts or facts as he may have expressed or stated in the book. Cases have arisen in which there was a private circulation for a restricted purpose, and the holding has been that it did not constitute a publication, as in *Prince Albert v. Strange*, 2 De Gex & S. 652. In that case it appeared that her Majesty and the Prince Consort had given to a number of friends copies of prints and etchings made for their own amusement, and this was held a private circulation, and not a publication. Out of a few cases of the same general character seems to have grown the idea that it is possible for a man, by putting restrictions on the use of his books by subscribers, however numerous they may be, to retain in himself forever the common-law right of first publication. If that position be sustained by the judgment of the Courts, then will have been obtained judicial legislation of far broader scope and much greater value to authors and others than that offered by the copyright statute.

Our attention has been called to but one previous case in which the precise question presented here has received consideration. In the case of *Ladd v. Oxnard*, 75 Fed. 705, the plaintiffs published annually a book entitled "The United Mercantile Agency Credit Ratings," and had 179 subscribers. The stipulation between the complainants in that case and the subscribers was "that the book issued to each subscriber was a loan, and not sold; and that, if any copy was found in any

other hands than those entitled to use it by the permission of the complainants, the publishers might take possession of it." In this case the plaintiff distributed its books under like restrictions. The plaintiff in Ladd's case brought his action in the United States Circuit Court, and the defendant sought to prevent a recovery upon the ground that, by reason of the special restriction on the use of the book, the plaintiff had not published it; therefore, his copyright had not been perfected, and the rights of the plaintiff were at common law, and not under the statutes. It will be seen, therefore, that the question was the same as that under consideration. Judge Putnam held that the copyright was complete. From his opinion we quote the following:

"He [the defendant] claims that, by reason of the special restriction on the use of the book to which we have referred, there never has been a publication, and that, therefore, the rights of the complainants are at common law, and not under the statutes, so that this Court has no jurisdiction of this suit, both parties being citizens of Massachusetts. It should be said in this connection that, while the nature of the use of the complainants' book was sought to be limited in the manner which we have explained, there was no limit placed by the complainants on the extent or number of persons to whom the book might be distributed under the conditions which they had provided. Though adapted specially for persons engaged in the trades of which we have spoken, yet even these are indefinite in number, and there is no evidence that the circulation was intended to be limited to them. In any view, it might be difficult to sustain the proposition, because, as the statute now stands, an author is compelled to complete his title to his copyright before publication, so there is at least one point of time, although it may be a very minute one, when the author, who has entitled himself to a copyright, is also entitled to look to the statutes of the United States for protection, notwithstanding he has not published. . . . However, we do not rest the case on this point, because we are satisfied there has been a publication. . . . So far as concerns the interests of the public and the general policy of the copyright statutes, this case stands in all respects practically the same as though the complainants' publication had been sold by unrestricted titles; and there is no substantial reason why, if the complainants had not obtained copyrights, they should now be protected against infringers."

We find ourselves in agreement with the learned judge, not only in the conclusion reached, but also in the argument which led to it, and, before referring to authorities upon that subject, it should be observed that it does not appear from this record but that every person in the United States was at liberty to become a subscriber of the plaintiff, and, as such, entitled to a reference book.

Plaintiff's position, therefore, in effect is that a distinction should be drawn between selling or giving a book away and leasing it; that to offer to sell a book to the public or give it to public libraries, where all the public may have access to it, is to publish it; but to lease it to such of the public as care for it is not to publish it. The latter is certainly an effective method of putting the contents of the book in the possession of such portions of the public as desire it. By this method

a party parts with the secret in such a way that the public may know it, provided the individuals composing such public are willing to become subscribers, and lease the book. And, if leasing books to the public generally does not constitute a publication of them, then an author or publisher would have but to extend the period of leasing from 1 year to 99 or 999 years, as is the case in certain leaseings of railroads, in order to secure almost as many lessees as there would be purchasers if the books were offered for sale. The buyer of the average book would be quite content with a restrictive title, which, nevertheless, assures him the possession of a book for either of the periods mentioned. It has not hitherto been understood to be the law that the common-law right could be so utilized as to secure to an author or publisher a continuing revenue from the public for a much longer period of time than Congress has been willing to grant to him the exclusive right to publish.

We shall now briefly refer to what has been said on the subject which seems to have persuaded counsel that the judgment in this case can be supported. In the first place, it must be conceded it has not been said, except in Ladd's case, *supra*, that leasing a book under an agreement not to show it to any one constitutes a publication of it; and this is so, probably, because it was not until a comparatively recent period that an attempt seems to have been made to obtain for a book subscribers who should agree that they would neither show nor loan it to others. So, when Coppinger, Scrutton, Drone, and Shortts, in their works on the subject of Copyright, assert that, "to constitute a publication it is necessary that the work should be exposed for sale or offered gratuitously to the general public, so that any person may have an opportunity of enjoying that for which copyright is intended to be secured," they did not intend to imply that the leasing of a book for a year or a term of years to any and all persons who would accept it on such terms would not constitute a publication. They did not have such a situation in mind. The consideration and discussion of the principles established by such cases as they succeeded in finding in England and this country, bearing upon the question of publication, did not suggest to them the possibility of such a claim being made.

It will be observed that the general rule which we have quoted from Coppinger asserts, first, that to expose for sale is to constitute publication. It is not necessary that the book be actually sold; it is sufficient if it be offered to the public. The act of publication is the act of the author, and cannot be dependent upon the act of the purchaser. The actual sale of a copy is evidence that it has been offered to the public, but that fact may also be shown by other evidence. It then asserts that, if a book be offered gratuitously to the general public, it will constitute publication. This may be done by presenting it to public libraries, and this is so because the author or publisher, by that act, puts it in such a place that all the public may see it if they choose. The reason why exposing for sale or offering gratuitously to the general public



constitutes publication is stated in the last part of the rule as follows: "So that any person may have an opportunity of enjoying that for which copyright is intended to be secured." And this reason, which lies at the foundation of all decisions upon this subject, is applicable to this situation. All persons were given the opportunity of enjoying this book upon the plaintiff's terms. Several cases have arisen where the Courts have held that the private circulation of pictures, manuscripts, or printed books did not constitute a publication, such as *Prince Albert v. Strange*, supra; also *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1082, where the plaintiff, a teacher of bookkeeping, for the convenience of his pupils, wrote his system or instructions on separate cards, which they were permitted to keep for their convenience. So a gratuitous circulation of copies of a work among friends and acquaintances has been held not to amount to a publication. *Dr. Paley's Case*, cited in 2 Ves. & B. 23, was one where a bookseller was restrained from publishing manuscripts left by Dr. Paley for the use of his own parishioners only. Coppinger, in his work on Copyright, at page 117, after considering the last case cited and others, reached the following conclusion:

"The distinction is in the limit of the circulation. If limited to friends and acquaintances, it would not be a publication; but, if general, and not so limited, it would be."

In this case the circulation was not limited to friends and acquaintances, or even to a class. The limitation was upon the character of the use which a subscriber could make of it. It was the privilege of any and all persons who desired to become subscribers to obtain possession and use of the reference books. The fact that the publisher of the book undertook to place restrictions on the use which individual purchasers could make of it, the effect of which might be to increase, rather than diminish, the public demand for the book, does not constitute such a limitation as takes away from the act of the plaintiff its real character, which is that of publication.

In *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, Myers was a reporter of the Supreme Court of the State of Illinois, and, desiring to secure a copyright for such portions of the reports as he was entitled to have copyrighted, undertook to provide the three conditions prescribed by the copyright statute, namely, a deposit, before publication, of a printed copy of the title of the book, the giving of information of the copyright by the insertion of a notice thereof on the title-page or the next page, and by depositing a copy of the book within three months after the publication. It was insisted, as to one of the volumes, that Myers had not deposited a copy of the book within three months after the publication as the statute then required. It was shown that under the statutes of the State of Illinois a reporter of decisions was required to supply to the secretary of state a certain number of copies of the

reports for the purposes expressly provided by law. This statute Myers complied with more than three months before he deposited in the clerk's office a volume of the reports containing the insertion of the notice giving the information of a copyright. It did not appear that these books were ever distributed from the secretary of state's office, but the Court held that the delivery of the copies for the use of the State was a publication of the volumes and therefore his copyright should fail. Myers did not expose the books for sale in the usual way. He was required by the statute to make delivery of them at the time he did, but that fact was held not to prevent publication, and the reason for it may be found scattered through the cases bearing upon that subject in the fact that by the delivery, whatever the occasion for it, the public, or an indefinite portion of it, were assured of access to the book without further action on the part of the author. . . .

The learned counsel for the respondent, apparently not unmindful that to sustain his contention requires the Court to take a very long step in advance of any hitherto taken upon this question, urges the very large pecuniary interest involved for the plaintiff, and insists that Courts of Equity should find a way to protect property rights such as plaintiff claims, even if there are no precedents for doing so; and refers to the remarks of the Court in *Piper v. Hoard*, 107 N. Y. 73, 13 N. E. 626, in which the Court said: "If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment." If the plaintiff's interests are of so important a character, and the public interest would be best subserved were the law such as plaintiff insists it to be, then is presented a proper subject for legislative action. But our examination leads us to the conclusion that the present state of the law is that, if a book be put within reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common-law copyright, or right of first publication, is gone. So far as is disclosed by this record, the plaintiff was in that situation at the time of the commencement of this action. The judgment should be reversed, and a new trial granted, with costs to abide the event.

GRAY, O'BRIEN, and HAIGHT, JJ., concur; and BARTLETT, MARTIN, and VANN, JJ., concur for reversal upon special ground as follows: We concur in the result upon the ground that the plaintiff, by depositing two copies of its reference book in the office of the librarian of Congress, published the same, even if it obtained no copyright; that, if it did obtain a copyright, it thereby waived its common-law right of literary property in said book, and its statutory rights under Federal legislation can be protected only in the Federal courts.

*Judgment reversed.*

207. HOLMES *v.* HURST

SUPREME COURT OF THE UNITED STATES. 1899

174 *U. S.* 82, 19 *Sup.* 606

APPEAL from the United States Circuit Court of Appeals for the Second Circuit.

This was a bill in equity by the executor of the will of the late Dr. Oliver Wendell Holmes, praying for an injunction against the infringement of the copyright of a book originally published by plaintiff's testator under the title of "The Autocrat of the Breakfast Table."

The case was tried upon an agreed statement of facts, the material portions of which are as follows:

Dr. Holmes, the testator, was the author of "The Autocrat of the Breakfast Table," which, during the years 1857 and 1858, was published by Phillips, Sampson & Co., of Boston, in 12 successive numbers of the *Atlantic Monthly*, a periodical magazine published by them, and having a large circulation. Each of these 12 numbers was a bound volume of 128 pages, consisting of a part of "The Autocrat of the Breakfast Table," and of other literary compositions. These 12 parts were published under an agreement between Dr. Holmes and the firm of Phillips, Sampson & Co., whereby the author granted them the privilege of publishing the same, the firm stipulating that they should have no other right in or to said book. No copyright was secured, either by the author or by the firm or by any other person, in any of the 12 numbers so published in the *Atlantic Monthly*; but on November 2, 1858, after the publication of the last of the 12 numbers, Dr. Holmes deposited a printed copy of the title of the book in the clerk's office of the District Court of the district of Massachusetts, wherein the author resided, which copy the clerk recorded. The book was published by Phillips, Sampson & Co. in a separate volume on November 22, 1858, and upon the same day a copy of the same was delivered to the clerk of the District Court. The usual notice, namely, "Entered according to Act of Congress, 1858, by Oliver Wendell Holmes, in the clerk's office of the District Court of the district of Massachusetts," was printed in every copy of every edition of the work subsequently published, with a slight variation in the edition published in June, 1874.

On July 12, 1886, Dr. Holmes recorded the title a second time, sent a printed copy of the title to the librarian of Congress, who recorded the same in a book kept for that purpose, and also caused a copy of this record to be published in the *Boston Weekly Advertiser*; and in the several copies of every edition subsequently published was the following notice: "Copyright, 1886, by Oliver Wendell Holmes."

Since November 1, 1894, defendant has sold and disposed of a limited number of copies of the book entitled "The Autocrat of the Breakfast Table," all of which were copied by the defendant from the 12 numbers

of the Atlantic Monthly exactly as they were originally published, and upon each copy so sold or disposed of a notice appeared that the same was taken from the said 12 numbers of the Atlantic Monthly.

The case was heard upon the pleadings and this agreed statement of facts by the Circuit Court for the Eastern District of New York, and the bill dismissed. 76 Fed. 757. From this decree an appeal was taken to the Circuit Court of Appeals for the Second Circuit, by which the decree of the Circuit Court was affirmed. 51 U. S. App. 271, 25 C. C. A. 610, and 80 Fed. 514. Whereupon plaintiffs took an appeal to this Court.

*Rowland Cox*, for appellant. *Andrew Gilhooly*, for appellee.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the Court.

This case raises the question whether the serial publication of a book in a monthly magazine, prior to any steps taken towards securing a copyright, is such a publication of the same, within the meaning of the Act of February 3, 1831, as to vitiate a copyright of the whole book, obtained subsequently, but prior to the publication of the book as an entirety.

The right of an author, irrespective of statute, to his own productions, and to a control of their publication, seems to have been recognized by the common law, but to have been so ill defined that from an early period legislation was adopted to regulate and limit such right. The earliest recognition of this common-law right is to be found in the charter of the Stationers' Company, and certain decrees of the Star Chamber promulgated in 1556, 1585, 1623, and 1637, providing for licensing and regulating the manner of printing and the number of presses throughout the kingdom, and prohibiting the publication of unlicensed books. Indeed, the Star Chamber seems to have exercised the power of search, confiscation, and imprisonment without interruption from Parliament, up to its abolition, in 1641. From this time the law seems to have been in an unsettled state — although Parliament made some efforts to restrain the licentiousness of the press — until the eighth year of Queen Anne, when the first copyright Act was passed, giving authors a monopoly in the publication of their works for a period of from 14 to 28 years. Notwithstanding this Act, however, the Chancery Courts continued to hold that, by the common law and independently of legislation, there was a property of unlimited duration in printed books. This principle was affirmed so late as 1769 by the Court of King's Bench in the very carefully considered case of *Millar v. Taylor*, 4 Burrows, 2303, in which the right of the author of "Thompson's Seasons" to a monopoly of this work was asserted and sustained. But a few years thereafter the House of Lords, upon an equal division of the judges, declared that the common-law right had been taken away by the statute of Anne, and that authors were limited in their monopoly by that Act. *Donaldson v. Becket*, id. 2408. This remains the law of England to the present

day. An Act similar in its provisions to the statute of Anne was enacted by Congress in 1790, and the construction put upon the latter in *Donaldson v. Becket* was followed by this Court in *Wheaton v. Peters*, 8 Pet. 591. While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright Act, — in other words, that, while a right did exist by common law, it has been superseded by statute.

The right thus secured by the copyright Act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas, or, as Lord Mansfield describes it,

“An incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words or sentences and modes of expression. It is equally detached from the manuscript or any other physical existence whatsoever.”

4 Burrows, 2396. The nature of this property is perhaps best defined by Mr. Justice Erle in *Jefferys v. Boosey*, 4 H. L. Cas. 815, 867:

“The subject of property is the order of words in the author’s composition, not the words themselves; they being analogous to the elements of matter which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation.”

The right of an author to control the publication of his works at the time the title to the “Autocrat” was deposited was governed by the Act of February 3, 1831 (4 Stat. 436), wherein it is enacted:

“Section 1. That from and after the passing of this Act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of a book or books, map, chart or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such book or books, . . . in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed.”

“Sec. 4. That no person shall be entitled to the benefit of this Act, unless he shall, before publication, deposit a printed copy of the title of such book, or books . . . in the clerk’s office of the District Court of the district wherein the author or proprietor shall reside, etc. And the author and proprietor of any such book . . . shall, within three months from the publication of said book, . . . deliver or cause to be delivered a copy of the same to the clerk of said district.”

The substance of these enactments is that by section 1 the author is only entitled to a copyright of books not printed and published, and:

by section 4 that, as a preliminary to the recording of a copyright, he must, before publication, deposit a printed copy of the title of such book, etc.

The argument of the plaintiff in this connection is that the publication of the different chapters of the book in the Atlantic Monthly was not a publication of the copyright book, which was the subject of the statutory privilege; that if Dr. Holmes had copyrighted and published the 12 parts, one after the other, as they were published in the magazine, or separately, there would still have remained to him an inchoate right, having relation to the book as a whole; that his copyright did not cover and include the publication of the 12 parts printed as they were printed in the Atlantic Monthly; and that, while the defendant had a right to make copies of those parts and to sell them separately or collectively, he had no right to combine them into a single volume, since that is the real subject of the copyright. Counsel further insisted that, if the author had deposited the 12 parts of the book, one after the other, as they were composed, he would not have acquired the statutory privilege to which he seeks to give effect; that to secure such copyright it was essential to do three things: (1) Deposit the title, "The Autocrat of the Breakfast Table"; (2) deposit a copy of the book, "The Autocrat of the Breakfast Table"; and (3) comply with the provisions concerning notice; that he could acquire the privilege of copyright only by depositing a copy of the very book for which he was seeking protection; that if the taking of a copyright for each chapter created a privilege which was less than the privilege which would have been acquired by withholding the manuscript until the book was completed, and then taking the copyright, this copyright is valid. His position, briefly, is that no one of the 12 copyrights, if each chapter were copyrighted, nor all of them combined, could be held to be a copyright, in the sense of the statute, of the book, which is the subject of the copyright in question; and that neither separately nor collectively could they constitute the particular privilege, which is the subject of the copyright of "The Autocrat of the Breakfast Table," as a whole.

We find it unnecessary to determine whether the requirement of section 4 could have been met by a deposit of the book, "The Autocrat of the Breakfast Table," prior to the publication of the first part in the Atlantic Monthly, or whether, for the complete protection of the author, it would be necessary that each part should be separately copyrighted. This would depend largely upon the question whether the three months from the publication, within which the author must deposit a copy of the book with the clerk, would run from the publication of the first or the last number in the Atlantic Monthly.

That there was a publication of the contents of the book in question, and of the entire contents, is beyond dispute. It follows from this that defendant might have republished in another magazine these same numbers as they originally appeared in the Atlantic Monthly. He



might also, before the copyright was obtained, have published them together, paged them continuously, and bound them in a volume. Indeed, the learned counsel for the plaintiff admits that the defendant had the right to make copies of these several parts, and to sell them separately or collectively, but insists that he had no right to combine them in a single volume. The distinction between publishing these parts collectively and publishing them in a single volume appears to be somewhat shadowy; but, assuming that he had no such right, it must be because the copyright protected the author, not against the republishing of his intellectual productions or "the order of his words," but against the assembling of such productions in a single volume. The argument leads to the conclusion that the whole is greater than the sum of all the parts,—a principle inadmissible in logic as well as in mathematics. If the several parts had been once dedicated to the public, and the monopoly of the author thus abandoned, we do not see how it could be reclaimed by collecting such parts together in the form of a book, unless we are to assume that the copyright Act covers the process of aggregation as well as that of intellectual production. The contrary is the fact. . . .

It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes; and the word "book," as used in the statute, is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his literary product. We are quite unable to appreciate the distinction between the publication of a book and the publication of the contents of such book, whether such contents be published piecemeal or en bloc.

If, as contended by the plaintiff, the publication of a book be a wholly different affair from the publication of the several chapters serially, then such publication of the parts might be permitted to go on indefinitely before a copyright for the book is applied for, and such copyright used to enjoin a sale of books which was perfectly lawful when the books were published. There is no fixed time within which an author must apply for a copyright, so that it be "before publication"; and, if the publication of the parts serially be not a publication of the book, a copyright might be obtained after the several parts, whether published separately or collectively, had been in general circulation for years. Surely, this cannot be within the spirit of the Act. Under the English copyright Act of 1845, provision is made for the publication of works in a series of books or parts, but it has always been held that each part of a periodical is a book within the meaning of the Act. *Henderson v. Maxwell*, 4 Ch. Div. 163; *Bradbury v. Sharp*, [1891] Wkly. Notes, 143.

We have not overlooked the inconvenience which our conclusions will cause, if in order to protect their articles from piracy, authors are compelled to copyright each chapter or instalment as it may appear in a periodical; nor the danger and annoyance it may occasion to the

librarian of Congress, with whom copyrighted articles are deposited, if he is compelled to receive such articles as they are published in newspapers and magazines; but these are evils which can be easily remedied by an amendment of the law.

The infringement in this case consisted in selling copies of the several parts of "The Autocrat of the Breakfast Table" as they were published in the Atlantic Monthly, and each copy so sold was continuously paged so as to form a single volume. Upon its title-page appeared a notice that it was taken from the Atlantic Monthly. There can be no doubt that the defendant had the right to publish the numbers separately as they originally appeared in the Atlantic Monthly (since those numbers were never copyrighted), even if they were paged continuously. When reduced to its last analysis, then, the infringement consists in binding them together in a single volume. For the reasons above stated, this act is not the legitimate subject of a copyright.

The decree of the Court below must therefore be affirmed.<sup>1</sup>

#### SUB-TOPIC C. RIGHT TO PROTECTION OF IDEAS OR INFORMATION COMMUNICATED WITHOUT PRINTING

### 208. NATIONAL TELEGRAPH NEWS COMPANY *v.* WESTERN UNION TELEGRAPH COMPANY.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT. 1902

119 *Fed.* 294

APPEAL from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The bill in the Circuit Court was by appellee, a corporation of New York, against the appellants, The National Telegraph News Company, a corporation of Illinois, and F. E. Crawford and A. K. Brown, citizens of Illinois; and the appeal is from an interlocutory order restraining the appellants, and each of them, their servants, agents and employees, from copying from the appellee's electrical instruments and

<sup>1</sup> [NOTES :

"Periodical : Copyright of, protects contributions." (C. L. R., IX, 451.)

"Infringement : Statutory rights where no notice on original." (H. L. R., XIX, 380.)

"Effect of assignee's failure to mark as copyrighted the original picture." (H. L. R., XXI, 286.)

In *Mifflin v. R. H. White Co.*, 190 U. S. 260, 23 Sup. 769, the copyright on "The Autocrat of the Breakfast Table" was again denied protection, through failure to print a formal notice of copyright in the serial magazine. These purely technical defects in copyright protection were justly denounced by Mr. Elder in the article above cited. In the revised Act of 1909, above set out, these defects were at last corrected in part by express enactment.]

printing machines, known as tickers, for the purpose of publishing, selling or transmitting through their own tickers, or otherwise disposing of, or using, any of the news or information — such as base-ball, foot-ball, racing, athletics, stock, grain and produce quotations, financial and other reports — which may thereafter be collected, formulated and transmitted by the appellee through its tickers; and from publishing, selling or using the matter so copied until the lapse of fully sixty minutes from the time such news items are printed by appellee's tickers.

The further facts appear in the opinion of the Court.

*Thomas S. Chadbourne* and *Charles S. Holt*, for appellants.

*H. D. Estabrook*, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

GROSSCUP, Circuit Judge, delivered the opinion of the Court.

The appellee, the Western Union Telegraph Company, does a general telegraphing business, having offices in every State, village, hamlet, and railroad station in the country, and wires connecting the same with central offices through the country.

About 1881 there was invented an instrument which, by means of a type wheel, actuated by electrical impulse, automatically prints in plain, ordinary type, upon a strip of paper, messages transmitted electrically from a distance. The instrument is now generally known as the "ticker," and is commonly found in the offices of brokers, bankers, and other persons interested in the current price of securities, and in hotels, saloons, and other places where people, who are interested in the happenings of the race tracks, athletic clubs, base-ball associations, and in pending events generally, are in the habit of gathering. Upon the perfecting of this instrument appellee entered, in addition to its general telegraphic business, upon a business heretofore new to it. It collected at various points, where it had offices, news relating to events there transpiring, and, after accumulating in its central offices such product by means of its wires, redistributed to its tickers, in the offices and places of its patrons, by means of local wires, what was deemed of sufficient interest. The news thus gathered and printed upon strips of paper is open to the inspection of all persons who may come within these places.

The appellants, The National Telegraph News Company, and F. E. Crawford and A. K. Brown, its officers, own and control within the city of Chicago a system of wires, connecting their operating office with tickers of their own, in the offices and places of patrons of their own. The evidence in the record before us shows that they have been appropriating *vi et armis* the news appearing upon the appellee's tape; and thereupon, with the loss of a few moments only, redistributing such news over their own wires and tickers to their own patrons. Such appropriation is not denied; but is defended as appellants' lawful right,

upon the ground, chiefly, that upon the appearance of the printed tape upon the appellee's tickers, in the places of appellee's patrons, there is such a publication as, within the meaning of the law, dedicates the contents of the tape to the public, and deprives appellee of any further monopoly therein. . . .

The general question raised by appellants' contention, then, is this: Is the printed tape, coming out of appellee's tickers, a book or article within the meaning of the copyright laws of the United States, and especially of section 4956 [U. S. Comp. St. 1901, p. 3407], and if not a book or article within the meaning of the copyright law, is there any remedy that will protect this feature of appellee's business against the kind of piracy shown?

1. We are of the opinion that the printed tape would not be copyrightable, even if the practical difficulties were out of the way. When the Federal Constitution was adopted the right of property in literary production had been already securely established in English law. Its source, whether in natural right, or in the statute of Anne, was still in doubt; but that an author had ownership of some species over the production of his brain — an ownership as distinctive as that of the creator of corporeal property — was conceded by all. Indeed, it could not be otherwise in a civil polity that recognizes the individual, and his right to enjoy what he creates, as the unit of organized society.

But when the Federal Constitution was adopted, the application of this right to productions other than those strictly literary had not yet been mooted. The great case of *Donaldson v. Becket*, 2 Brown, Parl. Cas. 129, had been decided only thirteen years previously. The business world, that in this day permits nothing to escape as a means for its exploitation, had not yet pressed into her service art and books. Business catalogues, circulars containing market quotations, sheets, such as Dun's and Bradstreet's directories — the whole staff of aides-de-camp to commerce, now familiar to all — were then practically unknown. In the public mind, the publication of a book meant that literature, as Literature, had received an accession.

Unquestionably, the framers of the Constitution, in vesting Congress with "power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors exclusive right to their respective writings and discoveries," had this kind of authorship in mind: and were the intention of the framers of the Constitution to give boundary to the constitutional grant, many writings, to which copyright has since been extended, would have been excluded. But, here as elsewhere, the Constitution, under judicial construction, has expanded to new conditions as they arose. Little by little copyright has been extended to the literature of commerce, so that it now includes books that the old guild of authors would have disdained; catalogues, mathematical tables, statistics, designs, guide-books, directories, and other works of similar character. Nothing, it would seem,

evinced, in its makeup, that there has been underneath it, in some substantial way, the mind of a creator or originator, is now excluded. A belief that in no other way can the labor of the brain, in these useful departments of life, be adequately protected, is doubtless responsible for this wide departure from what was unquestionably the original purpose of the Constitution.

But, obviously, there is a point at which this process of expansion must cease. It would be both inequitable and impracticable to give copyright to every printed article. Much of current publication — in fact the greater portion — is nothing beyond the mere notation of events transpiring, which, if transpiring at all, are accessible by all. It is inconceivable that the copyright grant of the Constitution, and the statutes in pursuance thereof, were meant to give a monopoly of narrative to him, who, putting the bare recital of events in print, went through the routine formulæ of the copyright statutes.

It would be difficult to define, comprehensively, what character of writing is copyrightable, and what is not. But, for the purposes of this case, we may fix the confines at the point where authorship proper ends, and mere annals begin. Nor is this line easily drawn. Generally speaking, authorship implies that there has been put into the production something meritorious from the author's own mind; that the product embodies the thought of the author, as well as the thought of others; and would not have found existence in the form presented, but for the distinctive individuality of mind from which it sprang. A mere annal, on the contrary, is the reduction to copy of an event that others, in a like situation, would have observed; and its statement in the substantial form that people generally would have adopted. A catalogue, or a table of statistics, or business publications generally, may thus belong to either one or the other of these classes. If, in their makeup, there is evinced some peculiar mental endowment — the grasp of mind, say in a table of statistics, that can gather in all that is needful, the discrimination that adjusts their proportions — there may be authorship within the meaning of the copyright grant as interpreted by the courts. But if, on the contrary, such writings are a mere notation of the figures at which stocks or cereals have sold, or of the result of a horse race, or base-ball game, they cannot be said to bear the impress of individuality, and fail, therefore, to rise to the plane of authorship. In authorship, the product has some likeness to the mind underneath it; in a work of mere notation, the mind is guide only to the fingers that make the notation. One is the product of originality; the other the product of opportunity.

Judged by a test like this, the printed matter on the tape in question is in no sense copyrightable. It is, at most, the mere annal of events transpiring. True, the happenings of a race track, or the incidents of a college boat race, may be put in narrative, involving creative imagination; or the doings of a board of trade become the basis

of a useful book or article evincing originality. But the printed tape under consideration is no such book or article, and affects no such dignity. It is, in its totality, nothing more or less than the transmission by electricity, over long distances, of what a spectator of the event, occupying a fortunate position to see or hear, would have communicated, by word of mouth, to his less fortunate neighbor. It is an exchange merely, over wider area, of ordinary sightseeing; and the exchange is in the language of the ordinary sightseer. Matter of this character is not, within the meaning of the copyright law, the fruit of intellectual labor, and would not, if actually copyrighted, be protected by the courts. *Iron Works v. Clow*, 27 C. C. A. 250, 82 Fed. 316.

Indeed, the printed tape under consideration has no value at all as a book or article. It lasts literally for an hour, and is in the waste basket when the hour has passed. It is not desired by the patron for the intrinsic value of the happening recorded — the happening, as a happening, may have no value. The value of the tape to the patron is almost wholly in the fact that the knowledge thus communicated is earlier, in point of time, than knowledge communicated through other means, or to persons other than those having a like service. In just this quality — to coin a word, the precommunicatedness of the information — is the essence of appellee's service; the quality that wins from the patron his patronage.

Now, in virtue of this quality, and of this quality alone, the printed tape has acquired a commercial value. It is, when thus looked at, a distinct commercial product, as much so as any other out-put relating to business, and brought about by the joint agency of capital and business ability. In no accurate view can appellee be said to be a publisher or author. Its place, in the classification of the law, is that of a carrier of news; the contents of the tape being an implement only, in the hands of such carrier, in its engagement for quick transmission. This is Service; not Authorship, nor the work of the Publisher.

2. This, then, brings us to the second inquiry: Is there any remedy that will protect appellee, in this feature of its business, against the piracy of outsiders? Has appellee, in the performance of this service, no appeal to the law? It will be noted, first, that the business is, as an entirety, a lawful one. It meets a distinctive commercial want, and in some of its branches, at least, adds to the facilities of the business world. Indeed, no argument against its lawfulness has been advanced.

The business involves, also, the use of property. This consideration brings it at once, in a general way, within the protecting care of Courts of Equity. At first glance the immediate act restrained in the order below — the use of the information by a rival enterprise until after sixty minutes — may not appear as a trespass upon, or injury to, property, other than to the extent that there may be property in the printed matter. But such a view falls short of looking far enough.



Property, even as distinguished from property in intellectual production, is not, in its modern sense, confined to that which may be touched by the hand, or seen by the eye. What is called tangible property has come to be, in most great enterprises, but the embodiment, physically, of an underlying life — a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment. Such, for example, are properties built upon franchises, on grants of government, on good will, or on trade names, and the like. It is needless to say, that to every ingredient of property thus made up — the intangible as well as the tangible, that which is discernible to mind only, as well as that susceptible to physical touch — equity extends appropriate protection. Otherwise courts of equity would be unequal to their supposed great purposes; and every day, as business life grows more complicated, such inadequacy would be increasingly felt.

Nowhere is this recognition by Courts of Equity of the intangible side of property better exemplified, than in the remedies recently developed against unfair competition in trade. An unregistered trade name or mark is, in essence, nothing more than a symbol, conveying to eye and ear information respecting origin and identity; as if the manufacturer, present in person, and pointing to the article, were to say, "These are mine"; and the injunctive remedy applied is simply a command that this form of speech — this method of saying, These are mine — shall not be intruded upon unfairly by a like speech of another.

Standing apart, the symbol or speech is not property. Disconnected from the business in which it is utilized it cannot be monopolized. But used as a method of making an enterprise succeed, so that its appropriation by another would be a distinctive injury to the enterprise to which it is attached, the name, or mark, becomes at once the subject-matter of equitable protection. Here, as elsewhere, the eye of equity jurisdiction seeks out results, and though the immediate thing to be acted upon by the injunction is not itself, alone considered, property, it is enough that the act complained of will result, even though, somewhat remotely, in injury to property.

Considering that in such case, equity, without question, lays its restraining hands upon the injurious appropriation of words that belong to the common language of mankind — than which nothing could be freer to the uses of men — there ought, it would seem, to be no difficulty, in the case under consideration, to find the power so manifestly needful.

The case under consideration may be summed up as follows: The business of appellee is that of a carrier of information. The gist of its service to the patron is, that, by such carriage, the patron acquires knowledge of the matter communicated earlier than those not thus served. The ticker, with its printed tape, is an implement or means

only to this commercial end, which the patron, or the patron's patron, may utilize to the end intended, but may not appropriate to some end not intended, especially if such appropriation result in injury to, or total destruction of, the service. In short, the law being clearly inadequate to that purpose, equity should see to it, that the one who is served, and the one who serves, each gets what the engagement between them calls for; and that neither, to the injury of the other, shall appropriate more.

The immediate business of appellee brought to our attention, in the case under review, may not arouse any great solicitude. It relates to the gathering and distributing of news, not looked upon perhaps, in all quarters, as essential to the public welfare. But the questions raised are of much wider significance. They involve, among others, that modern enterprise — one of the distinctive achievements of our day — which, combining the genius and the accumulations of men, with the forces of electricity, combs the earth's surface, each day, for what the day has brought forth, that whatever befalls the sons of men shall come, almost instantaneously, into the consciousness of mankind. Thus, a gun thunders in a harbor on the other side of the earth; before its reverberations have ceased, the moral sequence of the event has taken root in every civilized quarter of the earth. Famine arises in India to begin its grim march; it has gotten but little under way until a counter army — the unfailing benevolence of human kind — has been mustered from America to Russia. On an isolated island, and without premonition, a mountain claps its black hands upon the population of a city; almost before a ship in the harbor, with tidings of the catastrophe, could have set sail, relief ships from the harbors of Christendom are under way. By such agencies as these the world is made to face itself unceasingly in the glass, and is put to those tests that bring increasing helpfulness and beauty into the heart of our race.

Is service like this to be outlawed? Is the enterprise of the great news agencies, or the independent enterprise of the great newspapers, or of the great telegraph and cable lines, to be denied appeal to the courts, against the inroads of the parasite, for no other reason than that the law, fashioned hitherto to fit the relations of authors and the public, cannot be made to fit the relations of the public and this dissimilar class of servants? Are we to fail in our plain duty for mere lack of precedent? We choose, rather, to make precedent — one from which is eliminated, as immaterial, the law grown up around authorship — and we see no better way to start this precedent upon a career, than by affirming the order appealed from. *Affirmed.*<sup>1</sup>

<sup>1</sup> [NOTES:

“Copying of market quotations: Unfair competition.” (M. L. R., I, 692.)]

209. F. W. DODGE COMPANY *v.* CONSTRUCTION  
INFORMATION COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1903

183 *Mass.* 62, 66 *N. E.* 204REPORT from Superior Court, Suffolk County; *Jabez Fox*, Judge.

Action by the F. W. Dodge Company against the Construction Information Company. Heard on demurrers to plaintiff's bill. Demurrers overruled.

*Wm. Odlin and Dunbar & Rackemann*, for plaintiff.*Chas. F. Choate, Jr., and Edw. C. Stone*, for defendant.

KNOWLTON, C. J. This case comes before us on demurrers to the plaintiff's bill. The plaintiff corporation has been engaged for some years in the business of collecting information in regard to the erection of buildings, both public and private, the construction of sewers, water-works, and other undertakings of public utility, as soon after they are contemplated as possible. This information is carefully compiled and distributed each day to the plaintiff's customers in accordance with their contracts, enabling them very early to take such steps as may seem to them best to obtain contracts to do the work or to furnish supplies. The plaintiff, at great expense, has many servants and agents employed in the collection, preparation, and distribution of this information, which it sells to its subscribers under a contract in writing, whereby the subscriber binds himself to use the reports in strict confidence, and for his business only. The formal contract with subscribers, annexed to the bill, which is in blank, with large spaces for writing in special arrangements, shows that the information may be printed, written, or oral, and implies that the information furnished to the subscribers is such as pertains to their different kinds of business, so that different subscribers receive information in detail on different subjects, according to their interests. It also contains an agreement to be signed by each subscriber to hold the information in strict confidence, and for his business only. The plaintiff avers that the defendant corporation is engaged in the same kind of business as the plaintiff, and that it has obtained unlawfully and dishonestly, from the plaintiff's subscribers, information furnished them by the plaintiff under these contracts, being aware of the terms of the contracts between the plaintiff and its subscribers, and that it is purchasing these reports from these subscribers for cash, and is furnishing them to its subscribers daily, and is informing the plaintiff's subscribers that by subscribing for the reports of the defendant they will obtain the advantages of the plaintiff's reports for a less price than the plaintiff charges for them. The plaintiff says that the defendant has thereby prevailed upon many of the plaintiff's subscribers to cease buying the plaintiff's reports, and has caused the

plaintiff great loss and damage. The prayer of the bill is for an injunction and an account.

The important question in this case may be divided into two parts: First. Has the plaintiff any property in the information after it has been obtained at great expense and compiled for the use of its subscribers? Second. Does it lose its property by publication, abandonment, or dedication to the public, when it furnishes the information to subscribers under these contracts?

The facts, before it has ascertained them, unless they are held for a special purpose confidentially, and as secrets, are not property; but when these facts have been discovered promptly by effort and at expense, and have been compiled and put in form, and are of commercial value by reason of the speedy use that can be made of them before they have obtained general publicity, they are property. They represent expensive effort and valuable service, and, in the form in which they are presented to subscribers, they may be used with a reasonable expectation of profit from the early possession of them. The information is not visible, tangible property, but there is a valuable right of property in it, which the Courts ought to protect in every reasonable way against those seeking to obtain it from the owner without right, to his damage. What the plaintiff has when the defendant seeks to obtain it from him is the possession of valuable information. This early possession is valuable in itself. The plaintiff has it and the defendant does not have it. If the defendant can obtain it legitimately, he becomes the owner of the same kind of property, and the two may become competitors in the market as vendors to those who are willing to pay for it. But if the defendant surreptitiously and against the plaintiff's will takes from the plaintiff and appropriates the form of expression which is the symbol of the plaintiff's possession, and thus, by direct attack, as it were, divides the plaintiff's possession, and shares it, this conduct is a violation of the plaintiff's right of property. That there is a right of property of this kind has been decided in England in regard to information of stock quotations and other different kinds of news obtained to be furnished to those who will pay for it. *Exchange Telegraph Co. v. Gregory*, [1896] 1 Q. B. 147; *Exchange Telegraph Co. v. Central News Co.*, [1897] 2 Ch. 48. This has also been held by different Courts in this country. *Kiernan v. Manhattan Quotation Telegraph Co.*, 50 How. Prac. 194; *Chicago v. Christie Grain & Stock Co.* (C. C.), 116 Fed. 944; *National Telegraph News Co. v. Western Union Telegraph Co.* (C. C. A., 7th Circuit, Oct. Term, 1902), 119 Fed. 297. We are of opinion that one's possession of information which he has obtained, compiled, and put in form for a specific use is a right which ought to be protected against those who would share it with him without his consent.

The next question is whether the giving of information by the plaintiff to its subscribers is a publication of it, such as dedicates it to the

public, and deprives the plaintiff of its right of control. It is well established that the private circulation of information or literary composition, in writing or in print, for a restricted purpose, is not a publication which gives the public a right to use it. *Prince Albert v. Strange*, 1 Macn. & G. 25; *Jefferys v. Boosey*, 4 H. L. Cas. 815, 867; *Exchange Telegraph Co. v. Gregory*, [1896] 1 Q. B. 147; *Exchange Telegraph Co. v. Central News Co.*, [1897] 2 Ch. 48; *Bartlett v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1076. See, also, *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *The Mikado Case* (C. C.), 25 Fed. 183, 23 Blatchf. 347; *Press Publishing Co. v. Monroe*, 19 C. C. A. 429, 73 Fed. 196, 51 L. R. A. 353. It has been held in *Ladd v. Oxnard* (C. C.), 75 Fed. 703-729, and in *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666, that where a company published a reference book, or a book of mercantile agency credit ratings, to an unlimited number of subscribers, under a stipulation that the book was furnished as a loan, and not as a sale, and that it should not go into other hands, there was a publication. Each of these suits was brought under the United States copyright Act for an infringement of the copyright, and the decision was on the ground that by reason of publication the copyright was not perfected. In the latter case three of the judges did not agree that there was a publication. The thing sent out in these cases was a book designed to be preserved and used for a considerable time. It was in a convenient form for transfer from hand to hand, and for use from time to time by different persons. We do not think that these cases very much resemble the case before us. The information given by the plaintiff in this case, as we infer, is of specific facts for particular persons or classes of persons, adapted to their interests, and furnished from time to time as the facts are ascertained. It seems very unlike the sale or loan of a large printed book, designed to be distributed among a large class of persons. We think the case falls within the principles laid down in the cases first above cited. It makes no difference that the information in some of these cases was furnished by telegraph, and that in this it is furnished orally, or in writing or in print. We are of opinion that the averments of the bill do not show a publication which deprives the plaintiff of its rights or property.

We have considered the case without reference to the question whether it would be possible to obtain a copyright upon the plaintiff's compilations, for we think its rights are the same, however this question might be decided. It would seem, however, to be impracticable to obtain copyrights in the course of the plaintiff's business, whether the material would be a subject for a copyright under the statute or not.

We do not deem it necessary to consider at length the objections raised by the special demurrer. Although the averments of the bill are not so full as might be desired, we are of opinion that they are sufficient.

*Demurrers overruled.*

210. HASKINS *v.* RYAN

COURT OF CHANCERY OF NEW JERSEY. 1906

71 *N. J. Eq.* 575, 64 *Atl.* 436

SUIT by Harry C. Haskins against Thomas F. Ryan. Heard on demurrer to bill. Bill dismissed.

*Robert H. McCarter*, for complainant.

*Richard V. Lindabury* and *William H. Page, Jr.*, for defendant.

STEVENS, V. C. To the bill in this case a general demurrer is pleaded. The bill alleges, in substance, that during the years 1898, 1899, 1900, and 1901, the complainant devoted a large part of his time to the study of industrial conditions connected with the output of pig lead in the United States, and had conceived the plan of uniting the outstanding lead interests, which had not already become a part of the National Lead Company, into one company, and had either procured options thereon or had opened negotiations for their purchase; that in the spring of 1901 "he had crystallized and formulated a complete plan for the combination of the white lead industries in the United States not already in the National Lead Company; that he laid such plan before the defendant, a capitalist; that he sought his co-operation and aid, and himself agreed to contribute, if necessary, as much as \$200,000, if the defendant would join him therein, and also contribute enough to carry the enterprise through." The bill alleges, further, that defendant, to quote from the bill, "expressed a willingness to join your orator therein, provided an examination of the plan and papers by the attorneys and experts of said Ryan [the defendant] confirmed the statements of your orator made to him." The bill then alleged that the complainant submitted the plan to Ryan's attorney, and was subsequently told by him that he had submitted it to Ryan, and had indorsed it "as comprehensive, feasible, and attractive"; that through the efforts of Ryan's agents options had been obtained upon most, if not all, of the properties upon which the complainant had options, and that on January 20, 1903, the United Lead Company was organized as a corporation under the laws of New Jersey, and under the direction and control of Ryan proceeded to acquire and now owns the interests in nearly all the companies, firms, and individuals named in complainant's plan, and is capitalized with a capital stock of \$15,000,000 and has issued bonds for \$17,000,000; that in the formation and exploitation of this company the defendant, Ryan, "has made an enormous profit, the amount of which is unknown to complainant," and that a combination substantially as planned by complainant has taken place, or is about to take place, with the result of great profits to said Ryan. The bill then charges that Ryan's act of availing himself of the information complainant had collected and had only disclosed to Ryan "upon the agreement



and understanding on the part of the said Ryan that he would join your orator in the said scheme and share with him in the profits arising therefrom is contrary to equity"; but I do not understand that by this general charge it is intended to allege any other understanding or agreement than that contained in the stating part of the bill, viz., that Ryan had expressed a willingness to join complainant in his project, provided an examination of it by Ryan's attorneys and experts should confirm complainant's statements. The bill asks for a discovery and account of Ryan's profits and a decree that complainant is entitled to a share of them. Ryan is the sole defendant.

It is perfectly plain that no recovery can be had in this case on the basis of a completed agreement broken by Ryan. . . . As I understand the complainant's argument, he does not rest his case on any such basis. His contention is this: "The plan is my property. The defendant has appropriated it to his own use. I claim an account of the profits arising from its appropriation." If, in point of fact, the plan has been wrongfully taken or appropriated, the remedy, if any, would appear to be an action on the case for damages; the amount of damages being its fair value. But the plaintiff does not, and in this court could not, demand damages. He asks for a discovery and an account of profits. The fact that he has not been able to cite any precedent for the claim he makes is not, of itself, conclusive, if he can bring himself within the principle upon which an account is given.

The complainant has, undoubtedly, the right to claim protection in this court for his manuscript. It would seem that, without any reference to whether the plan is or is not open to the objection that it seeks to create a monopoly (Kerr on Inj. p. 186; *Oliver v. Oliver*, 11 C. B. N. S. 139), he would have the right to restrain its publication or to prevent its use; and, in the case of an author, the law does more than protect the manuscript, regarded as a material thing of ink and paper. The combination of words of which it is composed (whether written down, or acted, or sung before an audience admitted on payment of a fee) is also protected, and publication is restrained, even if the manuscript be destroyed and an attempt be made to reproduce it from a copy rightfully in the possession of another, or even from memory. The work is protected indefinitely before publication by the common law (*Aronson v. Baker*, 43 N. J. Eq. 366, 12 Atl. 177; *N. J. State Dental Ass'n v. Denticura Co.*, 57 N. J. Eq. 594, 41 Atl. 672; *Denticura Co. v. New Jersey State Dental Soc.*, 58 N. J. Eq. 582, 43 Atl. 1898), and for a limited time after publication by the statutory law of copyright. The law has never attempted to go beyond this, and to enjoin, for the benefit of the author, after publication, the use of the ideas contained in his work. In the case of secret processes of manufacturing, the law does, to a certain extent, enjoin the use of ideas. It would, of course, on the same principle on which it affords protection to the unpublished manuscript in the hands of the author, enjoin the publication or exhibition of

the paper containing the formula; but it does more. In enjoining the use of the formula, it restrains the wrongdoer from putting the idea formulated to practical account. *Stone v. Grasselli Co.*, 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 103 Am. St. Rep. 794. The protection ends when the secret becomes known. In the case of patent rights the statute goes still further. It affords protection for a limited period to a certain class of ideas, known as "useful inventions," after the inventor has published them to the world, and because he has so published them. The valuable right here protected is not, as in the case of copyright, the manuscript or writing, regarded as a peculiar combination of words or figures, but the idea or conception to which those words or figures give rise, so far as that idea or conception may admit of material embodiment. If the idea contained in the patented device of A suggests to the mind of B another idea, which would not have arisen in the mind of B but for the stimulus of the prior idea, A can claim no property in that, and yet B has mentally appropriated A's idea and made it the basis of his own; and I do not suppose that it has ever been contended that the entire public are not at liberty to subject A's idea to such investigation and discussion as it may desire. The wrong does not commence until the attempt is made to make or dispose of its material embodiment.

I now come to the precise question here involved. It is this: Has the complainant a property right in the scheme or idea to be found in his plan, as contradistinguished from the property right which he has in his manuscript, regarded as a combination of words and figures — a thing of ink and paper? A right is defined to be that interest which a person actually has in any subject of property, entitling him to hold or convey it at pleasure. But that can hardly be styled "property," over which there is not some sort of dominium. Now, as I have already said, the combination of words and figures contained in complainant's plan belongs to him absolutely. Its publication or reproduction or exhibition in any form may be enjoined. But the idea contained in the plan differs from the ideas to which I have already called attention in this important respect: It involves the voluntary action and co-operation of many different men. When I say voluntary action, I mean action not restrained by contract; for the allegation that complainant had "options" is altogether too vague to warrant an inference that they are still subsisting, or that complainant had the means of availing himself of them without the aid of outside capital. Besides, the allegation is, not that he has procured options on all the properties which it was proposed to combine, but that he either had options on them or had "opened negotiations for their purchase." The means of carrying out the plan, of giving effect to the idea, lay, therefore, beyond his control. It was an idea depending for its realization upon the concurring minds of many individuals, each of them unbound by contract and free to act as he chose. Such a project or idea can scarcely be called "property." It lacks that

dominium, that capability of being applied by its originator to his own use, which is the essential characteristic of property. It differs fundamentally from the secret process or patented invention which is capable of material embodiment at the will of the inventor alone. It is worthless unless others agree to give it life. It was, as far as complainant was concerned, an idea pure and simple. Now, it has never, in the absence of contract or statute, been held, so far as I am aware, that mere ideas are capable of legal ownership and protection. Says Lord Brougham, in delivering his judgment in *Jeffreys v. Boosey*, 4 H. L. Cas. 965:

“‘*Volat irrevocabile verbum*,’ whether borne on the wings of the wind or the press, and the supposed owner instantly loses all control over it. . . . He has produced the thought and given it utterance, and eo instante it escapes his grasp.”

Yates, J., in his dissenting opinion in the great case of *Millar v. Taylor*, 4 Burr. 2302, 2366, an opinion which was afterwards concurred in by the House of Lords, said:

“Where are the indicia or distinguishing marks of ideas? What distinguishing marks can a man fix upon a set of intellectual ideas, so as to call himself the proprietor of them? They have no earmarks upon them.”

A case much like the present is that of *Bristol v. Equitable Assurance Society of New York* (Sup.), 5 N. Y. Supp. 131, id. 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568. There the complainant confidentially disclosed to the president of a life insurance company a system of soliciting life insurance devised by him. It was alleged that the company, after the disclosure, used the plan without complainant’s consent. On demurrer, it was held that the plaintiff could not recover for the alleged use. I am therefore of opinion that complainant has no property right in his plan regarded as an idea. Having no property right, he has no right to an account. . . .

I think the complainant’s bill should be dismissed.<sup>1</sup>

211. FONOTIPIA, LIMITED *v.* BRADLEY  
VICTOR TALKING MACHINE COMPANY *v.* SAME

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF NEW YORK.  
1909

171 Fed. 951

IN EQUITY.

*Ralph L. Scott* (*Philip Mauro* and *C. A. L. Massie*, of counsel), for  
Fonotipia Limited and Columbia Phonograph Co.

<sup>1</sup> [NOTES :

“Things subject to ownership as property: Ownership in plan.” (H. L. R., XX, 143, 156.)]

*Horace Pettit*, for Victor Talking Machine Co.

*Waldo G. Morse*, for defendant.

CHATFIELD, District Judge. The present cases have been heard upon a record consisting of pleadings and affidavits presented originally upon a motion for preliminary injunctions and by stipulation made the record and testimony on final hearing. The two actions involve substantially the same principles and can be disposed of together, the slight differences between the positions of the parties, and certain questions peculiar to the allegations of each complainant, being capable of statement and determination in connection with the main issues, which are alike in the two suits.

The complainants at the present time are producing and putting upon the market records of vocal and instrumental music, for use upon machines for the reproduction of sound, and constructed in a form suitable for operation with these records in the flat and circular or disc form described in the patent to Berliner, No. 534, 543, February 19, 1895 (*Victor v. Amer. Grapho. Co.*, 145 Fed. 350, 76 C. C. A. 180), and Jones, No. 688, 739, December 10, 1901 (*Amer. Grapho. Co. v. Universal Co.*, 151 Fed. 595, 81 C. C. A. 139). It is unnecessary to consider in detail the machines made by either company, further than to say that those manufactured by the complainant the Victor Talking Machine Company are known generally as the "Victor talking machines," and those put upon the market by the Columbia Company are called "graphophones," and the discs described can be interchangeably used upon either type of instrument.

The discs themselves, as at present made, are of some such substance as hard rubber, and are said to be made by causing the music to be sung or played into a receiving instrument, which records the waves of sound upon a disc properly prepared, which, in turn, by an electroplating process, is used to yield a matrix of metal. From this matrix numberless reproductions, substantially duplicates even in minute details of the original record, are produced by processes perfected by each company, and these reproduced discs, when used upon the talking machine or graphophone, turn back, by means of the diaphragm of the instrument, the lines of the record into sound waves, which are the equivalent of those originally sung or played.

In the case of the Victor Company, the discs sold by it within the United States are plainly marked with notice of the patent, and also with notice that the disc is sold for use only upon a talking machine, for the reproduction of sound. The price at which the discs are to be sold is also printed upon each disc, and the maintenance of this price is made a condition of the sale under license. Thus actual notice is given to each purchaser or user of the Victor Company's discs, of the conditions under which they have been sold, and that the article has to do with a patented product. It also appears that a company was organized in Canada by Berliner, who had previously assigned his patent

to the Victor Company, and the Berliner Company, Limited, of Canada, has for a number of years been furnished with matrices of the Victor records, and has put upon the market and sold discs reproduced from these matrices, bearing similar license notices to those used by the Victor Company of this country.

The Fonotipia Limited is a British corporation, and the Columbia Phonograph Company is a corporation organized under the laws of West Virginia; the Fonotipia Limited conducting business in England, and in Italy, Germany, and other places on the Continent of Europe, while the Columbia Phonograph Company carries on its business within the United States. . . .

Particular attention has been called to the trademark of the Victor Company, which, both as a trademark and as an advertisement, in the shape of a dog listening to the sounds from a talking machine horn, and labeled "His master's voice," has become familiar to the public. The methods employed by all of the complainant companies, the uniform care and excellent reproducing qualities of their products (both machines and records), has educated the public to expect the successful reproduction of music of a high standard of quality in the reproduction, and, as shown by the record, the grade of goods produced by the complainant companies upholds the standards which they have established. The public is protected in its purchases by the evenness and excellence of the output.

In addition to the expense and the rights represented by the business indicated, all three of the complainant companies have entered into separate contracts with individual singers and musicians, and particularly in the case of singers under contracts with the so-called "Grand Opera Companies" of New York, Paris, London, Berlin, Milan, etc. Under these contracts with artists able to command large prices, the initial cost of producing the record is great, and the companies are under an agreement to pay a royalty for each record produced from the original matrix, thus furnishing a continuing contract and expense, of which the benefit is going to the singer. . . .

The defendant has been connected with the business of selling phonographs and sound producing machines for a number of years. He is shown by the record to be more or less familiar with the business and to be at present acting as sales agent for a corporation called the Continental Record Company, which is stated in the papers of incorporation to have its home office at New Baltimore, N. Y. The records show that at New Baltimore no plant or office is maintained, but that the company has a local attorney or representative to comply with the requirements of the law. In New York City the only address shown by the testimony as that of the Continental Record Company is the address contained in a bill for certain discs purchased by a representative of one of the complainants. . . . We have therefore no more information about the Continental Record Company and its business than

that which its selling agent has furnished, and what has been discovered by those investigating on behalf of the complainants as above set forth.

The defendant has been for some months advertising by circular letter and in other ways his ability to sell records of the Continental Record Company, stating in these advertisements that the records are sold at prices not more than half those now charged for the original records. The advertisements claim that the records themselves are pressed upon the very highest class of material finished equal to the original, that the character of the record itself is identical with the original record, and that experts who have listened to samples are unable to determine between the original and the copy. The catalogue contains a statement that the records offered by Bradley are "all duplicates from the original records made by the artists whose names are used herein." . . .

The Victor Company has, in addition to its patents and license system, and to its trademark, adopted a design for the center or identifying part of the commercial records, and has made use of a so-called "red seal" to cover the center of its higher grade of records. These centers or seals are made of some foreign substance, applied to the record, containing the labels and notices together with the trademark, and are printed in type. . . . It need only be said that the use of a red band cannot of itself be deemed an imitation of a red label, where the general style of the design is entirely different. The Victor Company does not seem to have the right to prevent, solely from the standpoint of its trademark, the use of a label of any sort affixed to the center of a disc, nor even of a circular label; and the fact that all of the labels are appropriate for use upon sound discs does not give either of the complainant companies right to relief solely from registration of trademark.

It would seem to be true, in a sense (and the evidence tending to show likeness between the original records of the complainant companies and the particular records sold by the defendant only accentuates this testimony), that the records put upon the market by the defendant have been made, through some transmutation, from original songs sung under contract by the artist to whom the disc is accredited, and to whom a royalty is being paid by one of the complainants, and with whom the defendant has no contractual or business relations whatever. In such case it is impossible to hold that the public is being deceived in the representation that the original song, from which the matrices and reproductions were derived, was sung by the artist to whom it is accredited. Certain mistakes in labelling are shown; but these are merely evidence of the way in which the work was done, rather than sufficient grounds for decree by themselves. Nor is there sufficient similarity to hold, as has been said, that the discs sold by the defendant are in appearance sufficiently like any other discs of the complainants as to bring them within the case of *Victor Talking Mach. Co. v. Armstrong et al.*, C. C., 132 Fed. 711. . . .



But before determining whether the complainants can have any remedy under the doctrine of unfair competition, certain questions must be disposed of, which cannot control, and which will complicate the issue if not separately taken up at the outset. First, the defendant contends that the complainants should be compelled to rely upon their patent rights; and inasmuch as their rights under their patents would prevent infringing, making, and sale of discs of the form in question, if their patents be valid, the defendant attempts to urge the converse of the proposition, and asks the court to dismiss this action on the ground that the complainants have an adequate remedy, not at law, but in equity, for infringement of patent. This would necessitate the finding of an additional proposition, namely, that the complainants are not entitled to a decree based upon the doctrine of unfair competition, if they could accomplish the same results by means of an injunction suit upon their patents. But if they should fail in upholding the validity of their patents or proving infringement, or when their patents expire, we should again be facing the same situation now presented, namely, that the doctrine of unfair competition is claimed by the defendant to be limited to cases in which an intent to deceive can be found, either because of misrepresentations or imitation of the trade name or outward appearance of the article over which the competition exists, or that some special quality in the nature of the product renders the sale of the competing article unfair competition, such as was shown in the stock-ticker, trading-stamp, or railroad-ticket cases, referred to below. . . .

But, as has been already said, the question of imitation of trademark cannot control the present case. And we must therefore consider the broad question presented by the issue, namely, whether the taking of property in the shape of valuable ideas and products, by mechanical imitation or reproduction, is susceptible of notice by a court of equity and whether any remedy therefor can exist apart from the questions of patent, trademark, and intentional deception, or imitation and deceitful substitution of the product. . . .

No case cited and decided strictly upon the question of unfair competition, so far as called to the attention of the court, has ever granted relief in instances outside of imitation or deception, and where the public would be likely to be misled by the points of similarity involved; but equity has granted relief in certain typical lines of cases where the doctrine of unfair competition seems to have been the guide to the decision, but where the basis upon which the relief was granted was the unfair taking of the complainant's property, rather than the deception of the purchaser, or the imitation of a patented or copyrighted article, or a registered trademark or trade name.

In the cases of *National Tel. News Co. et al. v. Western Union Tel. Co.*, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805, and *Illinois Commission Co. et al. v. Cleveland Tel. Co. et al.*, 119 Fed. 301, 56 C. C. A. 205, the dissemination of market news by a tape ticker was held not to

be copyrightable; but the Court determined that the business was lawful and involved the use of property which included intangible rights which were capable of illegal or inequitable appropriation and use by another party. The service of news by means of such a tape ticker was protected, and the further sale of the items of news given to the public by the ticker service was enjoined, apparently upon the theory that the appropriation of such property was the taking of that property from the person entitled to the enjoyment thereof. These cases were substantially approved by the Supreme Court of the United States in *Board of Trade v. Christie Grain & Stock Co.*, *supra*, and the Court says:

"The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's" — comparing *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460.

And while the approval by the Supreme Court of the United States in this particular case seems to have been specially given because the acts complained of therein induced a breach of trust, it is difficult to see any distinction between the questions involved in the present litigation and that in the stock-ticker cases.

Another line of cases involving somewhat similar determinations are known as the "ticket-scalper cases," such as: *Bitterman v. Louisville & N. R. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, affirming *Louisville & N. R. Co. v. Bitterman*, 144 Fed. 34, 75 C. C. A. 192; *Penna. Co. v. Bay et al.* (C. C.) 150 Fed. 770; *Illinois Central R. R. Co. v. Caffrey et al.* (C. C.) 128 Fed. 770; *Nashville, C. & St. L. Ry. Co. v. McConnell et al.* (C. C.) 82 Fed. 65. And also the trading-stamp cases. *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.* (C. C.) 128 Fed. 800; *Same v. Louis Weber & Co.* (C. C.) 161 Fed. 219, and cases therein cited.

In the ticket-scalper cases injunctions were granted, not because the purchasers of tickets were deceived by imitation or fraudulent tickets, but because the railroads issuing the tickets were injured by the trade in tickets obtained from them under special contracts, and then sold to other individuals who were not entitled to enjoy those contracts. In the trading-stamp cases, relief was granted, not to the extent of holding that trading stamps could not be transferred, nor upon the ground that persons obtaining trading stamps were being defrauded by a transfer of the right to redeem, but on the theory that the use of trading stamps as premiums, for the sake of soliciting trade by persons not parties to the original contracts under which the Sperry & Hutchinson Company agreed to issue the tickets, was a wrongful appropriation of property rights belonging to the Sperry & Hutchinson Company.

The present case is extremely like these just considered in principle. It is almost as if the Court should be asked to enjoin individuals from theft, upon the ground that the criminal statutes did not make the

taking of the particular kind of property in question larceny, and in cases where equitable relief was therefore appealed to because of the absence of any adequate remedy at law.

The principle involved is far-reaching, especially in that it carries the scope of equitable jurisdiction into matters frequently considered to be purely the result of business competition, and which, even if in themselves morally or financially wrong, are supposed to be without remedy where no contractual relations have existed from which suits for damages could arise. Various statutes have been passed in an attempt by legislation to protect certain classes of rights, such as the recording Acts of the various States, and the lien laws of different jurisdictions. The patent, trademark, and copyright laws of different governments and the history of legislation as well as law, prove that where an act is admittedly wrong in the eyes of the public, and where the interests of individuals are being interfered with by commissions of the acts in question, legislation in the appropriate jurisdiction usually follows, and a legal remedy is created; but such legal remedies must be with relation to a specific class of acts. The jurisdiction of a Court of equity has always been invoked to prevent the continuance of acts of injury to property and to personal rights generally, where the law had not provided a specific legal remedy, and it would seem that the appropriation of what has come to be recognized as property rights or incorporeal interests in material objects, out of which pecuniary profits can fairly be secured, may properly, in certain kinds of cases, be protected by legislation; but such intangible or abstract property rights would seem to have claims upon the protection of equity, where the ground for legislation is uncertain or difficult of determination, and where the principles of equity plainly apply. The so-called "common-law right" in literary property before its publication has long been recognized in the law. After the passage of legislation, literary property was secured, even in the published article, by the various copyright statutes of the different nations. When such a copyright statute has been passed, all property rights in the published article must be secured and controlled by strict compliance with the statute.

It has been held that under the copyright law in effect prior to the 1st day of July, 1909, musical compositions, unless transcribed in print or musical characters, upon paper, were incapable of copyright (*White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655). Since the beginning of the present action, the copyright law has been amended, and since the 1st day of July, 1909, any form of recording or transcribing a musical composition, or rendition of such composition, has been capable of registration, and the property rights therein secured under the copyright statute (Act March 4, 1909, c. 320, 35 Stat. 1075).

It would seem therefore that the questions raised in the present case may be avoided as to future compositions by copyrighting the original

rendition of the song, provided the singer has the right to use it for that purpose, and the disc record by which the rendition is preserved; but question will still remain as to the records produced prior to the present copyright law, and serious discussion may arise over the right obtained, for instance, by a grand opera singer who files a copyright for the resinging of a song already recorded by him or her, and sold to the public upon a disc record. With that we have nothing to do here, and the relief asked in this case would protect those who have already sung or played compositions having a pecuniary value, because of their musical excellence, and also the persons who have invested capital and labor in putting a valuable product upon the market. The education of the public by the dissemination of good music is an object worthy of protection, and it is apparent that such results could not be attained if the production of the original records was stopped by the wrongful taking of both product and profit by any one who could produce sound discs free from the expense of obtaining the original record. . . .

Reference has been made to the rights of a photographer who should make a film for moving pictures, of some historical or unique occasion, and should sell the film to parties who should reproduce it in a moving-picture machine. Other parties might make pictures from the film, or from the exposures, and a question, in some respects, similar to the present, might be involved. A dressmaking establishment might employ high-priced designers, and their product might be copied, and the designs thus appropriated. Architects might build houses and utilize extremely valuable methods and ideas, and others building houses might follow these ideas. Sculptors might carve statues of great commercial value, and stone carvers might copy these sculptures.

It cannot now be determined how far such appropriation of ideas could be prevented; but it would seem that where a product is placed upon the market, under advertisement and statement that the substitute or imitating product is a duplicate of the original, and where the commercial value of the imitation lies in the fact that it takes advantage of and appropriates to itself the commercial qualities, reputation, and salable properties of the original, equity should grant relief.

That is the particular proposition presented in the present case, and to that extent it seems to the Court that the principles applied in the stock-ticker and similar cases above recited should be followed, and relief by injunction granted.<sup>1</sup>

<sup>1</sup> [NOTES :

"Infringement: musical composition." (C. L. R., V, 615.)

"Infringement: of musical composition by perforated roll." (H. L. R., XIX, 134.)

"Common law rights: Musical composition." (H. L. R., XX, 327.)

"Copyright : Mimicry as infringement of musical composition." (M. L. R., II, 480.)]

## · SUB-TOPIC D. STAGE-RIGHT

212. TOMPKINS *v.* HALLECK

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882

133 *Mass.* 32

DEVENS, J. This is a bill in equity to restrain the defendant from representing at his theatre in Boston a drama called "The World," and for further relief.

It appears from the report of the judge who heard the case that this drama was originally composed in England, where, after being presented, it was sold to one Colville in New York, who caused it to be altered and amended, to suit the presumed taste of an American audience, by one Stevenson. It was successfully represented at Wallack's Theatre in New York, and was then assigned to the plaintiffs, with the exclusive right to represent the same in the New England States. The drama does not appear ever to have been copyrighted or printed. While represented at Wallack's Theatre, one Byron and one Mora attended the representation, on three or more occasions, with the intent of copying and reproducing the drama as there enacted. Byron committed as much of the play as he could to memory, and, after each performance, dictated it to Mora until the copy was completed. It was not shown that either took any notes or written memoranda in the theatre. Byron subsequently made an agreement with the defendant to produce the same; and, against the remonstrance of the plaintiffs, who informed him of their ownership, it was advertised and produced by the defendant at his theatre, known as the Alhambra. As produced by the defendant it was called "The World," and is found to be in all substantial particulars identical with the plaintiff's drama of the same name.

It being found by the judge who heard the cause that the dialogue and incidents of the drama were acquired by memory by Byron, who visited Wallack's Theatre sufficiently often for that purpose, that no written or stenographic minutes were made either by him or Mora in the theatre, and that there was no violation of any trust or confidence reposed in them by the plaintiffs or their assignors, he ruled that no injunction could issue; but, at the request of the plaintiffs, reported the case for the consideration of the full Court. If the ruling is sustained, the bill is to be dismissed; otherwise, an injunction is to issue, and the case to be referred to a master for the assessment of damages.

These facts bring the case clearly within the principles decided in *Keene v. Kimball*, 16 Gray, 545; and it is frankly admitted by the counsel for the plaintiffs that, unless that decision shall be reconsidered and reversed, no injunction can issue according to the prayer of the

bill. The question decided in *Keene v. Kimball* had never until then been directly determined in any reported case. It had been discussed with great ability by Judge Cadwalader in the Circuit Court of the United States for the Eastern District of Pennsylvania, where a decision of it was not necessary in order to dispose of the case before him. *Keene v. Wheatley*, 9 Am. Law Reg. 33. Adopting the views there expressed, it was held in *Keene v. Kimball*

"that the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others as they may be enabled, either directly or secondarily, to make from its being retained in the memory of any of the audience."

The case of *Keene v. Kimball* has not since been reaffirmed here, nor, so far as we are aware, elsewhere. . . .

An examination will show various and conflicting opinions expressed by jurists, as well as by text-writers of high respectability, upon the question involved. *Keene v. Clarke*, 5 Rob. (N. Y.) 38. *Palmer v. De Witt*, 2 Sweeny, 530; 7 Rob. (N. Y.) 530; 36 How. Pr. 222; and 47 N. Y. 532. *Crowe v. Aiken*, 2 Biss. 208. *Shook v. Rankin*, 6 Biss. 477. *Boucicault v. Fox*, 5 Blatchf. (C. C.) 87. Drone on Copyright, 558-564.

In view of this contrariety of opinion, it is not an unreasonable request on the part of the plaintiffs that the question involved should be re-examined, in order that the Court may consider whether the decision in *Keene v. Kimball* expresses correctly the rights of parties, and gives to the proprietors of unpublished plays the full protection to which they are entitled.

The St. of 8 Anne, c. 19, which is the foundation of the English copyright law, while it included plays and dramatic compositions, protected the author in his exclusive right to publish in print, but not in that of public representation of his work. It has since been modified by the St. 3 & 4 Will. IV, c. 15, and subsequently by that of 5 & 6 Vict., c. 45. The U. S. St. of February 3, 1831, was similar in this respect to the original English law, and, like it, has been so changed by the U. S. St. of August 18, 1856, that protection in the exclusive representation is now afforded where the play is published in print. It is perhaps somewhat remarkable that protection in the right of exclusive representation was not afforded by the St. of 8 Anne, c. 19, which is said in *D'Almaine v. Boosey*, 1 Y. & C. Ex. 288, by Lord Lyndhurst, to have been one of the most laboriously considered Acts ever passed by the British Parliament. Although the result of the petitions of the English booksellers, it was submitted to, and carefully examined and passed upon by, committees of which many distinguished literary men were members. When it is remembered that among them were such dramatic writers as Addison and Steele, it would seem that this right would have been carefully guarded.



Dramatic compositions differ from other literary productions not intended for oral delivery in this, that they have two distinct values, each worthy of protection; — that which they have as books or publications for the reader, and that which they have by reason of their capacity for scenic representation. They are works, in prose or poetry, in which stories are told or characters represented both by conversation and action. Some are poems cast in a dramatic form, capable of representation upon the scene rather than adapted to it, and whose most valuable characteristic is their purely literary merit. Others, of but slight literary pretensions, and affording but little satisfaction in the perusal, are found agreeable in representation from the spirited development of the story which is told in action, the vivacity and interest of the events displayed, even if the conversations of the imaginary characters, out of this connection, would appear tame and unattractive. The most perfect are those which, like some of the tragedies of Shakespeare, as *Hamlet* or *Macbeth*, are adapted alike to the library and the stage, and which address themselves more agreeably to those who read or those who hear, as such persons themselves differ in their respective capacities for enjoyment.

That the right of property which an author has in his works continues until by publication a right to their use has been conferred upon or dedicated to the public, has never been disputed. If such publication be made in print of a work of which no copyright has been obtained, it is a complete dedication thereof for all purposes to the public. *Wheaton v. Peters*, 8 Pet. 591. *Stevens v. Gladding*, 17 How. 447. If of a work of which a copyright has been obtained, it is so dedicated, subject to the protection afforded by the laws of copyright, the author accepting the statutory rights thereby given in place of his common-law rights. But the representation of an unprinted work upon the stage is not a publication which will deprive the author or his assignee of his rights of property therein. *Roberts v. Myers*, U. S. C. C. Mass. Dist. 23 Law Rep. 396. It will not interfere with his claim to obtain a copyright therefor. *Keene v. Kimball*, *ubi supra*. Nor will it deprive him of his power to prevent a publication in print thereof by another. *Macklin v. Richardson*, Ambl. 694.

Nor can we perceive why it should deprive him of his right to restrain the public representation thereof by another. . . . Postponing for a moment the question as to what is unlawfully obtaining a copy of a play which has not been copyrighted, and which has been exhibited for money, and whether there is a distinction between the representation from a copy obtained by memory and from one obtained by stenography or similar means, the proposition that the representation of such a play, the copy of which has been unlawfully obtained, will be restrained by injunction, is certainly supported by much authority since the case of *Keene v. Kimball* was decided, nor has it been controverted by the adjudication of any case. *Boucicault v. Fox*, *ubi supra*. *Shook v.*

Daly, 49 How. Pr. 366. French *v.* Maguire, 55 How. Pr. 471. Shook *v.* Rankin, *ubi supra*. Crowe *v.* Aiken, *ubi supra*. Palmer *v.* DeWitt, *ubi supra*. Boucicault *v.* Wood, 2 Biss. 34. . . .

In Keene *v.* Kimball, it is said that it is not intended

“to intimate that there is any right to report, phonographically or otherwise, a lecture or other written discourse, which its author delivers before a public audience, and which he desires again to use in like manner for his own profit, and to publish it without his consent, or to make any use of a copy thus obtained.”

But no distinction can be made between works cast in the dramatic form and other literary productions intended for public delivery to those who pay a suitable compensation for the amusement or instruction they expect to obtain. The right to be protected against the unauthorized representation of a dramatic work is in principle the same as the right to be protected against the unauthorized oral delivery of a public lecture. . . . The late Mr. Charles Dickens was an accomplished public reader of selections from his own works. If he had selected a story which had never been published or copyrighted, according to the suggestion above quoted from Keene *v.* Kimball, there would have been no right on the part of an auditor to report it, phonographically or otherwise, so as to avail himself of the copy by a subsequent oral delivery by himself or another to whom he might transfer it. The genius of Mr. Dickens was essentially dramatic; if he had seen fit to prepare and read himself, as he might have done, a drama, representing its various characters, such a literary production would not have been any less protected than a written discourse or lecture. Nor can it be perceived that, if, instead of reading such a drama himself, he had permitted it to be represented on the stage, which is but a reading by several persons instead of one, accompanied by music, scenery, and the usual accessories of the stage, his rights as an author to protection would be in any way diminished. Boucicault *v.* Fox, *ubi supra*.

The decision in Keene *v.* Kimball must be sustained, if at all, upon the ground that there is a distinction between the use of a copy of a manuscript play obtained by means of the memory or combined memories of those who may attend the play as spectators, it having been publicly represented for money, and of one obtained by notes, stenography, or similar means, by persons attending the representation;—that in the former case the unauthorized representation of the play would be legal, while in the latter it would not be. The case of Keene *v.* Kimball involved a controversy as to the right to represent the same play, the right of representing which was involved in Keene *v.* Wheatley, *ubi supra*. . . . The opinion of the Circuit Court, as delivered by Judge Cadwalader, is a very elaborate discussion of the whole subject of literary property, and embraces many questions not involved in the judgment of the case. Among these is included the question, whether

a public representation will authorize another, who may obtain a copy by memory, to afterwards represent the play so performed. The theory advanced by him, which was apparently original, and in support of which he cites no adjudicated case, is that the act of public performance of a play is a general publication; and that,

“when a literary proprietor has made a general publication in any of the modes which have been described, other persons acquire unlimited rights of republishing in any modes in which his publication may directly or secondarily enable them to republish.”

If this be correct to the full extent of the proposition, the manner in which a copy is obtained for other representations must be unimportant, as the right to subsequently represent is made to rest upon the fact that there has been a public representation. But in order that the play shall be thus represented, he contends that a copy must be obtained by “fair means.” Those which he defines as “fair means” are the impressions on the memory of some persons whose constant attendance at the performance of the play may enable them to write or repeat elsewhere that which they have heard; but he holds that no one may lawfully make use, for this purpose, of stenography, writing, or notes. According to the facts as they were proved in *Keene v. Kimball*, by the allegations of the bill and the admission of the demurrer, the copy there used for representation was obtained solely by memory.

Judge Cadwalader further remarks,

“that the manager of a theatre may prevent a reporter from noting the words of such a play phonographically or stenographically, or otherwise. As one of the audience, he would, in doing so, transgress the privileges conceded in his admission. But the privileges of listening and of retention in the memory cannot be restrained. Where the audience is not a select one, these privileges cannot be limited in either their immediate or ulterior consequences.”

The effect of this argument is that, as the privilege of listening is conceded, and as memory cannot be restrained, any use of memory would be legitimate; and that a spectator, either alone or acting in concert with others, if able to carry away in memory the contents of a play, acquires a lawful right to make any use of the play he chooses, however destructive to the literary property of its author. . . .

The theory that the lawful right to represent a play may be acquired through the exercise of the memory, but not through the use of stenography, writing, or notes, is entirely unsatisfactory. “The public,” it is true, as is said in *Keene v. Kimball*, “acquire a right to the extent of the dedication, whether complete or partial, which the proprietor has made of it to the public.” But the question is as to the extent of that dedication. It is not easy to understand why the author, by admitting the public to the performance of his manuscript play, any more concedes to them the right to exercise their memory in getting possession of his play for the purpose of subsequent representation, than he does

the privilege of using writing or stenography for that purpose. Drone on Copyright, 568, 569. The spectator of a play is entitled to all the enjoyment he can derive from its exhibition. He may make it afterwards the subject of conversation, of agreeable recollection, or of just criticism, but we cannot perceive that in paying for his ticket of admission he has paid for any right to reproduce it. The mode in which the literary property of another is taken possession of, cannot be important. The rights of the author cannot be made to depend merely on his capacity to enforce them, or those of the spectator on his ability to assert them. One may abandon his property, or may dedicate it to the use of the public; but while it remains his, the fact that another is able to get possession of it in no way affects his rights. If the performance of a manuscript play is not a complete dedication to the public, (and from the time of the decision in *Macklin v. Richardson*, *ubi supra*, there is no case known to us which has so held), subsequent performances by others, whether they obtain their copies by memory or by stenography, are alike injurious. Cases are not unknown of memories so tenacious that their possessors could, by attending one or two representations, retain the text of an entire play; and the dramatic profession is one in which the faculty of memory is highly cultivated. There is no reason why the exercise of this faculty should be in any way restrained; it is not that the spectator learns the whole play which entitles the author to object; it is the use that is sought to be made of that which is learned that affords just ground of complaint. "Such use," as remarked by Judge Monell, "is as much an infringement of the author's common-law right of property, as if his manuscript had been feloniously taken from his possession." *Palmer v. De Witt*, 2 Sweeny, 558. . . .

The acts done by these persons like those proved in *Keene v. Kimball*, were, as we view them, in a legal sense violations of contract and confidence. The author had a right to believe that, in purchasing their tickets of admission, these persons did so for the pleasure or instruction that the performance of his drama would afford, and they did not do so in order to invade his privilege of representation, which, as it was of value, he must have desired to preserve. The lectures of an accomplished medical professor are of high pecuniary value. They are repeated from year to year before different classes, with only such changes as advancing science may require, or such new illustrations as experience may dictate. The student is not only permitted, but invited, to take written notes. He is entitled to all the instruction he can obtain from the lectures, using both notes and memory to retain it; he may employ the information he has derived in his practice; he may reproduce it in his own discourses, with such other information as his education or experience may give him, should he desire himself to discuss a similar subject; but he cannot therefore orally deliver or publish in print the lecture of which he has been an auditor. Where persons are admitted, as pupils or otherwise, to hear public lectures, it is upon the implied

confidence and contract that they will not use any means to injure or take away the exclusive right of the lecturer in his own lectures, whether that be to publication in print or oral delivery. *Abernethy v. Hutchinson*, 3 L. J. Ch. 209, was a bill brought by the celebrated surgeon Abernethy to restrain the defendants from publishing his lectures. It was held by Lord Eldon, that, while those pupils who were rightfully admitted to the lectures might take them down for their own information, they could not publish them for profit, or sell them to others to publish. *Bartlette v. Crittenden*, 4 McLean, 300, goes even further. . . . The implied contract of the author of a play, which is not printed or copyrighted, with the spectator, is closely analogous to that of the lecturer with his pupil. It is a violation of contract and confidence when the spectator, obtaining possession of a copy of the drama, whether by memory, notes, or stenography, undertakes to use it for publication in print, or for another public representation. 2 Story Eq. Jur. §§ 949, 950. . . .

The ticket of admission is a license to witness the play, but it cannot be treated as a license to the spectator to represent the drama if he can by memory recollect it, while it is not a license so to do if the copy is obtained by notes or stenography. In whatever mode the copy is obtained, it is the use of it for representation which operates to deprive the author of his rights.

For the reasons stated, we are brought to the result that the decision in *Keene v. Kimball* cannot be sustained. The presiding judge having, at the hearing of this case, ruled in accordance with it, his decree must be reversed.

The plaintiffs are entitled to a decree restraining the defendant from exhibiting the play called "The World," and referring the case to a master to assess the damages sustained by them by reason of its unauthorized exhibition by the defendant. *Decree reversed.*

*S. J. Thomas*, for the plaintiffs.

*D. F. Fitz*, for the defendant.

## 213. FROHMAN v. FERRIS

SUPREME COURT OF ILLINOIS. 1909.

238 *ILL.* 430, 87 *N. E.* 327

ERROR to Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Bill by Charles Frohman and others against Richard Ferris for an injunction and other relief. There was a judgment of the Branch Appellate Court for the First District reversing a decree of the Circuit Court, and plaintiffs bring error. Judgment of Appellate Court reversed, and decree of Circuit Court affirmed.

For prior report, see 131 Ill. App. 307.

This is an appeal from a judgment of the Appellate Court reversing a decree of the Superior Court in a proceeding begun in the Circuit Court by plaintiffs in error for an injunction and other relief against defendant in error.

There is no controversy as to the facts. In 1894 Charles Haddon Chambers and B. C. Stephenson, dramatic authors and playwrights, citizens and residents of London, England, created and invented a dramatic composition entitled "The Fatal Card." Said composition was original with said Chambers and Stephenson, possessed considerable literary merit, and was of substantial value to the authors as a literary product. It was a melodrama in five acts, written in manuscript form, and was never printed. It was with the consent of the authors publicly performed at the Adelphi Theater, London, England, September 6, 1894, by A. and S. Gatti, theatrical managers, who had acquired an interest from the authors in the royalties to be derived from a performance of the play. Plaintiff in error Charles Frohman is a citizen of the United States, and on March 25, 1895, purchased all the right, title, and interest of Stephenson in said melodrama, with the exclusive right to produce and perform it in the United States of America and Canada. The play was never copyrighted in the United States. It was publicly produced under the supervision of Frohman in cities of the United States and Canada and appears to have met with popular favor and to have been a success financially. Afterwards George E. MacFarlane adapted the composition of Chambers and Stephenson, called it by the same name, "The Fatal Card," and transferred it to defendant in error, who caused it to be copyrighted in the United States, and thereafter produced and performed it in various cities of the United States until enjoined from so doing under the bill filed in this case. It is not denied that the master's conclusion that the MacFarlane play is "substantially identical with the play claimed by the complainants" was justified by the evidence.

The bill alleged that at the time Ferris obtained from MacFarlane the pirated copy of "The Fatal Card" he had full knowledge of complainants' rights; that he deceived the public by inducing them to believe that the play produced was the play of said Charles Frohman and his associates; that he made large profits by the production of said play, to the injury of the complainants, and the bill prayed for an accounting, and that the further production of the play by defendant in error be enjoined. After answer and replication filed, the case was referred to a master in chancery to take the testimony and report his conclusions of law and fact. The master reported that in his opinion complainants failed to establish an exclusive right to produce the play in the United States, and that the prayer of their bill should be denied and the bill dismissed. Objections to this report filed by the complainants were overruled by the master, and the cause was heard by



the chancellor on the report of the master and exceptions filed thereto by complainants. A decree was entered disapproving the master's report, and finding that complainants had the exclusive right in the United States to represent and perform, and to allow others to represent and perform, the said melodrama, "The Fatal Card," and to otherwise use and enjoy the same, and it was ordered that the temporary injunction theretofore issued be made perpetual, and that the defendant, Ferris, account to the complainants for the profits and royalties received by him through the production of the play. From this decree the defendant prosecuted an appeal to the Appellate Court for the First District, and that Court reversed the decree of the Superior Court and remanded the case, with directions to dismiss the bill. Complainants in said bill have sued out a writ of error from this Court to review the judgment of the Appellate Court.

*Mayer, Meyer & Austrian*, for plaintiffs in error: The public performance, in England, of a manuscript play, which under the English statute is made a publication and deprives the author of his common-law right of exclusive representation, does not deprive the English author of such common-law right in this country, where public performance is not deemed a publication. . . . At common law and before the passage of copyright statutes an author had an exclusive property right in his manuscript. . . . The public performance of a manuscript drama is not in this country a publication of the drama, but the author still retains his common-law right to its exclusive representation. A different rule prevails in England by the statutes 3 & 4 William IV, c. 15; 5 & 6 Victoria, c. 45, sec. 20; . . . The *lex domicilii* cannot fix the status of literary property where the author seeks to enforce rights in respect thereto in a foreign country. . . .

*Aldrich & McRoberts*, and *L. E. Chipman*, for defendant in error: The protection given to copyrights in this country is wholly statutory. . . . A play is peculiar property, — an intangible chose in action, — personal in character, as distinguished from real or mixed, and is governed by the *lex domicilii*. . . . Publication puts an end to common-law rights and all rights of the author or proprietor, unless he at the same time takes steps to initiate and secure statutory rights. . . . The two rights do not coexist in the same composition. . . . There can be but one publication, and it makes no difference where this is made, if with the consent of the author or proprietor. . . . The statute 5 & 6 Victoria, (c. 45, sec. 20,) makes public performance of a dramatic work, with the author's or owner's consent, equivalent to the first publication of a book.

FARMER, J. (after stating the facts as above). Plaintiffs in error base their exclusive title and right to perform said play upon what they contend to be their rights under the common law. Defendant in error contends that the public performance of the play in England with the consent of its authors, without causing it to be copyrighted in this coun-

try, was, so far as this country is concerned, such an act of dedication to the public as to extinguish the common-law rights of the authors or their assignees in the United States. At common law the author of a literary composition had an absolute property right in his production which he could not be deprived of so long as it remained unpublished, nor could he be compelled to publish it. This right of property exists at common law in all productions of literature, the drama, music, art, etc., and the author may permit the use of his productions by one or more persons to the exclusion of all others and may give a copy of his manuscript to another person without parting with his property in it. Drone on Copyright, p. 101 et seq.

"So, also, without forfeiting his rights, he may communicate his work to the general public, when such communication does not amount to a publication within the meaning of the statute. . . . It may be transmitted by bequest, gift, sale, operation of law, or any mode by which personal property is transferred."

Id. 104. Upon the publication of the production the author's common-law rights ceased, and it became public property unless protected by statute.

To protect the rights of authors in their productions after publication, statutes, in various countries have been enacted. Prior to 1891 an alien could not under the copyright statutes in the United States obtain a copyright upon his production, and the publication by an author in a foreign country by printing his production was held to have the effect of destroying his common-law rights in his production in this country and it became public property here. In March 1891, Congress passed an Act which extended to citizens of foreign countries the privilege of copyright in this country which such foreign countries granted the same privilege to citizens of the United States, and the statute provided that the existence of the conditions that authorized citizens of foreign countries to avail themselves of the privileges of copyright in this country "shall be determined by the President of the United States by proclamation made from time to time, as the purposes of this Act may require." Act March 3, 1891, c. 565, § 13, 26 Stat. 1110 (U. S. Comp. St. 1901, p. 3417). On July 1, 1891, the President of the United States by proclamation announced that the laws of Great Britain and the British possessions permitted citizens of the United States the benefit of copyright on substantially the same basis as citizens of those countries, and the Act of Congress therefore became effective and its benefits available to citizens of Great Britain and the British possessions. . . . There is no provision in our statute for securing to the author of a drama the exclusive right to perform it except where the drama is printed in a book, but the common-law rights apply in such cases, and the author does not lose his rights in the production by public representation. Drone on Copyright, p. 119.

The English statute of 3 & 4 William IV, c. 15, which was amen-

datory of an Act passed in the thirty-fourth year of the reign of his late majesty King George III, . . . was amended by St. 5 & 6 Victoria, c. 45, passed in 1842, which was a comprehensive enactment covering the subject of copyright in England. . . . The effect of these statutes was to substitute, after the first publication, for the common-law right of the author the statutory right to represent or perform his production for the period limited by the statute. The public performance of the play in England had the effect of divesting the authors of their common-law rights, and investing them with the right conferred by the statutes. The Act of 5 & 6 Victoria, above quoted, provides

“that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act, to the first publication of any book.”

Before the adoption of said Act the public performance of a dramatic piece was not equivalent to the publication of a book, and, as we have said, the common-law rights of the author were unaffected thereby. When the statutory conditions were complied with, the rights conferred thereby attached and the common-law rights ceased. . . .

It is not disputed that a performance of “The Fatal Card” in England was, by the statute referred to, a publication, and that in that country the author’s common-law rights thereupon ceased. Defendant in error contends that, when the authors of the drama surrendered their common-law rights in England for the rights conferred by the statutes, they ceased to have any common-law rights in the production in England or elsewhere. The plaintiffs in error contend that as under our laws the performance of the manuscript drama is not a publication of it, and does not deprive the author of his common-law rights, and, as our statute provides no means for copyrighting a drama unless it is printed and published in a book, our Courts in deciding what is such a publication as to divest the author of his common-law rights are not to be governed by what the English statute declares shall constitute a publication thereof. It is not by virtue of any statute that it has been decided the publication of a book, either in this country or in England, is a surrender by the author of his common-law rights and a dedication to the public unless protected by copyright under the statute. The basis of such decisions is that by causing the book to be printed without the protection of the copyright, the author is deemed to have relinquished all rights, both common law and statutory, and to have dedicated his production to the public; and this applies to books published in foreign countries as well as in this country. In the absence of the provision of the English Act referred to, that the first public representation or performance of a dramatic piece shall be deemed equivalent, in the construction of that Act, to the first publication of a book, it could not be claimed that the performance of “The Fatal Card,” in England was a publication any more than would its performance in this country,

while it remained unprinted, be deemed a publication. The object of copyright statutes is to protect the authors' rights to their own productions. There is no international copyright law or agreement between this country and England providing for the copyrighting of manuscript dramas, and we have seen "The Fatal Card" could not have been copyrighted in this country without printing.

In *Drone on Copyright* the author says, there are essential differences between the right to multiply and dispose of copies of an intellectual production and the right to represent a literary or musical composition, though both are often called copyright. On page 553 the author says:

"A dramatic composition is capable of two distinct public uses: It may be printed as a book and represented as a drama. With respect to the former use there is no distinction, in law, between a dramatic and any other literary composition. The exclusive right of multiplying copies is called copyright. But this does not embrace the right of representation. As these two rights are wholly distinct in nature, it is not only important, but necessary, that they should be distinguished in name. The property in a dramatic composition is often called dramatic copyright. But this expression is faulty and inaccurate. If it refers to the exclusive right of printing a drama, it would be equivalent to the name poetic copyright, prose copyright, or historical copyright as applied to works in poetry, prose, or history. If its use is restricted to the right of representing a drama, it is not accurate, because this is not a right to multiply copies in the proper meaning of that expression, and cannot, therefore, strictly be called copyright. If it is intended as a name for both rights together it can serve only to increase the confusion which should be wholly removed. The sole liberty of publicly performing a dramatic composition might more properly be called dramatic right or acting right. The expression 'stageright,' coined by Charles Reade, is not uncommon, but there are objections to this word with respect both to its formation and the purpose which it is required to serve. I have adopted 'playright,' as being, in my judgment, the best name for the purpose. It is a convenient, euphonious word, and its formation is analogous to that of copyright. As the latter word literally means the right to copy a work or the right to the copy, so playright means the right to play a drama or the right to the play; and it may properly be used to mean not only the right of representing a play, but also the right of performing a musical composition."

It would seem, therefore, that there is a logical distinction to be observed in dealing with the effect upon the authors' rights of the public performance of an unprinted drama and the publication of a printed book. It is not contended that the English statute has any extraterritorial effect, but, as we have said, the contention is that, as under the English statute a performance of the drama was made a publication of it so that the authors' common-law rights ceased and their statutory rights attached in that country, it necessarily follows that the authors and their assignees can claim no common-law right in this country.

A case much in point upon the question here involved is *Crowe v. Aiken*, 2 Bliss, 208, Fed. Cas. No. 3,441. That was, like this, a bill to enjoin the defendant, the manager of a theatre in Chicago, from

producing a play owned by the complainant. The play was a drama entitled "Mary Warner." Its author, Tom Taylor, was a subject of the queen of Great Britain. . . .

*Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480, was also a bill for an injunction to restrain the defendant from representing at his theatre in Boston a drama called "The World." . . . In *Palmer v. De Witt*, 2 Sweeney, 530 (40 How. Prac. 293, affirmed 47 N. Y. 532, 7 Am. Rep. 480), an English author of a drama sold to complainant prior to February 1, 1868, the exclusive right to perform and print it throughout the United States. . . .

Defendant in error contends that *Crowe v. Aiken* and *Palmer v. De Witt*, supra, are not in point, for the reason that the author in each of those cases had assigned to the complainant his rights in America before the first public representation of the play in England. Neither of those decisions appears to be based on any such distinction, and in the former it was distinctly stated that a definition of a representation by the British statutes is not operative as such in this country. . . .

In *Boucicault v. Delafield*, 1 H. & M. 597, and *Boucicault v. Chatterton*, 5 L. R. Ch. Div. 267, the English courts held that the performance of a drama in the United States should be considered as a publication. These cases were decided subsequent to the passage of St. 5 & 6 Victoria, and subsequent to the passage of St. 7 & 8 Victoria, c. 12. Section 19 of the latter Act provided that the author of a dramatic piece which should be first published out of her majesty's dominions should have no copyright therein nor any exclusive right to the public representation or performance thereof. In both the cases referred to *Boucicault* was the author of dramas that had been first performed in this country and sought to prevent their production in England by persons acting them without his consent or authority. He was denied the relief asked on the ground that the public representation of the dramas in this country was a publication of them, and by the nineteenth section of 7 & 8 Victoria he was not entitled to the protection of the British statutes, and it was said that this was true whether the author of the play was a British subject or an alien. It would follow, therefore, that, if "The Fatal Card" had been first performed in this country, the English courts would have treated it as a dedication to the public and to have had the effect of divesting the author of any rights whatever, under the laws of England, to its exclusive production.

As the English decisions appear to be based upon provisions of the statute referred to, and there is no such statute in this country, we are of opinion they are not decisive of the question here involved, and this view is sustained, we think, by the cases first above cited. . . . Judge Drummond said in *Crowe v. Aiken*: "I understand that it has been decided in England that the public performance, even in a foreign country, of the play of which an English subject is the author, defeats his claim to the copyright under the British statutes." From this ex-

pression it would seem clear that the author of the opinion was familiar with the doctrine announced in the *Delafield Case*, so that the opinion in that respect could not have been based upon any misapprehension. To our minds it is squarely in point and its reasoning sound. Besides, it is in harmony with sound principles of justice, and we are disposed to follow it rather than adopt the rule that we are bound by the decisions of the English courts made under their statute.

The judgment of the Appellate Court will therefore be reversed, and the decree of the Superior Court affirmed. *Judgment reversed.*<sup>1</sup>

## 214. HARPER & BROTHERS v. KALEM COMPANY

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT. 1909

169 *Fed.* 61

APPEAL from the Circuit Court of the United States for the Southern District of New York.

*Drury W. Cooper and Frank L. Dyer*, for appellant.

*Dittenhoefer, Gerber & James (David Gerber, of counsel)*, for appellees Klaw & Erlanger.

*John Larkin*, for appellees Harper & Bros. and L. Wallace.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, *Circuit Judge*. The late Gen. Lew Wallace wrote a story called "Ben Hur," the copyright of which belongs to the complainants Harper & Bros. The complainants Klaw & Erlanger caused the story to be dramatized, and Harper & Bros. duly copyrighted the dramatization and thereupon granted Klaw & Erlanger the sole right of producing the same upon the stage. The defendant the Kalem Company also employed a writer to read the story, without having any knowledge of

### <sup>1</sup> [PROBLEMS :

Messrs. Gilbert and Sullivan wrote in England the opera of "Iolanthe," consisting of a libretto of words, voice music for singing, and an orchestral arrangement of music for accompaniment; the composers' rights were assigned to the plaintiff. The orchestration of the music remained in manuscript. But a full libretto of the words, a full score of the voice, and a piano arrangement of the accompaniment, were published by the composers' license, without registration, in the United States. The defendant caused the piano score to be re-written for orchestral instruments, and performed the opera by this means. Can the performance with orchestral music be enjoined? (1883, *Carte v. Ford*, 15 *Fed.* 439.)

The plaintiff owned and performed an uncopyrighted play called "Sherlock Holmes." The defendant prepared and performed a similar play entitled "Sherlock Holmes the Detective." Can the defendant's performance be prevented? (1903, *Hopkins Amusement Co. v. Frohman*, 202 *Ill.* 541, 67 *N. E.* 391.)]

### [ESSAYS :

*Edward S. Rogers*, "Dramatic Copyright." (*M. L. R.*, I, 102, 179.)

### NOTES :

"Dramatic compositions." (*C. L. R.*, VIII, 589.)]



the copyrighted drama, and to write a description of certain portions of it. It then produced persons and animals, with their accoutrements, to perform the actions and motions so described. During this performance a film of celluloid was rapidly moved across the lens of a highspeed camera, on which a series of negative photographs were taken, from which a positive film suitable for exhibition purposes was reproduced. These positive photographs were contained on one film, about 1,000 feet long, which, being driven at great speed across the lens of an exhibiting machine, projects all the motions of the original actors and animals in succession upon a screen. The defendant advertises this film as suitable for giving public exhibitions of the story of Ben Hur, and sent advertisements to, among other persons, proprietors of theatoriums. At least 500 exhibitions have been given in such theatoriums; an entrance fee being charged. The defendant did not reproduce the whole story, but only certain of the more prominent scenes, such as the wounding of the Roman procurator, Ben Hur in the galleys, the chariot race, and others. It does not itself give any public or private exhibitions, but simply sells or licenses the use of the films. A final decree granting a perpetual injunction was entered in the Court below, from which this appeal is taken.

Section 4952, Rev. St. U. S., gives the author of a book, and his assigns, not only the sole right of printing, but also the sole right of dramatizing it, and in case of a dramatic composition the sole right of performing or representing it publicly. Section 4964 subjects any one who shall dramatize a copyrighted book without the written consent of the proprietor to the payment of damages. Section 4966 provides that any one who publicly performs or represents a copyrighted dramatic composition without the owner's consent shall be liable for damages not less than \$100 for the first and \$50 for every subsequent performance, and if his conduct be willful and for profit he shall also on conviction be imprisoned for not exceeding one year.

Two questions are raised: First. Did the defendant, by taking this series of photographs, dramatize Ben Hur, in violation of Harper & Bros.' sole right to dramatize the book under section 4952? Second. Is the exhibition of these photographs by means of an exhibiting machine in theatoriums, where an entrance fee is charged, a public performance or representation of a dramatic composition, in violation of the rights of Harper & Bros., as owners of the copyright of the book and of the dramatic composition, and of the rights of Klaw & Erlanger, as owners of the performing right, under section 4966?

There may be several dramatizations of the same story, each capable of being copyrighted. Harper & Bros., having given Klaw & Erlanger the sole right of performing the particular copyrighted drama, can give some one else the sole right of performing a different dramatic composition of the story (Drone on Copyright, p. 597); whereas, Klaw & Erlanger, who are the owners only of the right publicly to perform the

particular copyrighted drama, have no right to make another dramatization. Consequently infringing the copyrighted drama is a different thing from infringing the owner's right to dramatize the copyrighted book.

Answering the first question: The series of photographs taken by the defendant constitutes a single picture, capable of copyright as such (*Edison v. Lubin*, 122 Fed. 240, 58 C. C. A. 604; *American Mutoscope Co. v. Edison* [C. C.] 137 Fed. 262); and as pictures only represent the artist's idea of what the author has expressed in words (*Parton v. Prang*, 3 Cliff. 537, Fed. Cas No. 10,784), they do not infringe a copyrighted book or drama, and should not as a photograph be enjoined. This distinction between infringement of a copyright of a book and of the performing rights is like the distinction in respect to an infringement between perforated music rolls and sheet music discussed in the case of *White-Smith Co. v. Apollo Co.*, 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655, where the court said:

"There is no complaint in this case of the public performances of copyrighted music, nor is the question involved whether the manufacturers of such perforated music rolls, when sold for use in public performances, might be held as contributory infringers."

Coming now to the second question: When the film is put on an exhibiting machine, which reproduces the action of the actors and animals, we think it does become a dramatization, and infringes the exclusive right of the owner of the copyrighted book to dramatize it, as well as his right as owner of the copyrighted drama, and of Klaw & Erlanger's right as owners of the performing right publicly to produce it. In other words, the artist's idea of describing by action the story the author has written in words is a dramatization. It is not necessary that there should be both speech and action in dramatic performances, although dialogue and action usually characterize them. Judge Blatchford said on this point, in *Daly v. Palmer*, 6 Blatchf. 256, Fed. Cas. No. 3,552:

"To act, in the sense of the statute, is to represent as real, by countenance, voice, or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking — if such be his part of the play — is none the less an actor in it than one who, in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words."

And this Court, in the case of *Daly v. Webster*, 56 Fed. 483, 4 C. C. A. 10, said:

"Upon the main point of the case, namely, whether the combination or series of dramatic events (apart from the dialogue) which makes up the particular scene or portion of the play claimed to be infringed is a dramatic composition, and as such entitled to protection under the copyright laws, it is necessary to add but little to the exhaustive opinion of Judge Blatchford, reported in *Daly v. Palmer*, 6 Blatchf. 256, Fed. Cas. No. 3,552. The same scene in the same play

is elaborately discussed by him, and in his conclusion that it is a dramatic composition we concur. In plays of this class the series of events is the only composition of any importance. The dialogue is unimportant, and as a work of art trivial. The effort of the composer is directed to arranging for the stage a series of events so realistically presented, and so worked out by the display of feeling or earnestness on the part of the actors, as to produce a corresponding emotion in the audience. Such a composition, though its success is largely dependent upon what is seen, irrespective of the dialogue, is dramatic. It tells a story which is quite as intelligible to the spectator as if it had been presented to him in a written narrative."

It can hardly be doubted that, if the story were acted without dialogue, the performance would be a dramatization of the book; and we think that, if the motions of the actors and animals were reproduced by moving pictures, this would be only another form of dramatization. If the defendant had taken a series of moving pictures of the play as actually performed by Klaw & Erlanger, the exhibition of them would certainly be an infringement of the dramatic composition, because it would tell the story as they tell it, within the decision of *Daly v. Palmer* and *Daly v. Webster*, *supra*.

It is next objected that the defendant cannot be held as a contributory infringer, because its films are capable of innocent use; e. g., exhibitions for private amusement. This fact only compels the complainants to prove that the defendant does promote a guilty use of them. Inasmuch as it advertises the films as capable of producing a moving-picture spectacle of *Ben Hur*, and sends its advertisements to proprietors of theatricums with the expectation and hope that they will use them for public exhibitions, charging an entrance fee, and inasmuch as many of these proprietors have so used them, the defendant is clearly guilty of contributory infringement.

Finally, the defendant relies upon section 8, article 1, of the Constitution, that Congress shall have the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is argued from this that, as these moving pictures only express the artist's conception of the author's ideas as expressed in the words of the copyrighted book or dramatic composition, they cannot be said to infringe the author's rights. But the history of the copyright law does not justify so narrow a construction of the word "writings." The first copyright law of 1790 (Act May 31, 1790, c. 15, 1 Stat. 124), included maps and charts as well as books. In 1802 (Act April 29, 1802, c. 36, 2 Stat. 171) copyright was extended to engravings, etchings, and prints. In 1856 (Act Aug. 18, 1856, c. 169, 11 Stat. 138) it was extended in the case of copyrighted dramatic compositions to the right of publicly performing the same. In 1870 (Act July 8, 1870, c. 230, 16 Stat. 212) it was extended to paintings, drawings, chromos, statues, models, designs, photographs, and the negatives thereof, and authors were also allowed to reserve the right to dramatize their works. In 1891 (section 4952, Rev.

St. U. S.) authors and their assigns were given the exclusive right to dramatize their copyrighted works. The construction of the word "writings" to cover these various forms of expression, and also to cover the right of giving public performances, has been acquiesced in for over 50 years. In view of this fact, we have no difficulty in concluding that moving pictures would be a form of expression infringing not the copyrighted book or drama, but infringing the author's exclusive right to dramatize his writings and publicly to perform such dramatization.

Decree affirmed.<sup>1</sup>

### Topic 5. Diversion of the Relation by Multiplication of Invented Industrial Products

#### SUB-TOPIC A. USE OF TRADE SECRETS (AT COMMON LAW)

215. WILLIAM C. ROBINSON. *The Law of Patents for Useful Inventions*. (1890. Vol. II, §§ 867-873, in part.) Whatever rights an inventor may possess in his unpatented invention vest in him by virtue of his inventive act alone. The conception of an idea of means makes that idea the absolute and exclusive property of its conceiver, until in some manner he communicates it to others. Although he embodies it in tangible materials and reduces it to practical operation it still belongs to him, unless its embodiment or operation discloses its essential characteristics to his fellow-men. In this condition of affairs the security of the inventor's property depends upon his preservation of his secret. While he successfully conceals the principle of his invention, it is incapable of imitation, and his exclusive enjoyment of the fruits of his inventive skill must be as perfect and as certain as if sheltered under the most rigorous provisions of positive law. . . .

As the rights of an inventor to his secret invention, and to a remedy for the wrongs by which his property therein is injured, are not dependent upon the provisions of Patent Law, they exist equally whether the invention is or is not in its nature patentable. It must indeed be the product of inventive skill, for otherwise no title to it could vest in its inventor. But numerous products of inventive skill lie outside the field of those six classes of inventions which the Patent Law has undertaken to protect, and these are often as meritorious and valuable as those for which a patent can be legally granted. If the creator of these unpatentable inventions chooses to preserve his secret he has a right to do so, as also to communicate it confidentially under such restrictions as he deems expedient, and for an invasion of his rights he has the same redress

<sup>1</sup> [PROBLEMS:]

May the owner of a copyright in a painting prevent the representation of the painting's subject by living-picture reproductions? (1894, *Hanfstaengl v. Empire Palace*, 1894, 2 Ch. 1.)

NOTES:

"Dramatization, right of: infringement by moving pictures." (C. L. R., IX, 549.)

"Infringement: living pictures representing copyrighted paintings." (H. L. R., VIII, 176.)]

as if the subject-matter of his invention were entitled to the protection of a patent. . . .

The only wrong which an inventor can sustain in respect to his entirely undisclosed inventions, is that by which his secret is wrested from him against his will. This wrong may be committed either by force or fraud. Through physical compulsion, in the form of violence or threats, he may be driven to divulge the idea which he would otherwise have concealed, and be thus deprived of that exclusive knowledge which rendered his property in this idea secure. Or by a forcible invasion of his premises, or the asportation of the device in which his idea is embodied, the same result may be effected. Or by deceit and imposition he may be induced to yield the secret which he intended to preserve, and lose beyond recovery that dominion over it which, in the nature of things, was previously his.

The remedies for this wrong, in whatever way it may be committed, must be sought in the local courts having jurisdiction over the defendant, and in the ordinary forms of civil or equity procedure. The tort involved in either of its methods calls for compensation in damages, which are to be measured by the ordinary rules followed in other civil actions, and into which the violation of the inventor's secret may enter as a necessary element. The power which the wrong-doer has acquired to work him further injury through the possession and employment of his idea of means demands the interference of a Court of Equity, enjoining the defendant against the use of the invention and the communication of its principles to others. By these remedies, although the secret cannot be restored to the inventor nor the knowledge of it be obliterated from the memory of the wrong-doer, the disastrous consequences of the wrong to the inventor may be averted, and his practical enjoyment of his property be henceforth secured. . . .

The rights of an inventor in a secret invention, confidentially communicated to others, are capable of violation either on the part of those to whom it has never been disclosed by the inventor or on the part of those to whom he has entrusted it. With reference to the first class of persons it is still an entire secret, the knowledge of which they can obtain only by force or fraud. The wrongful acts by which they acquire possession of the secret are, therefore, as was stated in a preceding paragraph, torts to be compensated for in an action at law for damages, while the practical enjoyment of the stolen secret is prevented by injunction. With reference to the second class of persons the invention, though no longer secret, is known only for certain definite purposes, within the scope of which their employment of their knowledge must be confined. Any use of their knowledge for a different purpose, and any communication of it to others beyond the limits of the authority conferred upon them by the inventor, is a breach of trust, and an invasion of the rights expressly or impliedly reserved to him in the disclosure through which their own knowledge of the invention was obtained.

216. GRAY, J., in *Peabody v. Norfolk* (1868. 98 Mass. 452). It is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise. If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property. If he adopts and publicly uses a trademark, he has a remedy, either at law or in equity, against those who undertake to use it without his permission. If he makes a new and useful invention of any machine or composi-

tion of matter, he may, upon filing in a public office a description which will enable an expert to understand and manufacture it, and this affording to all persons the means of ultimately availing themselves of it, obtain letters patent from the government securing to him its exclusive use and profit for a term of years. If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it, which a Court of Chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority.<sup>1</sup>

### 217. STONE v. GOSS

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1903

65 N. J. L. 756, 55 Atl. 736

APPEAL from Court of Chancery.

Bill by Albert H. Stone and others against John Goss and the Grasselli Chemical Company. Decree for complainants, and defendants appeal. Affirmed.

*Cortlandt & R. Wayne Parker*, for appellants. *Charles W. Fuller*, for respondents.

SWAYZE, J. This is a bill for an injunction to restrain Goss from divulging a secret process of the complainants for the manufacture of depilatories (compounds used to remove hair and wool from skins and hides), and to restrain the Grasselli Chemical Company from using or divulging any information derived from Goss with reference to the secret process. The vice chancellor advised a decree for the complainants.

Goss was in the employ of the complainants from 1892 to 1901, during which time they had, by constant experiment, made improvements in the manufacture of depilatories, and had put upon the market what were called "Stone's XXX Depilatory" and "Stone's XXXX Depilatory." The ingredients out of which the depilatories were made were well known and had been in use for several years before 1892, but the depila-

<sup>1</sup> [COCHRAN, J., in *Hartman v. Park & Sons Co.*, post, No. 228:

The secret process and the medicine made under it are separate and distinct things, and each is a subject of ownership. One person may own one and another person the other. The question has been argued whether a sale of an article made under a secret process is a publication of the process. It is and it is not. It is, if and when one can by his own ingenuity ascertain therefrom the process by which it is made. Until he so ascertains it, there has been no publication of the process; and in the meantime the ownership of the secret and the right to its protection is as full and complete as if no sale had ever been made of the article embodying the secret process. But still, as stated, such article is not the process and the rights with reference to each are different.]



tories manufactured had not been entirely satisfactory until the complainants succeeded in producing the XXX and XXXX. The Grasselli Chemical Company, along with other branches of manufacture, was also engaged in the manufacture of depilatories from the same ingredients used by the complainants, and was their chief business rival. Some time in the year 1901, the Grasselli Chemical Company bought, through one of its agents, some of the complainants' XXX Depilatory, and caused a chemical analysis to be made, and thereafter conducted experiments with a view to the production of a depilatory equal in quality to the product of the complainants. In August, 1901, Goss became dissatisfied with his position with the complainants. He had received a letter two or three months before from Atteaux, a sales agent of the defendant company in Boston. About the middle of August, Goss wrote Atteaux, and by appointment met at Atteaux's office Grant, a director of the Grasselli Chemical Company. Goss fixes the date of this interview at about the middle of August, and, as he says he gave the complainants eight days' notice that he would leave their employ, and left September 3d, he apparently gave the notice after the interview with Grant. In the second week in September, he went into the employ of the Grasselli Company, in what was known as the sulphide department, which was the department concerned with the manufacture of depilatories. During the first two or three weeks he was in the employ of the Grasselli Company he did no work, but immediately upon his employment, Frazier, the superintendent of its plant at Tremley, questioned him "in regard to what he knew about the manufacture of depilatories," and Goss informed Frazier of the complainants' method of manufacture, and described fully the complainants' apparatus. Frazier reported to the defendant company the information obtained from Goss, with a sketch of the apparatus, and the manner in which it should be made and put up. This sketch was made by Frazier, and corrected by Goss. The Grasselli Company approved of Frazier's plan, and directed him to put up the shed to contain the apparatus. He was proceeding with this work when stopped by the injunction.

The complainants allege that Goss was under a contract with them not to reveal the secrets of manufacture. Goss denies this contract. We agree with the vice chancellor that the contract is established by the weight of evidence. The right of a manufacturer, whose goods are made by an unpatented secret process, to protection by injunction against the divulging of his secret in a proper case, is now established by a well-considered line of cases in England and in several States. The leading case is *Morrison v. Moat*, 9 Hare, 241, 20 L. J. Eq. 513, decided by Vice Chancellor Turner in 1851, and affirmed in Court of Appeals by Lord Cranworth, 21 L. J. Ch. 248. The principle has since been applied to cases in various aspects in the English Courts. *Merryweather v. Moore* (1892) 2 Ch. 518, 61 L. J. Eq. 505; *Lamb v. Evans* (1892) 3 Ch. 462, 61 L. J. Eq. 681, affirmed on appeal, 62 L. J. Eq. 404. A leading case

in this country is *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664. In New York the principle is established in *Tabor v. Hoffmann*, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; *Eastman v. Reichenback* (Sup.) 20 N. Y. Supp. 110; *National Gum Co. v. Braendly* (Sup.) 51 N. Y. Supp. 93; *Little v. Gallus* (Sup.) 57 N. Y. Supp. 104; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475. In Michigan it was adopted in a very well-considered opinion in *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469. In Pennsylvania, *Fralich v. Despar*, 165 Pa. 24, 30 Atl. 521. In Indiana, *Westervelt v. National Paper Co.*, 154 Ind. 673, 57 N. E. 552. In the Federal Courts, *C. T. Simmons Medical Co. v. Simmons* (C. C.) 81 Fed. 163. The rule has been applied in this State in the Court of Chancery by Chancellor Runyon in *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379. *Salomon v. Hertz*, *Peabody v. Norfolk*, and *O. & W. Thum Co. v. Tloczynski* are the leading American cases. These cases establish the principle that employees of one having a trade secret, who are under an express contract, or a contract implied from their confidential relation to their employer, not to disclose that secret, will be enjoined from divulging the same to the injury of their employer, whether before or after they have left his employ; and that other persons who induce the employee to disclose the secret, knowing of his contract not to disclose the same, or knowing that his disclosure is in violation of the confidence reposed in him by his employer, will be enjoined from making any use of the information so obtained, although they might have reached the same result independently by their own experiments or efforts. We approve the principle thus established.

We find in this case, as already stated, that an express contract between the complainants and Goss for secrecy is proved. Two questions remain: (1) Did Stone possess a secret process for the manufacture of depilatories? (2) Did the Grasselli Chemical Company obtain knowledge of that secret process from Goss under such circumstances that it should be enjoined from making use of it?

1. The ingredients used in the manufacture of Stone's depilatories were well known, and had been used for that purpose for years before the XXX and XXXX were put upon the market, and the same ingredients were used by the Grasselli Chemical Company in the manufacture of a depilatory. It is urged that the only advantage possessed by the complainants arose out of skill in handling, and not out of a secret process, and that there was no secret either in the ingredients or in the method of compounding them. The complainants combined the ingredients by a different method from any other in use, and the result was a product of a different character. The complainants' process of manufacture was considerably more complicated than the defendants'. The secret consisted in a knowledge of the proper method of mixing the ingredients, and treating them, in order to produce a product of proper consistency. The difference between mere skill in manipulation and a

process of manufacture is illustrated by a recent case in the United States Supreme Court. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968. In this case the process which was held patentable consisted in retaining a quantity of molten iron in a reservoir, to serve as a basis for mixing the varying products of the blast furnaces preparatory to converting the same into steel. The difficulty to be overcome was a lack of uniformity in the molten metal. The use of a reservoir in which the varying products of the blast furnaces had been mixed was known prior to the patent involved in that case, but the importance of always maintaining in the reservoir a sufficient quantity of molten metal to "dominate" (to use the Court's expression) the whole mass had not been before appreciated. The majority of the Court held that the process was therefore patentable. There the ingredients were the same, the idea of mixing the molten metal of different qualities was not new, and the only novelty was the retention in the reservoir of a "dominant mass" sufficiently large to control the average character of the product from time to time. If such an improvement was patentable, it is clear that a process of treating the ingredients, as complicated as that involved in the present case, resulting in a product of novel character, is a process which, if kept secret, is entitled to the protection of the Court. The evidence is convincing that the complainants made efforts to keep the process secret, and had succeeded until Goss revealed the secret to the Grasselli Chemical Company. Since we are satisfied that Stone had a secret process of manufacturing a depilatory, and that Goss was under a contractual obligation not to disclose the secret, the complainants are clearly entitled to an injunction against Goss. The question remains whether the injunction should go also against the Grasselli Chemical Company.

2. The evidence satisfies us that the Grasselli Chemical Company knew that Stone was manufacturing a superior article to its own: that it had been for some time trying to discover Stone's method of manufacture; that it had entered into correspondence with Goss and employed him while he was still in Stone's service; and that, immediately upon his coming into the employ of the defendant company, it sought through Frazier to learn Stone's secret, and, having learned it, was about to make use of it to manufacture a similar substance by Stone's process, to be sold in competition with his. These facts leave no doubt that the Grasselli Chemical Company acted in fraud of Stone's rights in the effort to learn his secret by inducing his employee to divulge the same. Even though they did not know of the contract, they must have known of the confidential character of Stone's business, and the confidential character of the relation between him and his employees. The defendant company is a party to Goss's fraudulent disclosure of the secret, and the complainants were entitled to an injunction restraining the Grasselli Chemical Company from making any use of the information thus obtained from Goss. The injunction should not be refused because the

process was such that it would probably have been discovered by independent experiments in the manipulation of the ingredients of which the products of both parties were alike composed. The Grasselli Chemical Company, by its own conduct, has put itself in such a position that it may even lose the advantage of future independent experiments. It would be quite impossible hereafter to decide how much of the improvement in the product of the Grasselli Chemical Company would be attributable to its own independent efforts, and how much to the knowledge of Stone's process fraudulently acquired by it. Every doubt must be resolved against the parties to a fraudulent act. If the defendant thereby suffers, it suffers only by reason of having been a party to Goss's fraudulent disclosure of the secret. The legal principle governing the case is, in effect, the same that was applied by this court to a case of fraudulent intermixture of goods. *Jewett v. Dringer*, 30 N. J. Eq. 291.

It was argued in behalf of the appellants that the disclosure of the complainants' secret, necessarily made during the trial, would render an injunction nugatory. This difficulty was expressed by Lord Eldon in an early case. *Newberry v. James*, 2 Merivale, 446, 451. To obviate it as far as possible, the testimony in this case was taken in camera, and care was taken to print only enough copies of this portion of the evidence to supply the members of the court. It has not been found necessary in this opinion to describe the process, and we see no reason why this disclosure to the Court, necessarily made for the purpose of the case, should deprive the complainants of their right to relief. The defendants were already possessed of the secret, and they cannot now take advantage of a disclosure made in order to secure relief against them. Such a disclosure is no publication to the world, and, although it may endanger the complainants' secret, it does not deprive them of the right to enjoin the defendants from making use of it. The doubts felt by Lord Eldon have not prevented the courts from giving such protection as they could in the later cases cited above.

The decree should be affirmed, with costs.

218. H. B. WIGGINS' SONS' COMPANY *v.* COTT-A-LAP  
COMPANY

UNITED STATES CIRCUIT COURT, DISTRICT OF CONNECTICUT. 1909

169 *Fed.* 150

IN EQUITY. On motion for preliminary injunction.

*Edwin J. Prindle*, for complainant.

*Henry C. White* and *Leonard M. Daggett*, for defendant.

PLATT, *District Judge*. The bill herein was filed March 11, 1909, and upon affidavits accompanying the same a restraining order was granted. The motion now to be decided was heard April 13th upon more elaborate affidavits. The motion asks for an order enjoining

the defendant during the pendency of the suit from "receiving or seeking to receive, or acquiring or seeking to acquire, from Robert W. Cornelison, any formula, process, or mechanical device or other manufacturing expedient" of the complainant, and from using the same in the manufacture of wall coverings.

The evidence shows that Cornelison is a consulting chemist, and as such was employed by the complainant in its business at Bloomfield, N. J., for a number of years. Under such employment his relations with the complainant were confidential and many secrets of the business came into his possession. The only secret specifically exploited is the formula for the backing upon the wall coverings and the process of applying such backing. The complainant claims that it owns a secret formula and process by which uniform backings of two colors only, one for the lighter and one for the darker faces, can be used on all wall coverings of the kinds made by it. He says that his backings will not penetrate to the face of the coverings, and because of that fact he can restrict the number of colors used on the backs as he does. This formula and process tends, he says, to promote economy and efficiency of manufacture.

In the case at bar there is a contract about the employment in which Cornelison agrees not to disclose trade secrets, but the law about such secrets is too plain to require extended comment. If one person has a trade secret which is valuable to him, and another person enters into confidential employment with him in and about the business which demands the use of that secret, and by such employment learns the secret, he cannot utilize this secret knowledge to the disadvantage of his employer. If he does so, he robs his employer. That is the contract relationship between them, and it makes no difference whether it is expressed in writing or not. If not expressed, it will be implied. In the case under discussion there is no doubt about the confidential employment and possession of trade secrets by Cornelison. He has now left the employment, and carries the secrets with him. He has accepted employment with a rival manufacturer of wall coverings.

The exact question before me is whether such a hiring of him by the rival warrants a Court of Equity in resorting to so drastic a measure as the use of the injunctive power to prevent that rival from acquiring that secret knowledge. I cannot think that it does, unless the circumstances surrounding the hiring are such as to persuade one that the ulterior purpose in such hiring is evil. It appears that long ago two different managers of the defendant's business, which was then owned largely by other people, made efforts to learn the complainant's secrets by hiring from it men who knew some of the secrets. The defendant as then organized disavowed responsibility for the acts of its managers, and harmony seems to have reigned, as thoroughly as harmony can be expected to exist between avowed rivals, for a long time thereafter. The defendant as now organized and Dr. Cornelison

state explicitly that there is no intention to derive any benefit from the doctor's secret knowledge gained while in the complainant's employ.

If the injunction issues, it means that hereafter no man can work for one and learn his business secrets, and after leaving that employment engage himself to a rival in business, without carrying on his back into that business the injunctive mandate of a Court of Equity. There is nothing whatever in the facts of this case, except opportunity to do wrong and a suspicion in the mind of the rival that wrong will be done. The remedy asked for is an extraordinary one, and should not be lightly indulged in. The chancellor ought never to come into such a frame of mind that he assumes human nature to be essentially and inherently evil. Furthermore, the danger of irreparable injury is not manifest. Whether the secrets are given away or not can never be positively known, except by inspection of defendant's goods hereafter to be made. Whenever the outcome shall warrant it, the road to injunctive relief is plainly marked and easily followed.

Upon such facts as have been brought to my attention it is my duty to deny the motion for an injunction.<sup>1</sup>

#### SUB-TOPIC B. USE OF PATENTED INVENTION (BY STATUTE)

219. WILLIAM C. ROBINSON. *The Law of Patents for Useful Inventions*. (1890. Vol. I, §§ 24-40, in part.) The relations of an inventor and the public to an unpatented invention first demand attention. In its earliest stage this invention is a mere addition to the stock of ideas possessed by the inventor. . . . In order, therefore, to retain exclusive ownership of his idea, he must withhold its material embodiment from observation; and, as long as he can do this, the invention is as truly his by natural right as if it never had been thus externally expressed. But with his submission of the tangible result of his idea to the inspection of others, in such a manner that the idea itself becomes apparent, his control over it is gone. An idea once communicated can no longer be exclusively appropriated and enjoyed. Every one who receives it possesses it in the same degree as if he alone had apprehended it, and its inventor has no power to re-

#### <sup>1</sup> [PROBLEMS :

A former manager, in the last year of his service as such, established a rival business at another place and sent circulars to his employer's customers whose names were contained in an order book to which he had access whilst so employed, and of which he made a copy without the knowledge or consent of his employer. Is this an infringement of a trade secret? (Robb v. Green, 98 Law Times, N. S. 569.)

#### NOTES :

"Disclosure of trade secrets." (H. L. R., XI, 262.)

"Trade secrets: nature of right acquired by purchaser." (H. L. R., XVII, 206.)

"Nature of right in trade secrets." (H. L. R., XX, 143, 156.)

"Trade-Secrets — Injunction against divulging." (M. L. R. IV, 402.)]

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT: see the citations in the footnote to No. 172, ante.



strain him from its practical and useful application. Under the laws of nature the exclusive public use of an invention is thus impossible, and hence there is no natural right to such a use. The inventor, who voluntarily discloses his invention to the public, necessarily and freely dedicates it to the public; and that which formerly was his alone by virtue of his sole possession becomes by universal possession the common property of all mankind. . . .

The natural right of the public to appropriate all new ideas that may be voluntarily disclosed is no less evident than that of the inventor to conceal them. It is a law of nature that men should profit by the discoveries and inventions of each other. This is the law which binds society together, and in obedience to which lies all the possibilities of moral, intellectual, and material advancement. No man lives, or can live, for himself alone. Every improvement he can make in his appearance, habits, manners, or affairs becomes a guide and stimulus to others, by following which they also can improve themselves in person or estate. To benefit by the discoveries of his fellow-men is thus not only a natural right, it is also the natural duty which every man owes to himself and to society; and the mutual, universal progress thence resulting is the fulfilment of the earthly destiny of the human race. . . . Perhaps no recognition of this inherent public right is clearer and more positive than that contained in the very law by which the patent privilege is created. It has always been a fundamental doctrine of that law that if the public once became possessed of the inventor's secret their right to use it could never thereafter be restrained. What should amount to such possession has, it is true, at different times been differently determined. In the earlier English cases it was held that any knowledge of the invention by the public before the granting of the patent vested it inalienably in them. *Wood v. Zimmer* (1815), 1 Web. 44, note; *Cornish v. Keene* (1835), 1 Web. 501. Modern legislation in the United States, on the other hand, permits the inventor to publicly use and sell his invention for two years before applying for a patent without thereby delivering it into their possession. But the principle remains the same, and in every aspect of it is enforced by the Courts, that whenever the inventor permits the invention to pass beyond the legally defined limits of his exclusive possession, his right to it ceases and the right of all mankind to it begins. See also *Phillips*, 422; *Curtis*, 101, 102. . . .

Into the midst of this harmonious system of mutual rights and duties the patent privilege intrudes itself as a disturbing element. . . . It temporarily deprives the human race of its right to profit by the labors and discoveries of the individual, except upon such terms as he may see fit to impose. It locks up, under the control of the inventor, the physical fact or law which he applies, and gives him as complete dominion over it as if he and not Almighty God were its creator, and as if his advantage and not that of mankind in general were the object for which this attribute or element itself was made. . . .

The right of an inventor to a patent depends entirely upon the provisions of positive law. . . . This proposition is as correct in reference to the English patent system as in reference to our own. Whatever considerations of private justice or of public policy may have sustained the grant of letters-patent at common law, the statute of James I. abolished all such grants except in certain special cases. . . . In A. D. 1623, the famous Statute against Monopolies (21 Jac. I, ch. 3) was enacted by Parliament and received the sanction of the king. By this statute all past monopolies were abolished, and the power of the Crown to grant them in the future was explicitly denied, except in cases where such grants had been or should be made to the inventors of new manufactures, conferring

upon them the exclusive privilege of practising such inventions for a limited period of time. . . . However valuable his discovery, however meritorious the service he has thereby rendered to the public, unless his invention falls within the scope of these provisions, it becomes, immediately upon its disclosure, the property of all mankind. That in peculiar cases great apparent hardship results from an adherence to this rule is no doubt true; but such exceptional evils necessarily attend all regulations which depart from the great principles of natural law, and seek by arbitrary measures to promote the common good. . . . Regarded, therefore, in its simplest and most abstract form, the patent privilege is a true restriction of pre-existing public rights. It may not, and ordinarily it does not, take away from the people the actual enjoyment of any benefit which they already had in their possession, but it does prohibit their immediate exercise of that perpetual and natural right by virtue of which every new discovery, when openly practised or proclaimed, becomes at once the possession and the property of all. . . .

The extent to which the patent privilege invades these natural rights and duties appears still more clearly on considering the fact that such privileges are granted only to a very small class of inventors. In some degree probably every sane person of mature age is an inventor. By accident or by the efforts of his genius he discovers something new in one or more of the innumerable departments of human affairs, by which his own condition, as well as that of other men, is substantially improved. Not only the scholar in his closet, the explorer in the ocean or the wilderness, and the artisan in his work-shop, but every other man whose faculties are occupied with any form of labor, or with any kind of rational amusement, makes some addition to the common stock of useful knowledge, and aids in the advancement of his race. If each of these were privileged to appropriate to himself, for the time being, the entire advantage of his own discovery, the relation of the individual inventor to the whole body of inventors would correspond more closely with the principles of natural justice. But, on the contrary, the field of patentable invention is comparatively narrow. . . . Under the statute of James I. a patent privilege is grantable only to protect a "new manner of manufacture." The Court interpreted this phrase as including: (1) New substances or compositions of substances; (2) new mechanisms or combinations of mechanisms; (3) new methods or processes of operating, whereby substantial or mechanical results were produced. *Boulton v. Bull* (1795), 2 H. Bl. 463 (492). Under the Acts of Congress only "an art, machine, manufacture, composition of matter, or design, or some improvement therein," can be thus privileged. . . . By far the greater and the most useful portion of human discoveries lie outside the domain of these exclusive privileges. The general phenomena and laws of matter, the methods of agriculture and commerce, the metaphysical and moral truths, and all other inventions which do not relate to the industrial arts, belong at once, upon their publications, to all mankind. Of every one of these the privileged inventor may avail himself as freely as their first discoverer. But because his invention chances to fall within the protected field he can enjoy it in its full extent, and yet withhold it from the general fund of knowledge. . . .

The nature of the patent privilege, as thus disclosed by its effects on the relations of the inventor and the public toward the invention, proves that it possesses both the characteristics of a true monopoly: (1) It confers on the inventor an inclusive right to which he is not naturally entitled, and which he could neither claim nor enforce except through the arbitrary interposition of the law; (2) it restricts the public in its enjoyment of three invaluable natural rights, without

the exercise of which, in some form, all progress in the industrial arts would be impossible! It differs from an odious monopoly in this: that in the odious monopoly the public are deprived of some existing method of enjoying these rights, while the patent privilege prevents their exercise only in the new direction marked out by the discovery of the inventor. But in both cases the rights restricted are the same, and the effect on their enjoyment after the monopoly is granted is identical. That a patent privilege is a true monopoly, derogatory to common right, is, therefore, the correct theory concerning it considered in itself. . . . Certain modern writers upon Patent Law have asserted that the exclusive privilege conferred on an inventor is not a monopoly. Certain judges of the courts of the United States, in their decisions upon patent cases, have expressed the same opinion. . . .

The creation of a monopoly embracing these extraordinary privileges, with their corresponding limitations of the common right, could not be justified unless the ultimate results of its bestowal were, upon the whole, highly advantageous to the public. That this is true, experience has fully demonstrated. The granting of a patent privilege at once accomplishes three important objects: it rewards the inventor for his skill and labor in conceiving and perfecting his invention; stimulates him, as well as others, to still further efforts in the same or different fields; it secures to the public an immediate knowledge of the character and scope of the invention and an unrestricted right to use it after the patent has expired. Each of these objects, with its consequences, is a public good, and tends directly to the advancement of the industrial arts. Any system of law which attains these results, without the undue restriction of natural rights, is evidently consonant with reason, justice, and sound public policy. . . . The patent privilege, if wisely guarded, effects this purpose. It removes from the inventor all inducement to conceal his discovery, by affording him the same protection that could be obtained by the most rigid secrecy. It encourages him to make known his results, as the method of securing for himself the largest recompense. It compels him to acquaint the public, thoroughly and at the outset, with all the details of his invention and with the various modes of benefiting by its use. It appropriates to the whole people, after a short period of exclusive ownership by the inventor, the entire invention as a portion of that common property in which all men may exercise an equal right. . . .

Regarded as a method of attaining these three objects, the concession of the patent privilege by the State is an act having a three-fold character. As a reward bestowed on the inventor for his past inventions, it is an act of justice. As an inducement to future efforts, it is an act of sound public policy. As a grant of temporary protection in the exclusive use of a particular invention, on condition of its immediate publication and eventual surrender to the people, it is an act of compromise between the inventor and the public, wherein each concedes something to the other in return for that which is conceded to itself. . . .

The habit among American writers of classing authors with inventors has probably arisen from the fact that the Constitution of the United States mentions them in the same clause, as alike entitled to protection. But their exclusive privileges rest, historically as well as theoretically, upon different foundations. The common law, as we have seen, never recognized any exclusive right in the inventor to his invention, after he had once publicly disclosed it. His privilege was based on a royal grant, which was justified only on the ground of the benefit accruing to the public from such disclosure. The property of an author in his writings, on the other hand, was acknowledged as existing at common

law even after his voluntary publication of them (*Miller v. Taylor* (1769), 4 Burr. 2303); and though this natural right has been merged into that defined and limited by the statute 8 Anne, chap. 19, § 1, 1710 (*Becket v. Donaldsons*, Burr. 2408), which is the foundation of our modern copyright law, its origin and nature are entirely different from that which left the inventor dependent on the bounty of the sovereign for whatever protection his invention might receive.

The character of the exclusive privileges secured to authors and inventors by existing laws is also widely different. His copyright vests in the author no exclusive right to his ideas, apart from the language in which they are expressed, and any other writer may create them or adopt them, and clothe them in his own words, at his pleasure. But the exclusive privilege of the inventor extends to the idea which is embodied in his invention as well as to the form in which that idea is presented to the eye, and no other person is permitted to conceive and use or copy that idea in any mechanism or production of his own.

But notwithstanding these historical and legal diversities, the distinction between authors and inventors is not as great or as well-defined as Mr. Hindmarch has asserted. It is not true that every author is a creator as distinguished from a discoverer, nor that every inventor is a discoverer as distinguished from a creator. In fact, there are two classes of authors: one which creates ideas as well as represents them; the other which collects ideas or facts already in existence and whose method of presenting them alone is new. To the first class belong the real authors, properly so called, — the pioneers in poetry, romance, and philosophy, and those who in succession have substantially added to, or developed the primeval thought. To the latter class belong the compilers, abridgers, and all others who bring nothing of their own into their works except their mode of selection, expression, and arrangement. In the same way there are also two classes of inventors: one which grasps at laws or facts in nature hitherto uncomprehended or unknown, and by applying them to practical uses, opens new fields of activity to the industrial arts; the other which, on these fundamental inventions, builds its humble superstructures, by the combination, re-arrangement, or new application of the facts or elements or principles which the great inventors have made known. To rank these two together as equal in accomplishment and merit is unwarrantable. The great inventor is no less a creator than the great author; and the idea by which he links the physical law or fact to its accomplished object in the arts, that idea which is embodied in his actual invention, is as truly his creation as the nebular hypothesis was the creation of Laplace, or "Samson Agonistes" that of Milton. These are the inventors who deserve the name, the honors, and the rewards of public benefactors. They confer upon mankind, not only during their own generation, but for all time, benefits which, without them, might have never been enjoyed. But the second class of authors and inventors are entitled to no such encomiums and to no such rewards. They achieve nothing which other men of ordinary ability and skill could not perform, and give nothing to the world that some one else would not be sure to give, as soon as the necessity for it was realized and the attention of the artisan or chemist turned in that direction.

With these differences in view it is evident that authors and inventors can neither be classed together nor entirely separated from each other; and it is also evident that neither the existing copyright nor patent laws give to these different classes of authors and inventors a protection commensurate with their respective merits. The copyright law apparently ignores the existence of the first class of authors, as a distinct and more meritorious class, and gives to them no higher protection than it accords to the mere echoer of their original ideas. The

patent law, on the other hand, secures to the first class of inventors an adequate recompense, in kind if not in duration, but bestows the same reward upon inventors of the second class, no matter how small may be the intellectual value of their achievements. The practical difficulties attending any attempt to measure recompense by merits, in either case, may be insurmountable. But there is no occasion for rendering the questions involved in the conflicting claims of inventors and the public any more obscure by putting all classes of inventors on the same level with the first class of authors, as has sometimes been done, or by denying to the first class of inventors the same degree of intellectual merit and accomplishment which is justly attributed to the highest class of writers. Patent law ought to rest on its own theories and antecedents, and deal with its own problems according to its own principles without being led astray, either in its enactments or interpretations, by false analogies or by attempts to follow systems which, in nature as well as origin, are unlike its own.

220. REVISED STATUTES OF THE UNITED STATES, 1873-74. *Title LX, Patents, Trademarks, and Copyrights. Chapter I, Patents. Sec. 4886.* Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned; may, upon payment of the fees required by law. and other due proceeding had, obtain a patent therefor. . . .

Sec. 4888. Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor and attested by two witnesses. . . .

Sec. 4900. It shall be the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word "patented," together with the day and year the patent was granted; or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented.<sup>1</sup>

<sup>1</sup> [Consult the following Report:

*Commissioners to revise the Statutes relating to Patents, etc.* Report (U. S. Sen.



(1) *What Things are Patentable*221. EARLE *v.* SAWYER

UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS. 1825

4 *Mason*, 1, *Fed. Cas. No.* 4247

CASE [by Willard Earle against Elisha Sawyer] for the infringement of a patent [granted to plaintiff December 28, 1882]. After a verdict found for the plaintiff, a motion for a new trial was made by *F. Dexter* for the defendant, which was opposed by *Bliss* and *Webster* for the plaintiff. The facts and arguments are fully discussed in the opinion of the Court.

STORY, Circuit Justice. The plaintiff, on the 28th of December, 1822, procured letters patent for "a new and useful improvement in the machinery for manufacturing shingles, called the 'shingle mill,'" and filed a specification in the patent office, a copy of which, with the explanatory drawings and figures referred to therein, is annexed to the letters patent. In this specification, he describes his invention as follows:

"Said improvement consists in such new arrangement and change of parts of my former machine for the like purpose, for which letters patent were granted to me by the President of the United States, bearing date the third day of November, A. D. 1813, as to admit the use and application in said machine of the circular saw, instead of the perpendicular saw heretofore used, and the substitution of such other parts as are rendered necessary by these alterations, in order to effect the required timing and proper movements of the respective parts thus altered, in connexion with other parts of said machine."

He then proceeds to describe these alterations with great minuteness, and annexes drawings of the whole machine with the new combination of parts, and distinguishes in those drawings, by appropriate coloring and descriptions, what is new from what belonged to the old machine. The former machine, here alluded to and patented by the plaintiff, is a machine for manufacturing shingles, called the "improved shingle mill," in which a perpendicular saw, with the appropriate machinery to move it, was exclusively used. The present patent claims, as an invention of the plaintiff, the substitution of a circular saw, with the appropriate machinery in the old machine, for the like purpose of sawing shingles. With the exception of this substitution, all the other parts of the old machine, such as the carriage to move the block to be sawed, and the alternate motion on a diagonal line of each end of it, so as to present first a thick and then a thin end to the saw, were unaltered.

At the trial it was proved, that the defendant had made and used a machine with a circular saw in substance like the plaintiff's, though



with some slight variations of form, so as to cover up the evasion of the patent. The defendant had previously applied to the plaintiff to buy one of his improved shingle mills for use in the town where he resided, which the plaintiff declined upon the ground (as was suggested) that he had already entered into some contract with other persons for the exclusive use there. The defendant, upon that refusal, intimated that the plaintiff would find that other persons could make shingle mills as well as he; and soon afterwards the defendant had his constructed and put in operation.

There was no evidence in the case to show, that any person had ever, before the plaintiff's asserted invention, applied a circular saw in any manner to the plaintiff's old machine. But the whole evidence established, that the first application was suggested by him, and first put in operation by him, before he obtained his patent. . . .

There was considerable conflict of testimony in the cause (which was left to the jury), as to the question whether the application of the circular saw to the old machine was an invention or not, scientific witnesses differing in opinion on the subject. It was proved that circular saws were in use before, for the purpose of veneering and sawing picture frames, but they were small; and it was testified, that the machinery, by which a circular saw should be substituted for a perpendicular saw, in the plaintiff's old machine, was so obvious to mechanics, that one of ordinary skill, upon the suggestion being made to him, could scarcely fail to apply it in the mode which the plaintiff had applied his. This testimony was encountered by suggestions and proofs of the difficulties, which the plaintiff himself (who is an ingenious mechanic) had encountered in making his own substitution. But this also was left for the consideration of the jury.

It was proved that the plaintiff's old machine sold for 60 or 70 dollars, and his machine with the improvement sold for 150 or 200 dollars.

The jury found a verdict for the plaintiff for 300 dollars; and the defendant has applied to the Court for a new trial, for reasons which he has filed in the cause, upon which I shall have occasion to comment, only stating at present, that the opinions imputed to the Court are not admitted to be accurately laid down, although the inaccuracy is doubtless unintentional on the part of the counsel for the defendant. The original reasons assigned for the new trial, state the following as misdirections of the Court: 1. That if any man makes or constructs a machine, which is new and useful, he is entitled to a patent. 2. That if he makes an improvement in any machine, which improvement is new and useful, he is entitled to a patent. 3. That if the plaintiff were the first to take out the perpendicular saw from his original shingle mill, and put in a circular saw (meaning, I presume, with the proper machinery), that if it be useful (meaning, I presume, new and useful), it is sufficient to entitle him to a patent. 4. That if the plaintiff were the first to apply or combine a circular saw with his original shingle mill for the purpose

of making shingles, although the shingle mill were in common use, and the circular saw were in use (meaning, I presume, separately, and not in combination), and there were nothing new in the mode or machinery, by which it was applied (but meaning, I presume, that the combination itself was new), still the plaintiff is entitled to a patent. In the directions thus supposed, with the explanations and additions above inserted, which seem necessary to express the true sense of the propositions, I do not at present perceive any error. But I rather wish to state the real opinions expressed to the jury, with which, upon more mature reflection, I confess myself entirely satisfied.

The main question was, and still is, whether there is anything new in the improvement patented by the plaintiff. He was already the patentee of the original shingle machine, which operated with a perpendicular or reciprocating saw. The other part of his apparatus for adjusting the logs to be sawed, was very ingenious, but not being in controversy, requires no consideration. By his present patent, he claims to be the inventor of the application of a circular saw, as a substitution for the perpendicular saw. He does not claim (which is very material) to be the inventor of the circular saw, or of any mode or machinery, by which it may be applied to sawing generally, or to sawing logs, or to sawing shingles. He claims to be the inventor of a combination of it in a particular manner with his old machine, for the purpose of sawing shingles. In what manner is the claim met? Not by showing that any other person ever thought of, or invented such combination before, for it is admitted that the plaintiff is the first person who conceived or executed it; but by showing, that he is not the inventor of a circular saw, or of the particular machinery of belts and drums and wheels, etc., by which such a saw is commonly put in operation; and that the combination itself is so simple, that, though new, it deserves not the name of an invention.

The whole argument, upon which this doctrine is attempted to be sustained, is, if I rightly comprehend it, to this effect: "It is not sufficient, that a thing is new and useful, to entitle the author of it to a patent. He must do more. He must find it out by mental labor and *intellectual creation*. If the result of accident, it must be what would not occur to all persons skilled in the art, who wished to produce the same result. There must be some addition to the common stock of knowledge, and not merely the first use of what was known before. The Patent Act gives a reward for the communication of that, which might be otherwise withholden. An invention is the finding out by some effort of the understanding. The mere putting of two things together, although never done before, is no invention."

It did not appear to me at the trial, and does not appear to me now, that this mode of reasoning upon the metaphysical nature, or the abstract definition of an invention, can justly be applied to cases under the Patent Act. That Act proceeds upon the language of common sense

and common life, and has nothing mysterious or equivocal in it. The first section <sup>1</sup> enacts,

“that when any person etc. shall allege that he has invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used before the application, etc. it shall be lawful for the secretary of State to cause letters patent to be made out, etc., granting the exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery,”

etc. The thing to be patented is not a mere elementary principle, or intellectual discovery, but a principle put in practice, and applied to some art, machine, manufacture, or composition of matter. It must be new, and not known or used before the application; that is, the party must have found out, created, or constructed some art, machine, etc., or improvement on some art, machine, etc., which had not been previously found out, created, or constructed by any other person. It is of no consequence, whether the thing be simple or complicated; whether it be by accident, or by long, laborious thought, or by an instantaneous flash of mind, that it is first done. The law looks to the fact, and not to the process by which it is accomplished. It gives the first inventor, or discoverer of the thing, the exclusive right, and asks nothing as to the mode or extent of the application of his genius to conceive or execute it. It must also be useful, that is, it must not be noxious or mischievous, but capable of being applied to good purposes; and perhaps it may also be a just interpretation of the law, that it meant to exclude things absolutely frivolous and foolish. But the degree of positive utility is less important in the eye of the law, than some other things, though in regard to the inventor, as a measure of the value of the invention, it is of the highest importance.

The first question then to be asked, in cases of this nature, is, whether the thing has been done before. In case of a machine, whether it has been substantially constructed before; in case of an improvement of a machine, whether that improvement has ever been applied to such a machine before, or whether it is substantially a new combination. If it is new, if it is useful, if it has not been known or used before, it constitutes an invention within the very terms of the Act, and, in my judgment, within the very sense and intendment of the Legislature. I am utterly at a loss to give any other interpretation of the Act; and indeed, in the very attempt to make that more clear, which is expressed in unambiguous terms in the law itself, there is danger of creating an artificial obscurity. With these views, I did not hesitate to tell the jury at the trial, that the true question for them to decide was, whether the improvement, secured by the patent, had ever been thought of, or applied to the original machine, by any other person, before the plaintiff conceived and executed the combination. If they were of opinion

<sup>1</sup> Act 1793, c. 11 [1 Stat. 318].

that it had not been, and that he was the author of it, then he was the inventor within the meaning of the Act, and entitled to a patent. All the other remarks, introduced as the ground-work of the motion for a new trial, were mere illustrations of this single principle, which was brought home to the case on trial, by a direct application. My judgment on this point remains unshaken by the subsequent arguments, urged at the bar.

The case of *Brunton v. Hawkes*, 4 Barn. & Ald. 541, is thought to countenance the doctrine contended for on behalf of the defendant. If it did, it might be very material to consider, whether it could govern in the construction of our own Patent Act. But, upon the most careful consideration of that case, it does not appear to me to break in at all upon the law, as the Court has held it on the present occasion. One question there, was, whether there was any novelty in an alleged improvement in the making of ships' anchors. It was proved, that the same operation had been long known and applied for similar purposes in the adze anchor and the mushroom anchor. The Court thought, upon the evidence, the plaintiff's invention, as to the anchor, was not new. Lord Chief Justice Abbott said:

"A patent for a machine, each part of which was in use before, but in which the combination of the different parts is new, and a new result is produced, is good, because there is a novelty in the combination. But here the case is perfectly different; formerly three pieces were united together; the plaintiff only unites two; and if the union of those two had been effected in a mode unknown before, as applied in any degree to similar purposes, I should have thought it a good ground for a patent. But, unfortunately, the mode was well known and practised."

It strikes me, that the doctrine here laid down is perfectly correct, and such as has been often recognized in this Court. And a careful perusal of the opinions of all the judges, in that case, will fortify, in no small degree, what has been delivered by this Court in the present trial. How, indeed, can it be possible, that an English Court should deem some intellectual labor, beyond the novelty of the combination, necessary for a patent, when it is the acknowledged law of England (different in that respect from our own), that the first importer of an invention, known and used in foreign parts, may be entitled to a patent as the inventor in England? What of intellect is employed in the mere importation of a known machine? An inventor, in the sense of the English law, is the first maker, or constructor, or introducer, in England. . . .

Upon the whole, my judgment is, that the motion for a new trial ought to be overruled. Judgment accordingly.

222. MORTON *v.* NEW YORK EYE INFIRMARY

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF  
NEW YORK. 1862

5 *Blatchf.* 116, *Fed. Cas. No.* 9865

THIS was a motion for a new trial. An action on the case to recover damages for an infringement of letters patent [No. 4848] for an "improvement in surgical operations," granted to plaintiff as assignee of Charles T. Jackson and William T. G. Morton, November 12, 1846, tried before Judge Shipman and a jury, had resulted, under the instructions of the Court, in a verdict for the defendants. The patent was for the well-known and valuable discovery of the effect of sulphuric ether in producing nervous quiet and insensibility to pain, especially during surgical operations. The questions arising upon this patent, and discussed in the opinion of the Court, are so important that the specification is given in full:

"Be it known that we, Charles T. Jackson and William T. G. Morton, of Boston, in the county of Suffolk, and state of Massachusetts, have invented or discovered a new and useful improvement in surgical operations on animals, whereby we are enabled to accomplish many, if not all, operations such as are usually attended with more or less pain and suffering, without any, or with very little pain to, or muscular action of, persons who undergo the same; and we do hereby declare that the following is a full and exact description of our said invention or discovery: It is well known to chemists that when alcohol is submitted to distillation with certain acids, peculiar compounds, termed 'ethers,' are formed, each of which is usually distinguished by the name of the acid employed in its preparation. It has, also, been known that the vapors of some, if not all of these chemical distillations, particularly those of sulphuric ether, when breathed or introduced into the lungs of an animal, have produced a peculiar effect upon its nervous system; one which has been supposed to be analogous to what is termed intoxication. It has never (to our knowledge) been known until our discovery, that the inhalation of such vapors (particularly those of sulphuric ether) would produce insensibility to pain, or such a state of quiet of nervous action as to render a person or animal incapable, to a great extent, if not entirely, of experiencing pain while under the action of the knife, or other instrument of operation of a surgeon calculated to produce pain. This is our discovery; and the combining it with, or applying it to, any operation of surgery, for the purpose of alleviating animal suffering, as well as of enabling a surgeon to conduct his operation with little or no struggling, or muscular action of the patient, and with more certainty of success, constitutes our invention. The nervous quiet and insensibility to pain produced on a person is generally of short duration; the degree or extent of it, or time which it lasts, depends on the amount of ethereal vapor received into the system, and the constitutional character of the person to whom it is administered. Practice will soon acquaint an experienced surgeon with the amount of etheric vapor to be administered to persons for the accomplishment of the surgical operation or operations required in their respec-

tive cases. For the extraction of a tooth, the individual may be thrown into the insensible state, generally speaking, only a few minutes. For the removal of a tumor, or the performance of the amputation of a limb, it is necessary to regulate the amount of vapor inhaled to the time required to complete the operation. Various modes may be adopted for conveying the etheric vapor into the lungs. . . . After a person has been put into the state of insensibility as above described, a surgical operation may be performed upon him without, so far as repeated experiments have proved, giving to him any apparent or real pain. . . . We are fully aware that narcotics have been administered to patients undergoing surgical operations, as we believe, always by introducing them into the stomach. This we consider in no respect to embody our invention, as we operate through the lungs and air passages, and the effects produced upon the patient are entirely, or so far different as to render the one of very little, while the other is of immense, utility. The consequences of the change are very considerable, as an immense amount of human or animal suffering can be prevented by the application of our discovery. What we claim as our invention is the hereinbefore described means by which we are enabled to effect the above highly important improvement in surgical operations, viz.: by combining therewith the application of ether, or the vapor thereof, substantially as above specified. In testimony whereof, we have hereto set our signatures, this twenty-seventh day of October A. D. 1846. Charles T. Jackson. William T. G. Morton. Witnesses: R. H. Eddy, W. H. Leighton."

*S. D. Cozzens and C. M. Keller*, for plaintiff.

*E. H. Owen and B. D. Silliman*, for defendants.

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

SHIPMAN, District Judge. This is an action at law, brought to recover damages for the infringement of a well-known patent. The case came on to be heard at a prior term of this court, before a jury, and after some testimony had been taken tending to show an infringement by the defendants, the Court, having doubts as to the validity of the patent, arrested the hearing of the evidence, and directed the counsel to argue the question of law arising on the face of the specification. This question — as will be obvious, at once, to any one familiar with the law of patents who reads the specification — is, is the subject matter of the alleged invention patentable? The question, after argument, was decided in the negative, and the patent was declared void. The same question is now again presented, on a motion for a new trial, before a full court.

The point is one of substance and not of form. It was discussed as such, and will be so decided. Any criticisms which we may make on the language of the specification, will be made only for the purpose of dealing with the subject which that language envelops; and, if at any time we appear to discard the phraseology of the instrument, it will not be because we complain of its terms, but only for the reason that we desire to strip the alleged invention and present it naked for consideration.

At common law an inventor has no exclusive right to his invention or discovery. That exclusive right is the creature of the statute, and



to that we must look to see if the right claimed in a given case is within its terms. The Act of Congress provides, "that any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use, or on sale with his consent or allowance as the inventor or discoverer," shall be entitled to receive a patent therefor. The true field of inquiry, in the present case, is to ascertain whether or not the alleged invention, set forth in this specification, is embraced within the scope of the Act. Very little light can be shed on our path by attempting to draw a practical distinction between the legal purport of the words "discovery" and "invention." In its naked ordinary sense, a discovery is not patentable. A discovery of a new principle, force, or law operating, or which can be made to operate, on matter, will not entitle the discoverer to a patent. It is only where the explorer has gone beyond the mere domain of discovery, and has laid hold of the new principle, force, or law, and connected it with some particular medium or mechanical contrivance by which, or through which, it acts on the material world, that he can secure the exclusive control of it under the patent laws. He then controls his discovery through the means by which he has brought it into practical action, or their equivalent, and only through them. It is then an invention, although it embraces a discovery. Sever the force or principle discovered from the means or mechanism through which he has brought it into the domain of invention, and it immediately falls out of that domain and eludes his grasp. It is then a naked discovery, and not an invention.

These remarks are not made for the purpose of laying down sweeping general propositions. We are too well aware of the futility, or, we might say, mischief, of that practice of expounding the law of patents, to embark in it. But these suggestions are submitted for the purpose of showing the relation of the terms "discovery" and "invention," and especially the dependence of the former upon the latter, as used in the statute. Every invention may, in a certain sense, embrace more or less of discovery, for it must always include something that is new; but it by no means follows that every discovery is an invention. It may be the soul of an invention, but it cannot be the subject of the exclusive control of the patentee, or the patent law, until it inhabits a body, no more than can a disembodied spirit be subjected to the control of human laws.

Now, that this patent contains the record of a discovery, there can be no doubt. And it is equally clear that, in a certain sense, it was new at or about the date of the patent. It is important here to ascertain precisely what that discovery was. It is described in general terms, in the first paragraph of the specification, to be "a new and

useful improvement in surgical operations on animals." This is, at best, vague — not from any fault of the person who drafted the schedule, but from the inherent difficulties of his task, and the imperfect nature of human language as an instrument of thought. But we can clearly gather from the paper itself what the discovery was; and we are aided in this by those parts of the specification which state what was old and well known. The second paragraph recites:

"It is well known to chemists that when alcohol is submitted to distillation with certain acids, peculiar compounds, termed 'ethers,' are formed, each of which is usually distinguished by the name of the acid employed in its preparation."

The origin and existence of ethers, those wonderful agents that produce a harmless insensibility to pain, formed no part of the discovery. No one of them was brought to light by these patentees, for they were all well known before. The same paragraph further sets forth that

"it has also been known that the vapors of some, if not all, of these chemical distillations, particularly those of sulphuric ether, when breathed or introduced into the lungs of an animal, have produced a peculiar effect on the nervous system, one which has been supposed to be analogous to what is usually termed intoxication."

It was not, then, the fact that these vapors could be introduced into the air-passages and lungs that was discovered. This was as old as respiration, or, at least, as old as the existence of the vapors. Neither was it discovered that, when inhaled, these vapors produced an effect like that of intoxication, exhilaration, and more or less stupefaction. This, too, had long been known.

The next paragraph distinctly sets forth the real discovery that was made, namely, that this well-known inhalation of well-known agents (in increased quantities) would produce a state of the animal analogous to complete intoxication accompanied with total insensibility to pain. It appropriately adds: "This is our discovery." It is not important to inquire here whether this was the discovery of an increased and more perfect effect, the same in kind with that already well known, or whether it was the discovery of an entirely new effect. The effect discovered was produced by old agents, operating by old means upon old subjects. The effect alone was new, and to that only can the term "discovery" apply. That this mere discovery, however novel and important, is not patentable, needs neither argument nor authority to prove. This the specification impliedly concedes, for after thus clearly setting forth the discovery, a struggle is made to grapple it to something in active existence, and thus make the two, in this new special relation, a patentable invention. This is done by "combining it with, or applying it to, any surgical operation." "This is our invention." The beneficial effects described as resulting from the application, refer merely to the utility of the alleged invention, which is not in question, and may,

therefore, be laid out of the case. The object of this combining the discovery with, or applying it to, surgical operations, is apparent. It was to shelter the discovery under those terms of the Patent Act which protect "any new and useful improvement on any art." It has clearly not the discovery or invention of an "art," or "machine," or "manufacture," or "composition of matter." Nor was it an "improvement" on any one of the last three. It was, therefore, called, in substance, an improvement in the art of surgery.

But we cannot change a thing by a name. In a certain general sense, it is an improvement in the art of surgery. So would the invention of a new and useful lancet, saw, forceps, or bandage be an improvement on the same art. But the patent securing the exclusive sale or use of such an instrument must rest exclusively upon the novelty of its construction. It could borrow no element of patentability from the art in which it was designed to be used, except merely the element of utility. Of this latter the art would furnish the test. Now this discovery of the effect of ether on the patient, in holding him motionless and insensible during the operation, has the same legal relation to the art of surgery that a machine or other mechanical contrivance for holding him would have. It holds him better, stiller, and with less discomfort and danger to himself than any mechanism could; but its office is to hold and protect the patient. It has no other relation to, or connection with, the art of the surgeon. We use the word "protect" as applied to the patient in the largest sense, and as including not only exemption from pain during the operation, but also from the shock which such operations often give the system. The only legal quality or aid, then, which this alleged invention can draw from the art with which it is connected in the specification, is that which relates to its utility. Of this it supplies undoubted evidence. The eminent surgeons who testified on the trial concurred in stating that its usefulness could not be overrated. We must, then, leaving the art of surgery to supply the evidence of its utility, contemplate the discovery as separated from the use to which it is applied. At this point the patent breaks down; for the specification presents nothing new except the effect produced by well-known agents, administered in well-known ways on well-known subjects. This new or additional effect is not produced by any new instrument by which the agent is administered, nor by any different application of it to the body of the patient. It is simply produced by increasing the quantity of the vapor inhaled. And even this quantity is to be regulated by the discretion of the operator, and may vary with the susceptibilities of the patient to its influence. It is nothing more, in the eye of the law, than the application of a well-known agent, by well-known means, to a new or more perfect use, which is not sufficient to support a patent.

But it was insisted on the argument that the claim at the close of the specification, when properly understood, disclosed the true character

of the invention, and furnished ground upon which the patent can stand. This clause declares, that "what we claim as our invention is the hereinbefore-described means by which we are enabled to effect the above highly important improvement in surgical operations, viz.: by combining therewith the application of ether, or the vapor thereof, substantially as above described." The plaintiff's counsel insists that the true reading of the claim, in the light of the preceding part of the specification is not that which asserts a combination of the discovery with surgical operations, but rather an application of the discovery to surgical operations by the means described; "and that the means described, and the only means described, are the process of rendering the system insensible to pain by the inhalation of ether." But we do not discover that this exposition of the claim relieves the difficulty. What is the process which is here set forth? The process of inhalation of the vapor, and nothing else. To couple with it the effect produced by calling it a process of rendering the system insensible to pain, is merely to connect the results with the means. The means, that is the process of inhalation of vapors, existed among the animals of the geologic ages preceding the creation of our race. That process, in connection with these vapors, is as old as the vapors themselves. We come, therefore, to the same point, only by a different road. We have, after all, only a new or more perfect effect of a well-known chemical agent, operating through one of the ordinary functions of animal life. . . .

Before dismissing this case, it may not be amiss to speak of the character of the discovery upon which the patent is founded. Its value in securing insensibility during the surgical operation, and thus saving the patient from sharp anguish while it is proceeding, and mitigating the shock to his system, which would otherwise be much greater, was proved on the trial by distinguished surgeons of the city of New York. They agreed in ranking it among the great discoveries of modern times; and one of them remarked that its value was too great to be estimated in dollars and cents. Its universal use, too, concurs to the same point. Its discoverer is entitled to be classed among the greatest benefactors of mankind. But the beneficent and imposing character of the discovery cannot change the legal principles upon which the law of patents is founded, nor abrogate the rules by which judicial construction must be governed. These principles and rules are fixed, and uninfluenced by shades and degrees of comparative merit. They secure to the inventor a monopoly in the manufacture, use, and sale of very humble contrivances, of limited usefulness, the fruits of indifferent skill, and trifling ingenuity, as well as those grander products of his genius which confer renown on himself, and extensive and lasting benefits on society. But they are inadequate to the protection of every discovery, by securing its exclusive control to the explorer to whose eye it may be first disclosed. A discovery may be brilliant and useful, and not patentable. No matter through what long, solitary vigils, or by what im-

portunate efforts, the secret may have been wrung from the bosom of Nature, or to what useful purpose it may be applied. Something more is necessary. The new force or principle brought to light must be embodied and set to work, and can be patented only in connection or combination with the means by which, or the medium through which, it operates. Neither the natural functions of an animal upon which or through which it may be designed to operate, nor any of the useful purposes to which it may be applied, can form any essential parts of the combination, however they may illustrate and establish its usefulness. Motion for a new trial denied.

## 223. AMERICAN BELL TELEPHONE COMPANY *v.* DOLBEAR

UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS. 1883

15 *Fed.* 448

IN EQUITY.

*Chauncey Smith* and *James J. Storrow*, for complainants.

*Causten Browne* and *James E. Maynadier*, for defendants.

Before GRAY and LOWELL, JJ.

GRAY, Justice. Few legal rules have been oftener misunderstood and misapplied than the maxim that you cannot patent a principle. But the confusion on this subject has been so effectually cleared up by the recent judgment of the Supreme Court, delivered by Mr. Justice BRADLEY, in *Tilghman v. Proctor*, 102 U. S. 707, that it will be sufficient for the purposes of this case to state the conclusions there announced. There can be no patent for a mere principle. The discoverer of a natural force or a scientific fact cannot have a patent for that. But if he invents for the first time a process by which a certain effect of one of the forces of nature is made useful to mankind, and fully describes and claims that process, and also describes a mode or apparatus by which it may be usefully applied, he is, within the meaning and the very words of the patent law, "a person who has invented or discovered any new and useful art"; and he is entitled to a patent for the process of which he is the first inventor, and is not restricted to the particular form of mechanism or apparatus by which he carries out that process. Another person, who afterwards invents an improved form of apparatus, embodying the same process, may indeed obtain a patent for his improvement, but he has no right to use process, in his own or any other form of apparatus, without the consent of the first inventor of the process.

It was decided by this Court in *American Bell Telephone Co. v. Spencer*, 8 *Fed. Rep.* 509, and is not denied by the present defendant, that Bell is the first inventor of a speaking telephone. The only controversy is the extent of his patent. The draughtsman of the specifications has exhibited as clear and accurate a comprehension of the

rules of the patent law, as the inventor has of the force of nature with which he was dealing, and of the means by which he reduced that force to a practical use. The patent is clearly not intended to be limited to a form of apparatus, but embraces a method or process. This is apparent upon the face of the specification. The inventor begins by saying:

"My present invention consists in the employment of a vibratory or undulatory current of electricity in contradistinction to a merely intermittent or pulsatory current, and of a method of and apparatus for producing electrical undulations upon the line wire."

After describing the advantages of an undulatory current, resulting from gradual changes of intensity, over a pulsatory current caused by sudden changes of intensity, he says:

"It has long been known that when a permanent magnet is caused to approach the pole of an electro-magnet, a current of electricity is induced in the coils of the latter, and that, when it is made to recede, a current of opposite polarity to the first appears upon the wire. When, therefore, a permanent magnet is caused to vibrate in front of the pole of an electro-magnet, an undulatory current of electricity is induced in the coils of the electro-magnet, the undulations of which correspond, in rapidity of succession, to the vibrations of the magnet, in polarity to the direction of its motion, and in intensity to the amplitude of its vibration." . . .

He further says:

"There are many ways of producing undulatory currents of electricity, dependent for effect upon the vibrations or motions of bodies capable of inductive action. A few of the methods that may be employed I shall here specify. When a wire, through which a continuous current of electricity is passing, is caused to vibrate in the neighborhood of another wire, an undulatory current of electricity is induced in the latter. When a cylinder, upon which are arranged bar magnets, is made to rotate in front of the pole of an electro-magnet, an undulatory current of electricity is induced in the coils of the electro-magnet.

"Undulations are caused in a continuous voltaic current by the vibration or motion of bodies capable of inductive action, or by the vibration of the conducting wire itself in the neighborhood of such bodies. Electrical undulations may also be caused by alternately increasing and diminishing the resistance of the circuit, or by alternately increasing and diminishing the power of the battery. The internal resistance of a battery is diminished by bringing the voltaic elements nearer together, and increased by placing them further apart. The reciprocal vibration of the elements of a battery, therefore, occasions an undulatory action in the voltaic current. The external resistance may also be varied. For instance, let mercury or some other liquid form part of a voltaic circuit, then the more deeply the conducting wire is immersed in the mercury or other liquid, the less resistance does the liquid offer to the passage of the current. Hence the vibration of the conducting wire in mercury or other liquid included in the circuit occasions undulations in the current. The vertical vibration of the elements of a battery in the liquid in which they are immersed produces an undulatory action in the current by alternately increasing and diminishing the power of the battery." . . .



The inventor adds this explanation:

"In this specification the three words 'oscillation,' 'vibration,' and 'undulation' are used synonymously, and in contradistinction to the terms 'intermittent' and 'pulsatory.' By the term 'body capable of inductive action,' I mean a body which, when in motion, produces dynamical electricity. I include in the category of bodies capable of inductive action, brass, copper, and other metals, as well as iron and steel."

His fifth and final claim is of

"the method of and apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth."

In this claim, as throughout the specification, the word "method" is evidently used, not as synonymous with "mode" or "apparatus," but as equivalent to "process"; just as it was used by Chief Justice Taney, delivering the judgment of the majority of the court, in *Morse v. O'Reilly*, 15 How. 62, 117, as well as by Mr. Justice Grier (who dissented in *Morse v. O'Reilly*) in delivering the unanimous judgment in *Corning v. Burden*, 15 How. 252, 267. And the invention claimed is not merely the apparatus described, but also the general process or method, by which the wind, or a musical instrument, or the human voice, produces in a current of electricity a succession of electrical disturbances, not sudden and intermittent or pulsatory, but gradual, oscillatory, vibratory, or undulatory, so as to give out at the further end of the conducting wire sounds exactly corresponding in loudness, in pitch, and in tone, character or quality, to the sounds committed to it at the nearer end.

The opinion in *Spencer's Case* clearly points out that "Bell discovered a new art — that of transmitting speech by electricity — and has a right to hold the broadest claim for it which can be permitted in any case," and "the invention is nothing less than the transfer to a wire of electrical vibrations like those which a sound has produced in the air"; and that his patent, while not covering the abstract principle, without regard to means, of transmitting speech by electricity, yet is not limited to a particular form of apparatus, but includes the process or method (using the two words as equivalent), the essential elements of which are "the production of what the patent calls undulatory vibrations of electricity to correspond with those of the air, and transmitting them to a receiving instrument capable of echoing them."

The evidence in this case clearly shows that Bell discovered that articulate sounds could be transmitted by undulatory vibrations of electricity, and invented the art or process of transmitting such sounds by means of such vibrations. If that art or process is (as the witness called by the defendants say it is) the only way by which speech can

be transmitted by electricity, that fact does not lessen the merit of his invention, or the protection which the law will give to it. The mode or apparatus by which Bell effects his purpose is by using an electro-magnet in the transmitter, and another electro-magnet in the receiver. But the essence of his invention consists not merely in the form of apparatus which he uses, but in the general process or method of which that apparatus is the embodiment. Dolbear likewise uses an electro-magnet in the transmitter; and both his method and his apparatus, as is admitted in his own affidavit, are substantially like Bell's, until he comes to the receiver. For the magneto-receiver, Dolbear substitutes a condenser-receiver, consisting of two thin metal diaphragms or disks, of about the size and thickness of those used in an ordinary Bell telephone, separated by a very thin air space, one or both disks connected with the conducting wire, and the speaking disk, if not so connected, otherwise charged with electricity; so that, as the varying currents flow into and out of this condenser, the two disks attract one another more or less strongly, and thereby vibrations are set up which correspond to the vibrations of the original sound.

The main difference on which the defendants rely is that Bell uses what is called dynamic electricity, producing by its motion an electric current; while Dolbear, in his receiver, uses what is called static electricity, producing, while at rest, electrical attraction. And the learned counsel for the defendants illustrate the distinction thus:

"It was known long before Bell's method that electricity had two properties, very much as water has two properties; namely, first, pressure or head, or that property which tends to make it flow, and which can exist by itself only in the case of an insulated and charged body, or a reservoir of water; and, secondly, that dynamic property arising from its motion, and which can never exist by itself, but depends upon the quantity in motion and the rate of motion. This is not an absolutely exact way of expressing it, for the reason that electricity is not a fluid; but, were it a fluid, the statement would be entirely exact."

It does not appear to us to be important to determine whether, in scientific exactness, the varying influences of static electricity may properly be called currents; or whether the two properties of electricity differ in kind and in substance, or only in degree, or in the form of manifestation and application; or whether the force of the property which tends to make a fluid, when stationary, change its place and flow, is different in kind from that which it exerts when changing its place and flowing; in short, whether the power of the pressure of water in a reservoir is different in kind from water-power in a stream or current. Whatever name may be given to the property, or the manifestation, of the electricity in the defendants' receiver, the facts remain that they avail themselves of Bell's discovery that undulatory vibrations of electricity can intelligibly and accurately transmit articulate speech, as well as of the process which Bell invented, and by which he reduced his discovery to practical use; that they also copy the mode

and apparatus by which he creates and transmits the undulatory electrical vibrations, corresponding to those of the air; and that in the plate charged with electricity, which they have substituted for the magnetic coil in the receiver, the charge constantly varies in accordance with the principle which Bell discovered, and by means of the undulatory current caused by the process, and in the mode which he invented and patented.

The defendants have therefore infringed Bell's patent by using his general process or method, and should be restrained by injunction from continuing to do so; and it is unnecessary, for the purposes of this decision, to consider whether the defendants' apparatus is a substantial equivalent of the plaintiff's, or whether it is an improvement for which Dolbear might himself be entitled to a patent. Temporary injunction ordered.<sup>1</sup>

## 224. HOTCHKISS *v.* GREENWOOD

SUPREME COURT OF THE UNITED STATES. 1850

11 *How.* 248

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Ohio. It was a question involving the validity of a patent right, under the following circumstances. The patent and specification were as follows:

"The United States of America, to all to whom these letters patent shall come.

"Whereas John G. Hotchkiss, New Haven, Conn., John A. Davenport, and John W. Quincy, New York, have alleged that they have invented a new and useful improvement in making door knobs, of all kinds of clay used in pottery, and of porcelain, which they state has not been known or used before their application. . . . These are therefore to grant, according to law, to the said John G. Hotchkiss, John A. Davenport, and John W. Quincy, their heirs, administrators, or assigns, for the term of fourteen years from the 29th day of July, 1841, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Hotchkiss, Davenport, and Quincy, in the schedule hereunto annexed, and is made a part of these presents.

"In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent-Office has been hereunto affixed. Given, under my hand at the city of Washington, this 29th day of July, A. D. 1841, and of the independence of the United States of America the sixty-sixth.

"DANIEL WEBSTER,  
Secretary of State.

"Countersigned and sealed with the seal of the Patent-Office.

"HENRY L. ELLSWORTH,  
Commissioner of Patents."

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<sup>1</sup> [Affirmed in *Telephone Cases*, 1887, 126 U. S. 1.]

. . . In October, 1845, the plaintiffs in error brought an action in the Circuit Court of the United States for Ohio, against the defendants for a violation of the patent right.

The defendants pleaded not guilty, and gave the following notice:

"The plaintiffs will please take notice, that on the trial of the above cause the defendants will give in evidence to the jury, that said John G. Hotchkiss, John A. Davenport, and John W. Quincy were not the original and first inventors and discoverers of making or manufacturing knobs of potter's clay or of porcelain. . . ."

And the evidence being closed, the counsel for the plaintiffs insisted in the argument, that, although the knob, in the form in which it is patented, may have been known and used in the United States prior to their invention and patent; and although the shank and spindle, by which it is attached, may have been known and used in the United States prior to said invention and patent; yet, if such shank and spindle had never before been attached to a knob made of potter's clay or porcelain, and if it required skill and thought and invention to attach the said knob of clay to the metal shank and spindle, so that the same would unite firmly, and make a solid and substantial article of manufacture, and if the said knob of clay or porcelain so attached were an article better and cheaper than the knob theretofore manufactured of metal or other materials, that the patent was valid, and asked the Court so to instruct the jury, which the Court refused to do; but, on the contrary thereof, instructed the jury, that, if knobs of the same form, and for the same purposes with that described by the plaintiffs in their specifications, made of metal or other material, had been known and used in the United States prior to the alleged invention and patent of the plaintiffs, and if the spindle and shank, in the form used by the plaintiffs, had before that time been publicly known and used in the United States, and had been theretofore attached to metallic knobs by means of the dovetail and the infusions of melted metal, as the same is directed in the specification of the plaintiffs to be attached to the knob of potter's clay or porcelain, so that if the knob of clay or porcelain is the mere substitution of one material for another, and the spindle and shank be such as were theretofore in common use, and the mode of connecting them to the knob by dovetail be the same that was theretofore in use in the United States, the material being in common use, and no other ingenuity or skill being necessary to construct the knob than that of an ordinary mechanic acquainted with the business, the patent is void, and the plaintiffs are not entitled to recover. . . .

The case came up to this Court, and was argued by Mr. *Ewing*, for the plaintiffs in error, and Mr. *Chase*, for the defendants in error.

Mr. *Ewing*, for the convenience of reference, divided the instructions of the Court into paragraphs. . . .

The Court seem to have been of opinion, first, that it could not, in

the nature of things, require skill and thought and invention so to unite the metal and clay as to make them, together, a firm and substantial article of manufacture; or, second, that the new manufacture produced by the substitution of one material for another in part of the article, and the uniting of the two materials, though of dissimilar qualities, and never before united for that purpose, was not patentable, even though it required skill and thought and invention to unite them; and though the new manufacture thus produced were cheaper and better than any like article ever before known.

1st. The first position, I respectfully contend, the Court had no right to assume. . . . Knobs had been in use many hundred years; potter's ware and porcelain, many thousand; but no one ever before succeeded in uniting the clay and the iron so as to make of the two a substantial and useful article. . . .

2d. But the second alternative position is the one on which I understood the Court to rest, namely, that the new manufacture produced by the substitution of one material for another as in this case the substitution of clay or porcelain in the place of metal for the knob, using metal as theretofore for the collet and spindle, was not patentable, though the materials are dissimilar, and were never before united for that or a like purpose; and though it required skill and thought and invention to unite them, and though the new manufacture thus produced was cheaper and better than any like article ever before known. This position cannot be maintained either by reason or authority. The clay or porcelain knob connected with the metal shank is a new and useful manufacture, according to the letter as well as the spirit and intent of our statute. . . .

The counsel for the defendants in error made the following points. The Court now is called upon to decide whether this patent, or whether any patent, can be sustained merely for applying a common, well-known material to a use to which it had not before been applied, without any new mode of using the material, or any new mode of manufacturing the article sought to be covered by the patent. . . .

It is a strange claim, to say the least of it. According to the principle of the claim, one man may claim a patent for making a stove of sheet-iron; another may claim a patent for making stoves of cast-iron; another may claim a patent for making stoves of copper; and each may claim, not the right to make a stove of a particular form and shape only, or by any peculiar process of making, but the exclusive right to make all sorts and shapes of stoves out of the particular material named. So another man claims the exclusive right of using ice to cool water; another claims the exclusive right to use ice for cooling wine; another, to use the same article to cool brandy; and a physician claims the exclusive right to use the article of ice to cool a fevered patient's head. Again, one man has been long accustomed to make window-sashes of pine wood; another comes and says he can make window-sashes of cast-iron, and

claims the exclusive right to make all the cast-iron sashes the country may want for the next fourteen years. . . .

To allow such a claim, it appears to us, would be violating the spirit of the Act of Congress. The object of the Act of Congress is to encourage men to devote their time and talent in making new and useful discoveries in the arts, manufactures, and compositions of matter. Why does the Act provide so carefully for new compositions of matter, if an individual could obtain a patent for a use of an element of matter without any composition at all?

The patentee in this case is endeavoring to add a new clause to the patent law. He is claiming the right to apply a common element of nature to a new purpose, without the aid of any new mode or process of working it, and without combining it with any other portions of matter so as to make it a composition. . . .

Mr. Justice NELSON delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the United States for the District of Ohio. The suit was brought against the defendants for the alleged infringement of a patent for a new and useful improvement in making door and other knobs of all kinds of clay used in pottery, and of porcelain. The improvement consists in making the knobs of clay or porcelain, and in fitting them for their application to doors, locks, and furniture, and various other uses to which they may be adapted; but more especially in this, that of having the cavity in the knob in which the screw or shank is inserted, and by which it is fastened, largest at the bottom and in the form of dovetail, or wedge reversed, and a screw formed therein by pouring in metal in a fused state; and, after referring to drawings of the article thus made, the patentees conclude as follows:

"What we claim as our invention, and desire to secure by letters patent, is the manufacturing of knobs, as stated in the foregoing specifications, of potter's clay, or any kind of clay used in pottery, and shaped and finished by moulding, turning, burning, and glazing; and also of porcelain." . . .

The instruction assumes, and, as was admitted on the argument, properly assumes, that knobs of metal, wood, etc., connected with a shank and spindle, in the mode and by the means used by the patentees in their manufacture, had been before known, and were in public use at the date of the patent; and hence the only novelty which could be claimed on their part was the adaptation of this old contrivance to knobs of potter's clay or porcelain; in other words, the novelty consisted in the substitution of the clay knob in the place of one made of metal or wood, as the case might be. And in order to appreciate still more clearly the extent of the novelty claimed, it is proper to add, that this knob of potter's clay is not new, and therefore constitutes no part of the discovery. If it was, a very different question would arise; as it might very well be urged, and successfully urged, that a knob of a new composition



of matter, to which this old contrivance had been applied, and which resulted in a new and useful article, was the proper subject of a patent.

The novelty would consist in the new composition made practically useful for the purposes of life, by the means and contrivances mentioned. It would be a new manufacture, and none the less so, within the meaning of the patent law, because the means employed to adapt the new composition to a useful purpose was old, or well known.

But in the case before us, the knob is not new, nor the metallic shank and spindle, nor the dovetail form of the cavity in the knob, nor the means by which the metallic shank is securely fastened therein. All these were well known, and in common use; and the only thing new is the substitution of a knob of a different material from that heretofore used in connection with this arrangement.

Now it may very well be, that, by connecting the clay or porcelain knob with the metallic shank in this well-known mode, an article is produced better and cheaper than in the case of the metallic or wood knob; but this does not result from any new mechanical device or contrivance, but from the fact, that the material of which the knob is composed happens to be better adapted to the purpose for which it is made. The improvement consists in the superiority of the material, and which is not new, over that previously employed in making the knob. But this, of itself, can never be the subject of a patent. No one will pretend that a machine, made, in whole or in part, of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one; or, in the sense of the patent law, can entitle the manufacturer to a patent. The difference is formal, and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purpose intended, but nothing more.

I remember having tried an action in the Circuit in the District of Connecticut some years since, brought upon a patent for an improvement in manufacturing buttons. The foundation of the button was wood, and the improvement consisted in covering the face with tin, and which was bent over the rim so as to be firmly secured to the wood. Holes were perforated in the centre, by which the button could be fastened to the garment. It was a cheap and useful article for common wear, and in a good deal of demand. On the trial, the defendant produced a button, which had been taken off a coat on which it had been worn before the Revolution, made precisely in the same way, except the foundation was bone. The case was given up on the part of the plaintiff. Now the new article was better and cheaper than the old one; but I did not then suppose, nor do I now, that this could make any difference, unless it was the result of some new contrivance or arrangement in the manufacture. Certainly it could not, for the reason that the

materials with which it was made were of superior quality, or better adapted to the uses to which the article is applied. . . .

Now if the foregoing view of the improvement claimed in this patent be correct, it is quite apparent that there was no error in the submission of the questions presented at the trial to the jury; for unless more ingenuity and skill in applying the old method of fastening the shank and the knob were required in the application of it to the clay or porcelain knob than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement is the work of the skilful mechanic, not that of the inventor.

We think, therefore, that the judgment is, and must be, affirmed.

Mr. Justice WOODBURY dissented.

I feel obliged to dissent from my brethren in this case. It is chiefly, however, in regard to the manner in which some of the facts were submitted to the jury; but, involving as it does an important principle in the practice under our patent system, it may be useful to explain the grounds of my dissent. . . .

It has been urged here, that this invention was merely applying clay and porcelain to a new purpose, and that merely a new purpose, in our patent system, is not entitled to protection. 2 Story, 190, 412; *Losh v. Hague*, Webster Pat. Cas. 207; Curtis on Patents, 87. The meaning of this rule, however, as eviscerated from all the cases is, that the application of an old machine or old composition of matter before patented to a new object, or what is termed a double use, does not entitle one to a patent connected with this new object; because then there is no new machinery or new combination of old parts, as in merely applying a patent grist-mill to a new purpose of grinding plaster.

But it is entirely different if you apply an old earth, or old mechanical power, or old principle in physics, to a new object. There is then a new form adopted, or a new combination for the purpose. And though the elementary material be old, or the elementary principle operating be old, it being difficult to discover a new substance or new elementary principle, yet there is a new shape and consistency and use given, or a new *modus operandi*, which, if cheaper and better, benefits the world and deserves protection and encouragement.

If these are the effects, however small the skill or ingenuity required to imitate them, they are not excluded from the aid of the laws by either principles or precedents. They are not mere double uses of a previous machine or composition; but a double or additional form or composition of an article for a new purpose. . . .

The precedents are quite full on this, and some of them in all respects nearly in point. Similar to this was the hot blast, substituted for the cold in making iron, and a patent for it upheld. *Neilson's Case*, Webster, P. C. 14. The blast was still air, but in a different condition, leading

to new and useful results. So the use of the flame of gas to finish cloth rather than the flame of oil. Webster, P. C. 99. So steel plates used instead of copper in engraving. *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 9, 11. That very closely resembles the present case. So pit-coal, substituted for charcoal in making iron, has been deemed patentable (Webster, P. C. 14); and anthracite for bituminous coal (273).

There are also some strong opinions beside these decisions in favor of a change in metal for an instrument being alone sufficient for a patent, if more useful or cheaper. See Webster on Sub. Matter, 25, note, and Curtis on Patents, 8. (Phillips on Patents, 134, if there be any contrivance connected with it.) Indeed, why should it not be sufficient? A new mode of operating or a new composition to produce better results is the daily ground for a patent. All which the Act of Congress itself requires is that the invention be for "any new and useful improvement on any art, machine, manufacture, or composition of matter," etc. 5 Stat. at Large, p. 119, 6. Must it not then be considered such an improvement, if operating with new materials both cheaper and more durable?

Who cannot realize that, since the improved modes of cutting, boring, and shaping, the substitution of iron for wood in many manufactures might not often be a gain in strength and durability, quite beyond any difference in expense, and be justly patentable? Who, too, would not deem it material to gain by the use of wood or leather, or a cheap metal, instead of gold and silver, for some manufacture or mechanical purpose, when it can be done with increased benefit as well as cheapness? And why is not he a benefactor to the community, and to be encouraged by protection, who invents a use of so cheap an earth as clay for knobs, or in a new form or combination, by which the community are largely gainers?

On the whole case, then, it seems to me that justice between these parties, as well as sound legal principle, requires another trial on instructions upon some points omitted, and instructions in some other respects different in law from what were given in this instance at the first trial.

## 225. NATIONAL AUTOMATIC DEVICE CO. v. LLOYD

CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS. 1889

40 Fed. 89

IN EQUITY. On motion for injunction pendente lite.

*Selden Fish and Banning, Banning & Payson*, for complainant.

*W. C. Hoyer, H. D. Paul, B. M. Shaffner*, and *George Burry*, for defendants.

BLODGETT, J. Complainant moves for an injunction pendente lite in this case. The bill charges the infringement of patent No. 410,981,

granted to Fred. N. Lang, on the 10th day of September, 1889, for a "Toy Automatic Race-Course," and contains the usual prayer for an injunction and accounting. The device covered by the patent is a shaft projecting upwards from the centre of the base of a circular shell or case, from 15 to 18 inches in diameter, to which shaft a clock-work mechanism is so geared that it can be made to revolve rapidly by releasing the escapement of the clock-work. On this shaft are mounted two or more radial arms, to the ends of which are attached small toy figures of horses. These radial arms are attached to the shaft by separate collars so loose that they turn easily on the shaft. The clock-work escapement is released by dropping a nickel coin through a slot in the machine, whereupon the shaft commences to revolve rapidly, carrying the radial arms with it, but, after a certain number of revolutions, the force of the clock-work is cut off, and the radial arms continue to revolve, from the momentum they have obtained while the clock-work was going, until such arms finally stop from friction and the resistance of the air.

Several objections are urged against the motion for an injunction, such as that the bill is multifarious, non-infringement, etc., which I do not deem it necessary to consider, as it seems to me there is sufficient reason on another ground for withholding the injunction.

The proof shows that the only use to which complainant's, or, for that matter, the defendants', machines, have been so far applied, is to place them in saloons, bar-rooms, and other drinking places, where the frequenters of such places make wagers as to which of the toy horses will stop first, or which will stop nearest to a designated point, after the machine has been put in motion, by dropping a nickel in the slot; in other words, the machine in question is only used for gambling purposes. The law of the United States only authorizes the issue of a patent for a new and useful invention, and in an early case on that subject (*Bedford v. Hunt*, 1 Mason, 302) it was held that the word "useful," as used in this statute, means such an invention as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, health, or good order of society, and the principle thus enunciated has been uniformly applied ever since. It is urged that this machine is susceptible of being utilized as a toy, or child's plaything; but it is a sufficient answer to this suggestion that no such use has been as yet made. The patent has been very recently issued, and it is possible that a useful application may yet be found for it; but as the case now stands, the only use to which the invention has been put being for gambling purposes, I must hold that it is not a useful device, within the meaning of the patent law, as its use so far has been only pernicious and hurtful. Injunction refused.<sup>1</sup>

<sup>1</sup> [PROBLEMS:

Water alone has in prior art been used to sprinkle roads, for the purpose of holding down the dust. Oil alone has been so used. The plaintiff makes a mix-

(2) *Infringement*226. UNITED TELEPHONE COMPANY *v.* SHARPLES

CHANCERY DIVISION, SUPREME COURT OF JUDICATURE OF ENGLAND.  
1885

*L. R. 29 Ch. D. 164*

THE plaintiffs are the proprietors of the patent rights in certain telephonic apparatus known as "Bell Telephones" and "Blake Transmitters," and the defendant, Mr. G. Sharples, carries on business as a chemist and electrician, or telegraph engineer, at Preston, in Lancashire, under the firm of Sharples & Co.

In November, 1883, the defendant, who had in his possession certain royalty-paid Bell telephones and Blake transmitters, saw an advertisement by the American Telephone Company of Rotterdam in the *Electrical Review*, offering Bell telephones and Blake transmitters of ordinary construction for sale, and on the 5th of that month he wrote to them saying that he might shortly require a few Blake transmitters and Bell telephones for export, and requesting the company to state their prices. Having ascertained the prices charged by the Rotterdam company, which were much lower than those for which the patented articles could be bought in England, the defendant, on the 10th of November, ordered two Blake transmitters and two Bell telephones, which were

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ture of oil and water, in which "the water carries minute particles of oil down into the body of the dust, thereby binding the dust particles into a top-dressing that adheres to the roadbed," and attains high utility for the purpose. Is this a patentable invention? (1909, *Westrunnite Co. v. Commissioners of Lincoln Park*, 7th C. C. A., 174 Fed. 144.)

For purposes of commercial clothes-laundries a steam-heated drying-room was long in prior use in the art. An endless conveyor propelled by machinery, with devices for stopping it at will and for carrying buckets or other articles depending from it, was long in prior use in many arts. The plaintiff combined the endless conveyor and the steam-heated drying-room to laundry purposes, so as to attain increased speed, convenience, and efficiency in the process of drying clothes. Was this a patentable invention? (1909, *American Laundry M. M. Co. v. Troy Laundry M. Co.*, 2d C. C. A., 174 Fed. 415.)

## ESSAYS:

*Walter F. Rogers*, "Patents for Methods; the case of *Risdon Iron and Locomotive Works v. Medart et al.*" (A. L. R., 29, 559.)

*C. C. Langdell*, "Patent Rights and Copy Rights." (H. L. R., XII, 553.)

*William B. Whitney*, "Patentable Processes." (H. L. R., XIX, 30.)

*Edward W. Hulme*, "History of the System of Patents for Industrial Inventions." (Select Essays in Anglo-American Legal History, III.)

*Dwight B. Cheever*, "Rights of Employer and Employee to Inventions made during Employment." (M. L. R., I, 384.)

## NOTES:

"Employee's patent: Employer's right." (C. L. R., VI, 204.)

"Patentee: Monopoly right of." (C. L. R., IX, 536, 559.)

"Novelty: Tests of novelty." (H. L. R., VI, 151; XIII, 62.)

shortly afterwards sent by the company and received and paid for by the defendant. . . .

The defence admitted that the instruments purchased from the Rotterdam company would, if manufactured in this country, have infringed the plaintiffs' patents, but alleged that the defendant had merely purchased them for examination and experiment by himself and his pupils in his laboratory in order to see if he could improve upon them, that he had never otherwise used them, and that since the commencement of the action he had sent them out of the country as a present to one M. Julius Barlein of Moscow. . . .

*Theodore Aston, Q. C., Moulton, and A. J. Ashton*, for the plaintiffs. The importation and using or vending in England of apparatus manufactured abroad according to the specification of an English patent is an infringement of that patent. . . .

*Hastings, Q. C., and Goodeve*, for the defendant: The plaintiffs' privilege is to "make, use, exercise, and vend" the invention which is the subject of their patents. The defendant has neither made nor vended, nor has he exercised or used it so as to infringe the patents. Mere purchase and importation of a pirated article not for sale or profit is no infringement, and the importer may subsequently lawfully export it as a present. . . . It need not, perhaps, be a user for pecuniary profit, but it must be a user for advantage; and it is perfectly lawful to import from abroad a pirated article, pull it to pieces, and improve it, . . . or use it for the purpose of experiment and instruction; . . . for this is neither making, using, nor vending. . . .

KAY, J. (after reviewing the evidence), said: It is admitted by the counsel for the defendant that if a man buys abroad, imports into this country, has in his possession here, and sells, although to a foreign customer, an instrument which he knows would, if made, sold, or used in this country be an infringement of an English patent, that would be an infringement of such patent. I confess I have little hesitation in acceding to this, and in my opinion, upon the balance of the evidence this is what was actually done in this case. Therefore I hold upon that ground that there has been a clear infringement of these patents.

But suppose that this was not the case, what is the alternative story? The witness Sharples says: "We used these instruments for the purpose of experiment; the cost of them was so small that we could afford to allow our pupils to pull them to pieces or experiment with them." Now they had, as he says, a number of the so-called royalty-paid instruments, which were more costly; and he says, again and again, "We could not afford to let our pupils use those, and pull them in pieces or experiment with them, and therefore it was that we bought these, which were very much cheaper, in order that our pupils might experiment with and use these, instead of using the more expensive instruments."

I am asked to say that that was not a user in this country. What does the word "pupil" mean? The defendant says that the pupils are



persons who do not pay anything for being taught, but, on the contrary, that those of them who have been a certain time, or certain classes of them, receive some payment. But whether these pupils, these young persons, who are admitted into this business for the purpose of learning it do or do not pay for their instruction it is obvious enough that they are paid very much less than an ordinary assistant would be paid who did not want to learn the business. They are admitted upon the terms that part of the remuneration they shall get for their services shall be instruction in the business. And to say that to buy a telephone which is an infringement of an English patent for the purpose of instructing your pupils who are learning the business, to let them use and experiment with it, to let them, if they please, pull it in pieces, for the purpose of saving the expense of using the patent telephone and experimenting with or pulling that to pieces, to say that that is not a user in this country, is a thing to which I cannot accede. It seems to me plainly to be a user. If it were nothing but this, that it was fixed (as has been proved) between the lower room and the switch-room for the purpose of being used by the pupils who could not be trusted with the use of the more costly instrument, it would be a part of the instruction of those pupils, and the person who so used it would be getting the advantage of instructing his pupils by means of this cheaper instead of the more expensive instrument. I asked Mr. Goodeve whether he carried his proposition thus far, that there could be no user of a patent unless it produced a direct pecuniary advantage to the person who used it? At first he seemed inclined to go so far, but I think at last he receded from that position; because I put to him this very obvious case: Suppose, for example, if the Singer sewing machine were protected by patent, a man should buy a cheaper instrument which he knows is an infringement of the patent, for some member of his household, who uses it, let us say, for amusement simply, would that be a user in this country or not? Without any doubt it would, although it did not produce to or save him one farthing. Therefore Mr. Goodeve modified his proposition to this, that "it must be a user for the purpose of advantage." Well, then, is not the user which I have been describing a user for the purpose of advantage? If not I do not know what advantage means or user means. . . .

I do not think it necessary to consider the other parts of the case, because one instance of clear infringement of the patent is quite enough to justify the order which it seems to me the Court is bound to make. That order is, that there be a perpetual injunction against the defendant Sharples, restraining him from infringement of the plaintiffs' patents, and I order him to pay all the costs of this action.

227. MANUFACTURING COMPANY *v.* COWING

SUPREME COURT OF THE UNITED STATES. 1881

105 U. S. 253

APPEAL from the Circuit Court of the United States for the Northern District of New York. The facts are stated in the opinion of the Court.

*Mr. William F. Cogswell*, for the appellant.

*Mr. Elisha Foote*, for the appellees.

Mr. Chief Justice WAITE delivered the opinion of the Court. The only questions raised on this appeal relate to the amount which the Goulds' Manufacturing Company is entitled to recover for the infringement of letters-patent No. 117,925, dated August 8, 1871, for an improvement in pumps "specially designed for drawing off the gas from oil-wells and conducting the same to the furnace of the engine." The validity and the infringement of the letters are not disputed here.

After the letters and the infringement were established below, the case was sent to a master to ascertain the damages. He reported that 298 pumps had been manufactured and sold by the defendants, out of which a net profit of \$47.71 on each pump had been realized, that being the difference between the cost of the material and labor used in making a pump and the price at which it was sold. Upon this report the Court ruled that, as the patent was only for an improvement on an old pump, the profits for which the defendants were accountable must be confined to such as were realized from the manufacture of the patented improvement, and not from the whole pump as improved. For this reason a new reference was ordered to state the account on the proper basis.

The second report was, in its result, substantially the same as the first. . . . The master on the second reference, however, reported further as follows:

"I find as further facts from the evidence that the plaintiffs' pump, with their patented improvement, which they had introduced into the market, virtually controlled the market, and had superseded all the other pumps then in use for pumping gas, and the others were literally driven out of the market, as they could not be sold at the places where the plaintiffs' pump had been introduced. The defendants went into the very market where the plaintiffs' pump had been introduced, and where they had sold, and where plaintiffs were then supplying most of their pumps, and the defendants, in fact, went and employed Wenson, the former agent of the plaintiffs, to sell the pumps for them, and he, from being the plaintiffs' agent in the locality, made very ready sale of the same pumps for the defendants, and had not the defendants interfered in urging the pumps which they manufactured upon this local market the plaintiffs would certainly have had the whole market to themselves, and would, beyond doubt, have secured orders and supplied the demand of

the market for the same number of pumps more than they did sell, as the defendants furnished, to wit, 298 pumps. The plaintiffs were, by their agent, in the field furnishing pumps in those oil regions, and would have supplied the market demand had not the defendants intervened and supplied to the market these 298 pumps."

This finding as to the facts is, in its general effect, supported by the evidence. Notwithstanding this, however, the Court still adhering to its holding as to the rule of estimating profits, set aside the report, and inasmuch as the company had, on the second reference, failed to show what had been realized upon the principles of accounting prescribed, a final decree was entered in its favor for nominal damages only and costs. From that decree this appeal was taken by the company.

The rule applicable to this class of cases was well stated by Mr. Justice STRONG, speaking for the whole Court, in *Mowry v. Whitney*, 14 Wall. 620. The subject-matter of that suit was a patent for an improvement in the process of manufacturing car-wheels, and in respect to the profits resulting to an infringer from the use of the patented process, it was said, p. 651:

"The question to be determined . . . is, what advantage did the defendant derive from using the complainant's invention over what he had in using the other processes then open to the public, and adequate to enable him to obtain an equally beneficial result. The fruits of that advantage are his profits."

It does not necessarily follow from this that where the patent is for one of the constituent parts, and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately. If, without the improvement, a machine adapted to the same uses can be made which will be valuable in the market, and salable, then, as was further said in that case, the inquiry is, "What was the advantage in cost, in skill required, in convenience of operation, or marketability," gained by the use of the patented improvement? If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market. Such, we think, is this case. Pumps for all ordinary, and many extraordinary, uses were very old; but, in the new developments of business, something was wanted to take the gas from the casing of an oil-well, and conduct it safely to the furnace of the engine. "With that special purpose in view," this inventor took the well-known parts of an ordinary double-action pump, changed some of them slightly in form, added a new device, and produced something which would do what was wanted. While nominally he only made an improvement in pumps, he actually made an improved pump. For

ordinary uses the improvement added nothing to the value of the old pump, but for the new and special purpose in view, the old pump was useless without the improvement. The testimony shows that there was no market for pumps adapted to this particular use, except in the oil-producing regions of Pennsylvania and Canada. The demand was limited, as well as local. Less than a thousand pumps actually supplied all who wanted them. But for that particular use no other pump could at the time be sold. If the appellant kept the control of its monopoly under the patent, it alone had the advantage of this market. Unless the appellees got the improved pump, they could not become competitors in that field; and just to the extent they got into the field they drove the appellant out. Through their infringement they got the advantage of selling the pumps that had upon them the patented improvement. Without it no such sales would have been effected. The fruits of the advantage they gained by their infringement were, therefore, necessarily the profits they made on the entire sale.

This is an exceptional case. A limited locality required a particular kind of pump, to be used only in that locality for a special purpose. The market was not only limited to a particular locality, but it was unusually limited in demand. A single manufacturer, possessing the facilities the appellant had, could easily, and with reasonable promptness, fill every order that was made. There was no other pump that could successfully compete with that controlled by the patent. Under these circumstances it is easy to see that what has been the appellees' gain in this business must necessarily have been the appellant's loss, and consequently the appellant's damages are to be measured by the appellees' profits derived from their business in that special and limited market. This, as it seems to us, is the logical result of the rule which has been stated. By infringing on the appellant's rights, the appellees obtained the advantage of the increased marketability of their pumps. The action of the Court below, therefore, limiting the field of inquiry as to damages, cannot be sustained. . . .

The decree will be reversed, and the cause remanded with instructions to sustain the fifth exception to the report of the master, and enter a decree against the appellees for \$4,470 and costs; and it is

*So ordered.*<sup>1</sup>

<sup>1</sup> [NOTES:

"Infringement: Possession of infringing articles." (H. L. R., XIV, 625.)

"Infringement: Accounting for profits not due in whole or in part to infringement." (H. L. R., XX, 631-632.)

"Infringement: Statutory compensatory damages measured by owner's license fees without interest, regardless of infringer's profits." (H. L. R., XXI, 293.)]

(3) *Relation between Common-Law Trade-Secret Right and Statutory Patent-Right*

228. HARTMAN v. JOHN D. PARK & SONS  
COMPANY

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF KENTUCKY.  
1906

145 Fed. 358

IN EQUITY. On demurrer to bill.

*F. W. Hinkle, F. F. Reed, and E. S. Rogers*, for plaintiff.

*W. J. Shroder, Alton B. Parker, Morris & Fay*, for defendant.

COCHRAN, District Judge. This case is before me on demurrer to the bill for want of equity. The bill alleges in substance that complainant is the manufacturer and seller amongst other medicines of one known as "Peruna"; that the formula by which it is made was discovered by him, and is known only to him and his trusted employees; that he puts it up in bottles, each of which is inclosed in a loose white wrapper bearing the words "Peruna the Great Tonic" and has pasted on it a label giving its history, the theory upon which it is based, the ailments for which it is recommended, and the directions for taking it, and is serially numbered, the number being stamped both on the wrapper and label in several places; that he sells the medicine to wholesale druggists only, who in turn sell to retail druggists, who in turn sell to consumers; that the wholesalers to whom he sells contract with him not to resell except to retailers designated by him and at certain prices, and the retailers whom he designates contract with him not to resell to consumers except at certain prices; that his prices to the wholesalers are uniform and so are the prices fixed by him of wholesalers to retailers and of retailers to consumers; that he alone advertises the medicine and creates the demand for it; that with each package of medicine is furnished a card containing the serial numbers of the bottles therein, and the wholesalers are required to note thereon the retailers to whom same is sold, and to return it to complainant; that the defendant, a Kentucky corporation, is a wholesale druggist; that it obtains said medicine from complainant's wholesalers and retailers by false and fraudulent representations, surreptitious and dishonest methods and persuading them to break their contracts with him, and sells same to retailers operating "cut rate drug stores" at less than the wholesale prices fixed by him, who in turn sell to consumers at less than the retail prices so fixed; that before the medicine is so sold to consumers the wrappers are removed and the labels are defaced so as to obliterate the serial numbers stamped thereon and the information thereby given; and that defendant gives out and announces that he will continue so

to obtain said medicine and so dispose of it. The relief sought is an injunction against his so doing.

The defendant's contention is that complainant has no right to sell his medicine outright to the wholesalers, and at the same time retain a control over the subsequent trade therein as to the retailers to whom and prices at which the wholesalers may resell and as to the prices at which the retailers may resell to the consumers, and that, hence, the system of contracts by which he is attempting to retain such control is unlawful. It concedes that if this contention is not correct the complainant is entitled to the relief he seeks. The demurrer, therefore, presents for determination the single question as to whether this contention is correct. Its counsel advance two arguments in support thereof. The first one presupposes that the owner of a patent or copyright has the right to sell the things patented or copyrighted outright, and, at the same time by such system of contracts, retain such control over the subsequent trade therein. It is that such owner has such right by virtue alone of the federal statutes as to patents and copyrights, and that as there is no statute giving any rights to the owner of a secret process he does not have such right. The argument has some plausibility and has bothered me somewhat — less, however, in concluding that it is not sound than in demonstrating that it is not in a lucid and convincing way, which I have aimed to do.

In order to determine its validity it should be ascertained first what rights the owner of a patent or copyright has by virtue alone of the statutes as to patents and copyrights. They in express terms confer the exclusive right to make, use, and sell the things patented or copyrighted. Unquestionably the owner of a patent or copyright has this right by virtue alone of said statutes. It arises solely therefrom. If it were not for them he would not have the right. No other person has any such right in relation to any other articles. Complainant's counsel hesitate to concede this, if they do not actually dispute it. They contend, in effect, that an inventor or author who has not obtained a patent or copyright has, before publication, such right in relation to articles embodying his invention or authorship, and that the owner of a secret process who may be an inventor and entitled to a patent, and who is in exactly the same position as an inventor or author who has not obtained a patent or copyright before publication has such right in relation to articles embodying his secret process. As to the former they say that he has precisely the same rights which an inventor or author who has obtained a patent has. To make sure of this I quote from their brief. They say:

"It is therefore proposed — to show that in cases of inventors and authors — precisely the same exclusive monopolistic and all controlling property rights in inventions and literary products subsisted at common law before publication as are given by statute after publication. The right given by the federal copyright statute is the exclusive right to print, publish and sell the production.



The right given by the patent statutes is the exclusive right to make, use and vend the invention. At common law and by natural right the author of a book or the discoverer of an improvement in machinery, art or manufacture has precisely the same rights before publication."

Again they say:

"The common-law right and the statutory right are identical in their natures."

As against these views many expressions from learned judges can be quoted. As for instance, in the case of *Wheaton v. Peters*, 8 Pet. (U. S.) 591, 8 L. Ed. 1055, Mr. Justice McLean, in referring to the federal statutes as to copyrights, said:

"Congress then by this Act instead of sanctioning an existing right as contended for created it."

And in the case of *Gayler v. Wilder*, 10 How. (U. S.) 477, 13 L. Ed. 504, Mr. Chief Justice Taney said:

"The inventor of a new and useful improvement certainly has no exclusive right to it until he obtains a patent. This right is created by the patent."

And again in the case of *In re Brosnahan* (C. C.) 18 Fed. 62, Mr. Justice Miller said:

"The sole object and purpose of the laws which constitute the patent and copyright systems is to give to the author and inventor a monopoly of what he has written or discovered, so that no one else shall make or use or sell his writings or his invention without his permission; and what is granted to him is the exclusive right; not the abstract right but the right in him exclusive of everybody else."

Concerning these expressions complainant's counsel say.

"All that is meant or intended to be meant, when various courts have said that copyright and patent laws create new rights, must be simply that these statutes have continued and extended the old rights after publication or disclosure."

In this line they frequently speak of the rights of an inventor or author who has obtained a patent or copyright as being an extension, protraction, continuance, or prolongation of the rights he had in the absence of publication before he obtained his patent or copyright. Counsel for defendant, though taking issue here with complainant's counsel, at times use language implying what they contend. They speak of an inventor or author losing his exclusive right by publication and of his preserving it by obtaining a patent or copyright.

I cannot concur in this contention. An inventor or author who has not obtained a patent or copyright does not have before publication the exclusive right to make, use, and sell articles embodying his invention or authorship. Nor does the owner of a secret process have exclusive right to make, use, and sell articles embodying his secret process. The

statutes as to patents and copyrights in conferring upon an inventor or author the exclusive right to make, use, and sell articles embodying his invention or authorship create in him a new right, and do not extend, protract, continue, or prolong a previously existing right. An inventor or author who has not obtained a patent or copyright, has, before publication, a valuable right of another kind. He has the right to keep the knowledge of what he has invented or composed to himself. No one can lawfully obtain it from him without his consent. So, likewise, the owner of a secret process has the right to maintain the secrecy of his process. Both such an inventor or author and such owner have a right to sell their knowledge and their right to keep it a secret to another and vest him with the same rights in regard thereto as he has. They have the right to impart the knowledge to others with restrictions as to the use they shall make of it, and to have them make no greater use of it. Such knowledge as well as the articles embodying it is property, and entitled to the protection of the courts. From a commercial standpoint, the owner of a secret process may be in as good a position, if not better, than an inventor or author who has obtained a patent or copyright. But the exclusive right to make, use, and sell articles embodying his invention or authorship which such an inventor or author has is not the same as the right to secrecy which the owner of a secret process or an inventor or author who has not obtained a patent or copyright has before publication. The two rights are entirely distinct. . . .

In the case of *Tabor v. Hoffman*, 118 N. Y. 31, 23 N. E. 12, 16 Am. St. Rep. 740, Judge Vann said:

"If a valuable medicine not protected by patent is put upon the market any one may, if he can by chemical analysis and a series of experiments or by any other use of the medicine itself aided by his own resources, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor he may use it to any extent that he desires without any danger of interference by the courts. But because this discovery may be possible by fair means, it would not justify a discovery by unfair means, such as the bribery of a clerk who in the course of his employment has aided in compounding the medicine and had thus become familiar with the formula. The courts have frequently restrained persons who have learned a secret formula for compounding medicines, beverages and the like, while in the employment of the proprietor, from using it themselves or imparting it to others, to his injury."

And in the case of *Vulcan Detinning Co. v. American Can Co.* (N. J. Ch.), 58 Atl. 290, Vice-Chancellor Reed said:

"A patent protects its owner and his assignees and licensees against every one infringing it, while a trade secret protects its owner only against those who have learned the secret under a contractual or confidential obligation."

It must be accepted, therefore, as true that as to the exclusive right which the statutes as to patents or copyrights confer the owner of a patent or copyright has it by virtue alone of said statutes. It arises

solely therefrom. If it were not for them he would not have it. And no other person has any such right in relation to any other articles.

This right, however, is not the same as the right in question; that is, the right on the part of the owner of a patent or copyright to sell the things patented or copyrighted outright, and at the same time by a system of contracts similar to that involved herein retain control over the subsequent trade therein. As counsel for defendant say the two are essentially different. And this exclusive right is the only right which those statutes in express terms confer. It follows, therefore, that, if the owner of a patent or copyright has the right to sell the things patented or copyrighted and at the same time by such a system of contracts retain control over the subsequent trade therein by virtue alone of said statutes, he does not have it directly therefrom. Said statutes do not in express terms confer it upon him. If he has it at all, he must come by it indirectly; that is, through said exclusive right. It must grow out of that right. And it must be conceded that if it does grow out thereof that he has it by virtue alone of said statutes, just as much so as he has the exclusive right by virtue alone thereof, which we have heretofore demonstrated. The question I have been considering, then, simmers down to this: Does the right which it is presupposed the owner of a patent or copyright has — that is, the right to sell the things patented or copyrighted outright, and at the same time by a system of contracts similar to that involved herein retain the control over the subsequent trade therein as to retailers to whom and prices at which the wholesalers may resell, and as to the prices at which the retailers may resell to the consumers — grow out of the exclusive right which those statutes confer, and which the owner of a patent or copyright has by virtue alone thereof?

To answer this question correctly it is essential that we look more deeply into this exclusive right so conferred, and ascertain its exact nature. No better definition of the nature of this exclusive right which the owner of a patent has by virtue alone of the statutes as to patents can be found than in these words of Mr. Chief Justice Taney, in *Bloomer v. McQuewan*, 14 How. (U. S.) 539, 14 L. Ed. 532, to wit:

“The franchise which the patent grants consists altogether in the right to exclude every one from making or using or vending the thing patented, without the permission of the patentee. This is all he obtains by the patent.”

In other words, the right is the right to prevent every one from making, or using, or selling the thing patented without his consent. Or, to put it differently, it is the right to sue any one who so makes, uses, or sells the thing patented. It is not the right to make, or to use, or to sell the thing patented. *That* he has the right to do irrespective of the statute by virtue of the common law. That it is the former right, and not the latter which the statute grants, and the patentee has by virtue thereof, is pointed out in these words of Mr. Justice Harlan in *Patterson v. Kentucky*, 97 U. S. 506, 24 L. Ed. 1115, to wit:

"The right to sell the Aurora oil was not derived from the patent; that right existed before the patent, and unless prohibited by valid local laws could have been exercised without the grant of the latter's patent. The right which the patent primarily secures is the exclusive right in the discovery, which is an incorporeal right, or in the language of Lord Mansfield, in *Millar v. Taylor*, 4 Burr. 2303, 'a property in notion' which has no corporeal tangible substance."

Having the right to prevent every one else from making, using, or selling the thing patented, he has the right to permit any one else to make, use, or sell it. This right to license does not exist by virtue of the statute. It is a common-law right. In the case of *United States v. American Bell Telephone Co.* (C. C.) 29 Fed. 17-43, Judge Jackson said:

"The right of the patent owner to permit or license the use of the invention is not the creature of the federal franchise or statute, but of the common law."

Just as the exclusive right of the owner of the patent has been defined as the right to sue any one who makes, uses, or sells the thing patented, so the grant of a license to another by the owner of the patent may be said to be a grant of the right not to be sued for making, using, or selling the things patented.

Judge Lurton in *Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co.* (77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728), said:

"It has been said that the sole matter conveyed in a license is the right not to be sued."

Still further, it is to be noted that what the owner of a patent has a right to prevent every one else from doing, and to sue him if he does it, is either one of three separate and distinct things, to wit, making the thing patented, using the thing patented, or selling the thing patented. Likewise, the common-law right of doing which the owner of the patent has is of doing either one of these three things. And the like right of licensing others to do, which the owner of the patent has, is to make the thing patented, to use the thing patented, or to sell the thing patented. The statutory exclusive right of prevention and suing consists of these three separate and distinct things, and the common-law rights of doing and licensing to do consists also of these three separate and distinct things. . . .

Hence, the patentee may license another simply to make the thing patented. If he licenses him to do no more he has no right to use or to sell the thing patented. He simply acquires title to the thing patented if he makes it under the license. He can neither use nor sell it. . . .

But it is possible that the license may go no further and it is conceivable that a patentee might grant no greater license. So, in addition to licensing such other person to make the thing patented, he may license him to use it, or to sell it, or to both use and sell it. If

he licenses him to use it only, he has no right to sell it, and if he licenses him to sell it, he has no right to use it. . . .

We come, then, to this. The owner of a patent may make the things patented himself, and sell them to others and license such others to resell them, but may limit the license to resell to such persons as he may designate and at certain prices and the license of such persons to resell to others at certain prices. If he does so, and the first purchasers exceed the license either by selling the things licensed to persons other than those they were licensed to sell to or by selling at different prices from those at which they were licensed to sell, or the second purchasers exceed the license by selling the things licensed at different prices from those at which they were licensed to sell at, then, in either case, the purchasers so exceeding the license invade the patent owner's exclusive right, and infringe the patent. That this is so is established by several recent decisions. They are: *Edison Phonograph Co. v. Kaufmann* (C. C.), 105 Fed. 960; *Same v. Pike* (C. C.), 116 Fed. 863; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58; *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C. C. A. 594. . . .

We must conclude, therefore, that the owner of a patent or copyright has the right to sell the thing patented or copyrighted outright, and, at the same time, retain the control over the subsequent trade therein as to the retailers to whom, and prices at which, the wholesalers may resell, and as to the prices at which the retailers may resell to consumers; that this right on his part so to do grows out of the exclusive right which the statutes as to patents and copyrights confer and which such owner has by virtue alone thereof; and that this right of outright sale and retention of control which he has, he has by virtue alone of said statutes. . . . It follows from this that no other person has the right to sell any other personal property outright, and at the same time in this way retain the control over the subsequent trade in such personal property by the vendees and subvendees thereof. The owner of a secret process does not have the right to sell articles embodying said process outright, and at the same time in this way retain the control over the subsequent trade in such article by his vendees and subvendees. He can communicate the knowledge of his secret to others and limit the use that they are to make of it, and compel them to make no greater use thereof. If they make a greater use thereof, such conduct on their part is no invasion of an exclusive right on his part, but a breach of his confidence. If he sells the articles embodying the secret to others outright, he can, at the same time, retain no greater control over the subsequent trade therein by his vendees and subvendees than can the vendor of any other personal property, not a thing patented or copyrighted, who sells it outright can at the same time retain; and he cannot retain it in any other way than the owner of such other personal property can. Neither he nor the owner of such other property

can sell outright, and, by a mere limiting license to resell, retain control, so that a reselling in excess of the license will be an invasion of any exclusive right on his part and liable to be proceeded against as such.

But the question I have been considering has not been so far answered. As heretofore stated, it is this: Does the right to sell the things patented or copyrighted outright, and, at the same time *by a system of contracts* similar to that involved herein retain control over the subsequent trade therein by his vendees and subvendees, in the particulars stated, which it is presupposed the owner of a patent or copyright has, grow out of the exclusive right which the statutes as to patents and copyrights confer; and hence, does such owner have such right by virtue alone of said statutes? It will be noticed that the question is not whether the right to retain such control in the way I have indicated — that is, by limiting the license to resell — grows out of such exclusive right, or whether the patent or copyright owner has the right to retain such control in that way, by virtue alone of said statutes; but it is whether the right to retain such control *by a system of contracts* similar to that involved herein grows out of such exclusive right, and whether the patent or copyright owner has the right to retain such control by such a system of contracts by virtue alone of said statutes. The question thus put must be answered in the negative. No right on the part of the patent or copyright owner to sell the thing patented or copyrighted outright, and at the same time retain control over the subsequent trade therein by his vendees and subvendees by such a system of contracts, grows out of said exclusive right and the patent or copyright owner has no such right by virtue alone of said statutes. [No] such a system of contracts, nor any contract on the part of the licensee that he will not exceed his license, is necessary to enable the patent or copyright owner so to do. He is enabled so to do by limiting the licenses as heretofore indicated. The licensees are bound not to exceed the license, even though they may not have agreed so to do. They are bound so to do in such a case, because an excess of the license is an invasion of the exclusive right. . . .

The sole effect, then, of the application of a system of contracts to things patented or copyrighted is, as stated, to afford another remedy for an excess of the license, which may be enforced in another forum. . . .

Inasmuch, then, as the right to apply such a system of contracts to things patented or copyrighted arises solely from the common law, and not to any extent from the statutes as to patents and copyrights, no inference whatever can be drawn. . . . that the owner of a secret process, who cannot appeal to any statute for any right, has no right to apply it to articles made thereunder, or that it would be unlawful for him to apply it thereto.

I am therefore driven to the conclusion that the argument of defendant's counsel is not sound. It breaks down at two points. The presupposition that control over the subsequent trade in things pat-



ented or copyrighted is effectuated by such system of contracts applied thereto is incorrect. That control is not so effectuated. It is effectuated by the exclusive right and the limited license. The sole effect of the application of the system of contracts thereto is to supply a remedy on contract that may be enforced in the State Courts. The other point of break-down is in the position that the right to apply such a system of contracts to things patented or copyrighted with such effect as it has arises solely from the statutes as to patents and copyrights. To no extent does it arise therefrom. It is the creature alone of the common law. . . .

This brings us to the other argument put forward by defendant's counsel in support of the contention that the system of contracts under which he sells his medicine outright and attempts at the same time to retain the control over the subsequent trade therein is unlawful. It is that said system of contracts in so far as it attempts to retain such control contravenes the common-law rule invalidating contracts in restraint of trade. . . . I conclude that the complainant's system of contracts is valid. The position is taken in brief on behalf of defendant that the system of contracts is invalidated by the federal anti-trust Act of 1890; but I understand that this position is not insisted on. I therefore make no further reference thereto.

The general demurrer is overruled. There is a special demurrer to so much of the bill as seeks an injunction restraining defendant from removing the dress from complainant's bottle and mutilating the label. It is urged that if the system of contracts is upheld and enforced the complainant will have no occasion for such relief. This does not occur to me as sufficient reason for his not obtaining it.

The special demurrer is also overruled.<sup>1</sup>

**SUB-TITLE (III): HARMS TO ONEROUS RELATIONS;  
BURDENS CREATED OR INCREASED BY DEFENDANT'S ACT<sup>2</sup>**

**229. CUMMING v. BROOKLYN CITY RAILROAD  
COMPANY**

**COURT OF APPEALS OF NEW YORK. 1883**

**109 N. Y. 95, 16 N. E. 65**

**[Printed ante, as No. 70.]**

<sup>1</sup> [NOTES:

"Conditions as to resale of patented articles." (C. L. R., V, 62.)

"Control over sale of copyright article." (C. L. R., VI, 50, 55.)

"Agreements in restraint of trade by patentees: Whether illegal." (H. L. R., XIX, 125.)

"Copyrighted Books — Restriction on sales." (M.L.R., V, 398.)]

<sup>2</sup> [LORD PENZANCE, in *Simpson v. Thomson* (1877, L. R. 3 App. Cas. 279, 289). The contention of the plaintiffs involves a principle which, if it were

230. ANTHONY *v.* SLAID

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1846

11 *Met.* 290

SHAW, C. J. The case stated in the plaintiff's declaration is this: He was a contractor for the support of all the poor of the town of Adams, at a fixed sum per annum, and undertook to support them, in sickness and health, at his own risk: The defendant's wife committed an assault and battery upon one of the town paupers, by means of which he was hurt, and the plaintiff was put to increased expense for his cure and support.

The Court of Common Pleas decided that this action, if the facts alleged in the declaration were proved, could not be maintained; and exceptions were alleged by the plaintiff. We are of the opinion that this decision was right. It is not by means of any natural or legal relation between the plaintiff and the party injured that the plaintiff sustains any loss by the act of the defendant's wife, but by means of the special contract by which he had undertaken to support the town paupers. The damage is too remote and indirect. If such a principle be admitted, we do not see why the consequence would not follow, as stated in the argument for the defendants, that in a case where an assault is committed, or other injury is done to the person or property of a town pauper, or of an indigent person who becomes a pauper, the town might maintain an action, with a *per quod*, for damages. That there is no precedent for such an action, where there must have been many occasions for bringing it, if maintainable, is a strong argument against it. *Lamb v. Stone*, 11 Pick. 527 [ante, No. 133]. *Exceptions overruled.*

*Robinson & Sayles*, for the plaintiff.

*Byington*, for the defendants.

231. CUE *v.* BREELAND

SUPREME COURT OF MISSISSIPPI. 1901

78 *Miss.* 864, 29 *So.* 850

From the Circuit Court of Hancock County.

Hon. *Thaddeus A. Wood*, Judge.

Breeland, appellee, was the plaintiff, and Cue, appellant, was defendant in the Court below. The action was trespass for damages done

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sound, would have a wide application and significance. It is this: Where damage is done by a wrongdoer to a chattel, not only the owner of that chattel, but also all those who have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial, by the damage done to the chattel, have a right of action against the wrongdoer. . . . If this be true as to injuries to chattels, it would seem to be equally so as to injuries to the person.]

to a county bridge. The plaintiff connects himself with the bridge only in this way: He erected the same under a contract with the county, and bound himself to the county, by his contract and a bond, to maintain the bridge for five years after its erection. The declaration charged that the bridge was destroyed by the negligence and wilfulness of defendant's servants, who were engaged in the floating of logs down the stream; that the plaintiff, in pursuance of his obligations to the county, had rebuilt the bridge at a cost of \$400, and the demand was for said sum, with interest, etc. The trial in the Court below resulted in plaintiff's favor and defendant appealed to the Supreme Court.

*E. J. Bowers* and *McWillie & Thompson*, for appellant. The ownership of the bridge was not in the plaintiff, but was in the county. Can a plaintiff maintain an action in his own name for damages done by a trespass to property which belongs to another?

That the ownership of the bridge was in the county cannot be disputed under the authorities. . . . The ownership of the property damaged, or its possession, is essential to the maintenance of an action of trespass, whether the property be real or personal. The plaintiff does not claim to have either owned the bridge, to have been in possession of it, or to have owned the fee of the land over which the highway passed or on which the bridge was erected. He was not an abutter.

He cannot maintain an action of trespass. Buller's *Nisi Prius*, 81a. The same doctrine is announced in Abbott's *Trial Evidence*, 629; *Ib.* 634, 635. This is certainly the law of Mississippi. *McFarland v. Smith, Walker*, 172; *DeJarnett v. Haynes*, 23 Miss. 600.

But it is claimed that this action can be maintained because of the obligation to the county under which the plaintiff rested by his contract, and that, having performed that obligation, he is the only party injured. While it is true plaintiff has been damaged, yet it does not at all follow that he can maintain this action. We are led to the inquiry, What legal relation did plaintiff occupy towards the bridge? He was purely and simply an insurer; he insured the county against loss from the destruction of its bridge. The authorities are abundant that an insurer cannot, in his own name without an assignment of the cause of action by the owner of the destroyed property, maintain an action of trespass against the wrongdoer. *Sheldon on Subrogation*, § 230; *Swarthout v. Chicago, etc., R. R. Co.*, 49 Wis. 625; *Peoria, etc., Co. v. Frost*, 37 Ill. 333; *Hart v. Western, etc., R. R. Co.*, 13 Met. (Mass.) 99, s. c. 46 Am. Dec. 724; *Aetna Ins. Co. v. Hannibal, etc., R. R. Co.*, 3 Dillon C. C. 1; *Rockingham, etc., Co. v. Boshier*, 39 Me. 253, s. c. 63 Am. Dec. 618; *Insurance Co. v. Railroad Co.*, 25 Conn. 265, s. c. 65 Am. Dec. 571; *Hall v. Nashville, etc., R. R. Co.*, 13 Wall. 367. . . .

*J. M. Shivers*, for appellee. At the time of the wrongful destruction of the bridge, appellee, Breeland, was under obligation to rebuild it, and he did rebuild it at a cost of \$400 to himself. He was not a volunteer in so doing; he was damaged by appellant's wilful trespass just as

effectually as if he were the real owner of the bridge. In fact, he was under all the obligations of ownership. His interest was sufficient to maintain the action. 26 Am. & Eng. Enc. L. (1st ed.), 588; *Ib.* 600, and notes. The principle on which the case rests finds recognition in the case of *Fast v. Canton, etc., R. R. Co.*, 77 Miss. 498.

Argued orally by *E. J. Bowers* and *R. H. Thompson*, for appellant.

WHITFIELD, C. J., delivered the opinion of the Court.

The wrong done was one done to appellee, not the county. That wrong consisted in putting the appellee in a situation where he was bound to rebuild, and it is the cost of the rebuilding which is the measure of his damage. The declaration proceeds on this idea, and the demurrer was properly overruled. With the damages here sought to be recovered the county had nothing to do. The fifth charge asked by the defendant properly states the abstract principle of law, but the sound principle had been announced substantially in defendant's third and fourth charges.

If the creek was navigable, it was yet the duty of appellant not to so float his logs as wilfully to injure appellee. There was evidence showing that the appellant's authorized agent, while engaged in the master's work, told an employe to "let the logs loose and let them make or break"; that they were let loose late in the evening; that they could have been guided through by four men stationed on the bridge, and that no effort was made to do this. *Sic utere, etc.*, fits in here. If the jury believed this, and it would seem they did, then a case of wilful wrong was made out, and error in refusing the fifth instruction for defendant, and the one as to navigability conferring superior rights, could not possibly, in that view, be reversible error. We think the right verdict has been reached, the judgment is *Affirmed.*

## 232. MITCHELL *v.* BURCH

SUPREME COURT OF INDIANA. 1871

36 *Ind.* 529

APPEAL from the Fountain Common Pleas.

BUSKIRK, J. This was an action of replevin brought by the appellee against the appellant, to recover the possession of eighteen head of hogs, which he alleged belonged to him, and had been illegally and unlawfully taken, and were unlawfully and wrongfully detained by the appellant.

The appellant answered in two paragraphs: first, denial; second, that the defendant was the owner of the hogs in controversy. The cause was tried by a jury, which returned the following verdict:

"We, the jury, find the property replevied to be the property of the plaintiff, and assess his damages at twenty-five dollars, and assess his damages for the detention thereof at twenty-five dollars.

GEORGE RIDGE, *Foreman.*"

"We, the jury, find the nine hogs not replevied to be the property of the plaintiff, and are of the value of ninety-five dollars, and assess his damages for the detention thereof at ninety-five dollars.

GEORGE RIDGE, *Foreman*."

. . . The Court rendered a judgment on the verdict. The judgment was that the plaintiff was the owner of, and entitled to the possession of the hogs described in the complaint, and that the plaintiff recover of and from the defendant, the sum of one hundred and twenty dollars as and for his damages as assessed by the jury, and costs of suit. . . .

It is next insisted that the damages were excessive, for the detention of the nine hogs that were replevied. As we have seen, the jury assessed the plaintiff's damage at twenty-five dollars for the detention of the nine hogs. The solution of this question will depend upon the elements that enter into and constitute the basis for determining the measure of damages for the detention of personal property, in an action of replevin.

The plaintiff testified as follows: "I lost two weeks' time hunting hogs; hands were worth one dollar per day; team to plow worth from one dollar and fifty cents to two dollars per day; had to stop the plow while hunting the hogs, as I only had two work horses, and used one to ride."

An elementary writer states the law thus:

"When the property has been delivered to the plaintiff, and the jury find for him, they should assess the damages for the detention, and he is entitled to compensation for any deterioration in the value of the goods replevied, while they were in the hands of the defendant, and also for his time lost and expense incurred in searching for his property, and to the hire of slaves. When the property has not been delivered to him, the jury should also find the value of the property. In this case the damages for detention are usually interest on the value from the time of taking, but in proper cases exemplary damages may be given." Morris, *Replevin*, 193-4.

Nelson, C. J., in delivering the opinion of the Court in *Bennett v. Lockwood*, 20 Wend. 224, says:

"The defendant took the horse and wagon of the plaintiffs wrongfully, and used them, by reason of which taking the plaintiffs were induced to believe that the person to whom they had hired them temporarily had absconded, and therefore they went in pursuit of their property, and expended time and money. It is insisted for the plaintiffs in error that the Common Pleas erred in allowing the plaintiffs to recover for the time spent, and expenses incurred, on the ground that the damages thus claimed were not the natural or necessary consequence of the wrongful taking. Admitting the counsel for the plaintiffs to be right in this proposition, it is not objection to the recovery if the damages were proximate and not too remote, and were claimed in the declaration. 1 Chitty's R. 333; Saund. Pl. and Ev. 136. Here the damages were duly claimed; they occurred in the use of reasonable means on the part of the plaintiffs to repossess themselves of their property, and were occasioned by the wrongful act of the defendant."

. . . We are of the opinion that the plaintiff was entitled to recover damages for the time necessarily spent and expenses incurred in hunting

for his hogs. He does not claim for any time spent or expense incurred after he had ascertained where his hogs were. He would have no right to recover for time spent or expenses incurred after he had ascertained where his property was. It is shown by the evidence by the defendant that he knew that the plaintiff was hunting for his hogs, and did not inform him where they were. We are of the opinion that the hogs of the plaintiff were wrongfully taken away by the defendant, and that he permitted the plaintiff to spend time and money, and delay his plowing, in the search for his property, and that it is reasonable and just that he should compensate him in damages therefor. We do not think the amount found by the jury is excessive, upon the facts in the case. The Court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

*T. F. Davidson*, for appellant.

*F. H. Brown* and *F. McCabe*, for appellee.

### WITTICH v. O'NEAL

233: SUPREME COURT OF FLORIDA. 1886

22 Fla. 592

APPEAL from the Circuit Court for Escambia County. The facts of the case are stated in the opinion.

*W. A. Blount* for Appellant. . . .

*J. C. Avery* for Appellees. Appellees admit that the Courts of last resort in most of the States have decided the question in this cause against their position; but they plant themselves with confidence on the decision of the United States Supreme Court, which has been uniformly followed by the other Federal Courts and some of the State Supreme Courts. *Oelrichs v. Spain*, 15 Wall. 211; *Olliphant v. Mansfield*, 36 Ark. 191. . . . Public policy is against the allowance of fees of attorneys as damages in any suit. What is that policy? The language of appellant's brief aptly expresses it:

"They are disallowed from motives of public policy, because, otherwise, the courts would be closed to the timid and open to the bold, righteous claims would be unasserted, and righteous claims undefended for fear of the heavy loss entailed by a failure to win a verdict, and the courts would no longer be for the rich and the poor alike. The true policy is to cheapen litigation in order that the assertion of right should not depend entirely upon the pecuniary ability of the assertor."

Another reason of that policy is that an attorney in the prosecution of his client's cause should not be, or be suspected to be, or subject to the suspicion of being, diligent or negligent in proportion to the pecuniary condition of his client's adversary. Such temptations tend to barratry, etc.



In what respect does a claim for an attorney's fee against an unsuccessful adversary, when based upon a bond for damages, differ from such claim without reference to such bond, in so far as public policy is concerned? I am unable to discern in what particular there is a greater morality or a wiser or purer public policy in the one than in the other.

If it is immoral, unwise or against a pure public policy to require an unsuccessful suitor to pay the fee of his adversary's attorney incurred in an action of slander, false imprisonment or trover in which there is no bond, how does the giving of a bond alter the case? If it does, then if the Legislature should enact that at the institution of every suit a bond must be filed by the plaintiff to indemnify the defendant for damages resulting from the bringing of the suit, the whole policy referred to would be defeated and a great impetus given to litigation. Substance would be forced in all cases to yield to form. Policy would be wiped out by a quibble.

In ordinary actions the law gives a successful suitor the damages he has sustained by reason of the injury on account of which he sues. But in doing this, there is excluded from reasons of public policy the money expended in employing attorneys in the suit. . . .

It is not even alleged that the fees have been paid. Many Courts hold this to be necessary. *Pruder v. Grimm*, 28 Cal. 11; *Packer v. Nevin*, 67 N. Y. 550.

The Chief Justice, McWHORTER, delivered the opinion of the Court:

The questions presented by the record are:

1st. In a suit on the bond given to obtain a temporary injunction, are counsel fees, incurred to dissolve the injunction, damages that may be recovered?

2d. Is it essential that the plaintiff in such suit should have actually paid such fees, or is it sufficient that he has become liable therefor?

1. The record shows that a temporary injunction was issued in a suit then pending between the surviving partners of the firm of Keyser, Judah & Co., and W. L. Wittich, and that the injunction was dissolved "by the judge of said Court upon the application of the defendant in said suit, the plaintiff herein," on the 6th April, 1881, and that on the 9th day of April, 1885, a final decree was rendered in the suit dismissing the bill therein. The appellees were securities on the injunction bond, the condition of which is that if the obligors "shall pay to the said W. L. Wittich all damages he may sustain by the issuing of said injunction in case the injunction be hereafter dissolved, then this obligation to be void." If the plaintiff was compelled to employ counsel to dissolve the temporary injunction, it is clear that he was damaged to that extent, and the question above mentioned arises as to whether such damages are recoverable or not.

In the case of *Ah Thaie v. Qan Wan & Kan Se*, 3 Cal. 216, the complaint stated that on the 28th of May, 1853, one Chin Lan and Ah

Lee filed a complaint against the plaintiff, and sued out a writ of injunction against the plaintiff; that to obtain the same the defendants executed a bond for \$8,100, to pay the plaintiff such damages as he might sustain by reason thereof; that the plaintiff was obliged to procure counsel to obtain a dissolution of such injunction at the cost of \$1,200. Defendants demurred and assigned for cause the charge of \$1,200 paid counsel. The Court held:

"The language of the condition of the bond is undoubtedly broad enough to embrace the necessary counsel fees, which the defendants have been obliged to pay out in order to procure the dissolution of the injunction. The necessity of paying such counsel fees is an actual damage that the defendant has sustained in defending himself and procuring a dissolution of the injunction, and the condition in the bond is imperative that the obligors 'shall pay to the parties injured such damages as they may sustain by reason of the injunction.' It appears to us that the principle is not only just in equity, but sound in law, that all the damages to which a party may be put by the wrongful issuance of an injunction should be recoverable in action on the bond, and reasonable counsel fees should be included in those damages, of course, leaving the amount to be assessed by the jury."

The Court cited in this case the decision of Chancellor Walworth, in *Edwards v. Bodine*, 11 Paige Chancery Reports, 224, 225. The same principle has been upheld in the following cases. *Darby Bank v. Heath*, 45 N. H. 524; *Cullins v. Sinclair*, 51 Ill. 328; *Behrens v. McKensie*, 23 Iowa, 341; *Reece v. Northway*, 58 Iowa, 187; *Brown v. Jones*, 5 Nevada, 374, 377; *Livingston v. Exum*, 19 South Carolina, pp. 223, 229. Many other cases might be cited to the same effect.

Appellees very frankly admit the "Courts of last resort in most of the States have decided the question in this cause against their position," but they plant themselves with confidence on the decision of the United States Supreme Court in *Oelrichs v. Spain*, 15 Wallace, 211, which has been followed by the other Federal Courts, and some of the State Supreme Courts. The language of the Supreme Court, on the question, is as follows:

"The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant and assumpsit, damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendants, however unjust the litigation on the other side, and however large the expensae litis to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and

this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary." "We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

Against such an array and weight of authority as sustain the conclusion of the Court, as expressed in 3 California, 216, in favor of the principle that attorney fees are recoverable in a suit on an injunction bond, we are loth to follow the few authorities that hold the contrary, in the absence of some controlling argument or reason that would convince our judgments of the correctness of these conclusions.

The reasons set forth in *Oelrichs v. Spain* are to our minds not satisfactory, and we think are fully answered in the brief of counsel for appellant. . . .

2. The remaining question is, Is a liability for the payment of counsel fees sufficient, or must they have been actually paid? . . . We think the great weight of authority maintains the principle that a fixed liability is sufficient without actual payment. In the case of *Underhill v. Spencer*, 25 Kansas, 71, 73, the Court say:

"The other question is, whether the defendant in the injunction suit can recover the fees of his attorney for services in obtaining a dissolution of the injunction before he has paid them. In this case the amount was agreed upon and the sum was reasonable. The defendant's liability was absolute, but the fees had not in fact been paid. With perhaps the single exception of California, the authorities agree that if the liability is fixed and absolute, it is enough; payment is not an essential prerequisite." . . .

We do not wish to be understood as holding that the defendant and his attorney fix the fee which the plaintiff in the injunction suit must pay. Such fees must be reasonable and proportionate to the value of the services to the defendant and the skill shown and work done by the counsel.

*Judgment reversed and cause remanded.*<sup>1</sup>

# <sup>1</sup> [PROBLEMS:

The defendant Mary set fire wilfully to the house of Charles and destroyed it. The plaintiff was under contract insuring Charles against the destruction of the house by fire. Mary was Charles' wife, and expected that the fire would obtain payment of the insurance money to Charles. Assuming that Charles obtains the money, is Mary liable to the plaintiff, and for what amount? (1881, *Midland Ins. Co. v. Smith*, L. R. 6 Q. B. D. 561.)

The defendant culpably caused the death of a third person, whose life the plaintiff had insured. The policy being paid, may the plaintiff recover from the defendant, and how much? (1877, *Insurance Co. v. Brame*, 95 U. S. 758).

The plaintiff had a contract with K. to repair an embankment, crossing K.'s land, for a lump sum. After entering on the work, he discovered a large extra amount of repairs needed, by reason of the defendant's improper construction of its water-main. May the plaintiff recover such extra cost? (1875, *Cattle v. Stockton Water Co.*, L. R. 10 Q. B. 453.)

The plaintiff levied an attachment for debt on W. and had him arrested. The

defendant forcibly rescued him from the officer, "whereby the plaintiff lost his debt." Has the plaintiff an action? (1617, *Wheatley v. Stone*, Hob. 180.)

The plaintiff was the owner of premises subject to a mortgage with power of sale or default. The mortgagees were not in a hurry for the money, and informed the plaintiff that on maturity they would give him ample notice when they desired payment. Just before maturity, the defendant falsely represented to the mortgagees that the plaintiff desired them to assign the mortgage to M., and they did so. M. appointed the defendant as agent to foreclose and sell, and the notice of sale was so given as not to come to the plaintiff's knowledge. The sale was made, during his absence, to one H., who was ignorant of the facts. The plaintiff was thereby obliged to pay \$500 to H., to obtain a deed. Has he an action? (1886, *Randall v. Hazelton*, 12 All. 412.)

The plaintiff's store was located on the banks of an inlet, close to a railroad depot, and drawbridge. The depot had been located by contract between the plaintiff and the H. R. Co. The defendant railroad company was the successor of the H. R. Co., but was not bound by that contract. To change the railroad drawbridge into a fixed bridge required the consent of the riparian owner, the plaintiff. He refused consent, and the defendant railroad removed its depot a third of a mile, thus depreciating the value of the plaintiff's land and injuring his business. He thereupon consented to the change of the bridge and a depot was again built by the defendant on the old site. The defendant then refused to open the depot for traffic unless the plaintiff would further consent to the closing of a street giving access from the plaintiff's land to the docks. On the plaintiff's refusal to consent, the plaintiff went to a person holding a mortgage for \$35,000 on the plaintiff's premises, and persuaded him to foreclose it and to sell the premises. The buyer then gave his consent, the street was closed, and the depot opened. The mortgagee had agreed with the plaintiff, before the defendant persuaded him otherwise, not to foreclose but to give the plaintiff time. In consequence of which, the plaintiff was damaged in his business to the amount of \$150,000. Has he an action? (1882, *Rich v. New York C. R. Co.*, 87 N. Y. 382.)

The plaintiff was evicted from a street-car by the defendant's agent. One of the issues was whether there was such insult as authorized exemplary damages. If only compensatory damages were allowed, could counsel fees be included? (1909, *United Power Co. v. Matheny*, — Ohio, —, 90 N. E. 154.)

The plaintiff's horse was injured by the defendant's fault. The plaintiff incurred an expense of \$35 for the services of a veterinary surgeon to cure the horse. In spite of all, the horse died. What amount may the plaintiff recover? (1889, *Ellis v. Hilton*, 78 Mich. 150.)

The plaintiff was corporally injured by the defendant's fault. As a part of his efforts to restore his health, the plaintiff went for a short stay at some hot springs and again at some "electric wells." May he recover these expenses? (1890, *Hart v. Charlotte C. & A. R. Co.*, 33 S. C. 427, 12 S. E. 9.)

#### CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. XV, § 529, p. 543.

**TITLE C: PROPRIETARY HARMS****SUB-TITLE (I): REALTY****Topio 1. Kinds of Interests protected by the Right**

234. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England*. (1765. Book II, p. 18.) In treating of things real, let us consider, first, their several sorts of kinds; secondly, the tenures by which they may be holden; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and losing it.

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. . . .

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For land, says Sir Edward Coke,<sup>1</sup> comprehendeth, in its legal signification, any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings: for they consist, said he, of two things; land, which is the foundation, and structure thereupon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that water is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of water only; either by calculating its capacity, as, for so many cubical yards; or by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water.<sup>2</sup> For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary, property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immovable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, eius est usque ad coelum*, is the maxim of the law; upwards, therefore, no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries.<sup>3</sup> So that the word "land" includes not only the face of the earth, but everything under it, or over it.<sup>4</sup>

<sup>1</sup> 1 Inst. 4.

<sup>2</sup> Brownl. 142.

<sup>3</sup> [W. M. JAMES, V. C., in *Corbett v. Hill* (1870, L. R. 9 Eq. 671, 673). The ordinary rule of law is that whoever has got the solum — whoever has got the site — is the owner of everything up to the sky and down to the centre of the earth.]

<sup>4</sup> [CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT: *Herbert Spencer*, "Justice," c. XI, §§ 52, 53, *The Rights to the Uses of Natural Media*, c. XII, *The Right of Property*.

## SUB-TOPIC A. STATIONARY ELEMENTS

(1) *Superjacent Space*

## 235. PICKERING v. RUDD

KING'S BENCH. 1815

4 *Camp.* 219. 1 *Stark.* 581

TRESPASS for breaking and entering the plaintiff's close, and placing a board over it, and cutting a tree, &c.

Plea, not guilty as to the *clausum fregit*; and as to cutting the tree, a justification that it was wrongfully growing against the wall of the defendant, and that he therefore removed it, as he lawfully might. New assignment of excess, and issue thereupon.

The defendant's house adjoins to the plaintiff's garden, the *locus in quo*; and to prove the breaking and entering of this, the evidence was, that the defendant had nailed upon his house a board, which projected several inches from the wall, and so far overhung the garden.

*Garrow, A. G.*, and *Richardson*, for the plaintiff, contended that this was a trespass for which he had a right to maintain the present action. *Cujus est solum, ejus est usque ad coelum*. The space over the soil of the garden is the plaintiff's, like the minerals below, and an invasion of either is, in contemplation of law, a breaking of his close. A mere temporary projection of a body through the air across the garden may not be actionable; but where a board is caused permanently to overhang the garden, this is a clear invasion of the plaintiff's possession. If this be not a trespass, it is easy to conceive that the whole garden may be overshadowed and excluded from the sun and air without a trespass being committed.

LORD ELLENBOROUGH, C. J. I do not think it is a trespass to interfere with the column of air superincumbent on the close. I once had occasion to rule upon the circuit, that a man who, from the outside of a field, discharged a gun into it, so as that the shot must have struck the

*Sheldon Amos*, "Science of Law," c. VIII, Laws of Ownership or Property.

*Henry Sidgwick*, "Elements of Politics," c. IV, § 2, chap. V.

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. XI, § 345, p. 340.

*Jeremy Bentham*, "Theory of Legislation: Principles of the Civil Code," pt. I, c. VIII.

*William Paley*, "Principles of Moral and Political Philosophy," b. III, pt. I, c. II (16th ed., vol. I, p. 121).

*Theodore D. Woolsey*, "Political Science," § 22-32.

*Sheldon Amos*, "Systematic View of the Science of Jurisprudence," c. X, par. A, p. 125.

*Francis Lieber*, "Manual of Political Ethics," b. II, c. II, § 7 (Misc. Writings, vol. I, p. 108).

*Charles S. M. Phillipps*, "Jurisprudence," b. I, c. II, § 58, p. 113, § 86, p. 128.

*John W. Salmond*, "Jurisprudence," 2d ed., §§ 86, 152.]



soil, was guilty of breaking and entering it. A very learned judge who went the circuit with me, at first doubted the decision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. But I am by no means prepared to say, that firing across a field in vacuo, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit*, at the suit of the occupier of every field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded. If any damage arises from the object which overhangs the close, the remedy is by an action on the case. Here the verdict depends upon the new assignment of excess in cutting down the tree.

*The jury found for the defendant.*

## 236. KENYON v. HART

QUEEN'S BENCH. 1865

6 B. & S. 249

CASE stated under Stat. 20 & 21 Vict. c. 43.

At a Petty Sessions of the Peace, holden at Ashford, in the county of Kent, an information was exhibited by the appellant against the respondent for having, on the 1st October, 1864, unlawfully committed a trespass by being in the daytime upon certain land in the possession and occupation of Henry Tappenden, in search of game, without the license or consent of the owner of the land or of any other person having the right to authorize him, &c., contrary to the statute.

On the hearing of the case the appellant on his oath stated,

"I am under-keeper to Sir Richard Tufton, Bart.; on the 1st October last, about half-past ten in the morning, the respondent was out shooting. He shot a cock pheasant and it fell on Mr. Tappenden's field belonging to Sir Richard Tufton; he went and fetched the bird himself, taking his dog and gun with him; the respondent was on his own land when he shot the pheasant, and it rose off his land. The pheasant was dead when the respondent picked it up, and it lay upon its back."

When the respondent's solicitor was addressing the Court, the chairman recalled the appellant and asked him whether, when the respondent shot the pheasant, it was or was not in the air over the land belonging to Sir Richard Tufton. The appellant replied that it was, and fell a considerable distance within his boundary. The respondent's solicitor objected to the question being put after the appellant had heard the opening of the respondent's case, and contended: First, That no trespass within the meaning of Stat. 1 & 2 W. 4. c. 32, s. 30, had been committed, as the pheasant rose off the respondent's land and the

respondent was upon his own land when he shot the bird. Second, That the 30th section of the Act did not apply to game when dead. Having heard the evidence of the appellant, and the argument of the respondent's attorney, the justices dismissed the case on the grounds that, as the pheasant was raised off the respondent's land and shot by him while he was upon his own land, the mere act of entering the land for the purpose of picking up the pheasant, which was then dead, was not such a trespass in pursuit of game as is contemplated by Stat. 1 & 2 W. 4, c. 32, s. 30.

The question for the opinion of the Court was whether they were right in point of law. . . . The statute reads, "And whereas, . . . if any person whatsoever shall commit any trespass by entering or being, in the daytime, upon any land in search or pursuit of game, &c., such person shall, on conviction thereof," etc. . . .

*Keane*, for appellant. The respondent committed a trespass by entering upon land in search of game within Stat. 1 & 2 W. 4, c. 32, s. 30. . . . In *Reg. v. Pratt*, 4 E. & B. 860 (E. C. L. R. vol. 82), it was held that a conviction under Sect. 30 was supported by evidence of the defendant having, while standing on a public road, sent a dog into an adjoining cover in the occupation of B., and shot at a pheasant which flew across the road without killing it. [BLACKBURN, J. Yes, but the ratio decidendi was that the road on which the respondent stood when he fired was also the soil and freehold of B. That case raises the old query of Lord Ellenborough as to a man passing over the land of another in a balloon: he doubted whether an action of trespass would lie for it. I understand the good sense of that doubt, though not the legal reason of it. Here the justices do not find whether the pheasant was shot over the land where it was picked up.] In *Osbond, appt., Meadows, resp.*, 12 C. B. N. S. 10 (E. C. L. R. vol. 104), where the respondent, being on land over which he had the right of shooting, shot a pheasant which was on the ground in an adjoining close over which another person had the exclusive right of shooting, and went into that close and picked it up, it was held a trespass in search or pursuit of game. [BLACKBURN, J. In that case the Court held that taking the whole of the transaction together, the respondent was within sect. 30; the shooting the bird and going upon the close to pick it up being one transaction; but I am not satisfied with that reasoning.] . . .

*Keane*, in reply. The justices had no right to direct their attention solely to the fact of the respondent's entry on the land, and to dismiss from their consideration the circumstances that the bird was game, that it was killed by a shot from the respondent, and that the shot was fired over the land of another person. . . .

BLACKBURN, J. The justices were right on the point which they have stated for our consideration, and also in confining in the manner they have done the question put to us. . . .

Looking at the object and spirit of this section we shall see that it

was to prevent persons entering land in search or pursuit of game in the sense of living game. . . .

With respect to the second question. No doubt the respondent entered this field without lawful authority, and therefore was a trespasser. It is equally certain that he did so in order to pick up a dead pheasant lying there, of which he was in search, but at the time of his entry upon the land the bird was dead. It is endeavoured to show that he is guilty under this section from previous facts, viz., that being shooting in his own ground the bird rose and flew over the boundary, that he fired and struck the bird when over his neighbour's land. . . . It has been held in *Reg. v. Pratt*, 4 E. & B. 860 (E. C. L. R. vol. 82), that if, as here, a person standing on his own land sends a leaden messenger at game on the land of another person, this is not a trespass in pursuit of game.

Then, however, it is said the respondent entered the land of the other person to pick it up, and the case, consequently, comes within the decision in *Osbond, appt., Meadows, respt.*, 12 C. B. N. s. 10 (E. C. L. R. vol. 104). . . . The facts are different from the present. There a man shot a bird in his neighbour's close and then went to fetch it; and as the justices had some doubt, and the statute was a penal one, they did not convict. The Court say, at I read the decision, that if the justices thought the shooting the bird and the picking it up were all one and the same act, that it was the pursuit of the game continued till consummated by picking up the bird, they might have so inferred. . . . But the question is, were the justices here right in *not* drawing the inference? Without saying if they had drawn the opposite inference they would have been wrong, it is enough that the question they ask us is, not about the pheasant having been hit while it was in the air over the neighbour's land, but whether the entering the land to pick up the dead pheasant was a trespass within this statute. It was a trespass, but not in pursuit of game, and we cannot, as in *Osbond, appt., Meadows, respt.*, infer that it was all one act.

MELLOR, J., concurred.

*Decision affirmed.*

## 237. SMITH v. SMITH

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1872

110 *Mass.* 302

TORT. The declaration alleged that the defendant forcibly entered the plaintiff's close and broke down a fence, and also built a part of a barn upon the close, and thereby expelled and put out the plaintiff from possession and occupation of a part of the close, and kept and continued him so kept out and expelled from said part of the close. Trial in the Superior Court, before *Bacon, J.*, who, after a verdict for the defendant, allowed the following bill of exceptions:

"The plaintiff offered to prove that the eaves or jet of a barn, alleged to have been built and erected upon the plaintiff's close by the defendant, extended over on to the close from fifteen to eighteen inches, but the judge excluded the evidence.

"The judge also, against the plaintiff's objection, instructed the jury that an owner of land who is bound to maintain a fence between his own land and an adjoining inclosure, may place half of a fence of reasonable dimensions on the land of the adjoining owner; . . . that it was a question of fact for the jury under the circumstances, whether this barn was a suitable structure and of reasonable dimensions for a fence; and that if in their judgment it was, it would not be a trespass upon the plaintiff's land if it came over on to the plaintiff's land no more than a fence of ordinary width. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions."

*C. A. Holbrook*, for the plaintiff.

*T. G. Kent*, for the defendant.

MORTON, J. This is an action of tort in the nature of trespass *quare clausum fregit*. The plaintiff in his declaration, among other acts of trespass, alleges that the defendant built a part of his barn upon the plaintiff's close, and thereby put and kept the plaintiff out of the possession and occupation of a part of the close. We think it was competent for the plaintiff to prove that the eaves of the defendant's barn projected over the plaintiff's close. Projecting his eaves over the plaintiff's land is a wrongful act on the part of the defendant which, if continued for twenty years, might give him a title to the land by adverse occupation. It is wrongful occupation of the plaintiff's land for which he may maintain an action of trespass. *Codman v. Evans*, 7 Allen, 431. *Carbrey v. Willis*, *Ib.* 364. . . .

We are of opinion that the instruction to the jury, that if the defendant's barn "came over on to the plaintiff's land no more than a fence of ordinary width" would, it would not be a trespass, was erroneous. It was not erected as a fence, and was not a fence. A man who erects a barn or other building partly upon the land of another, without any agreement that the wall shall be a division wall or fence, cannot defend an action of trespass by showing that it covered no more of the plaintiff's land than a fence would. Such an occupation is, in its nature and legal effect, entirely different from the occupation by a fence. It is an adverse occupation which, if continued for twenty years, will give a title to the soil by prescription.

*Exceptions sustained.*

## 238. HANNABALSON *v.* SESSIONS

SUPREME COURT OF IOWA. 1902

116 *Ia.* 457, 90 *N. W.* 93

APPEAL from District Court, Pottawattamie County; *N. W. Macy*, Judge.

Action at law to recover damages for an alleged assault and battery.

There was a verdict and judgment for defendant, and plaintiff appeals. Affirmed.

*Lindt & Mynster*, for appellant.

*Jacob Sims*, for appellee.

WEAVER, J. Plaintiff and defendant live upon adjoining lots. There is frequent war between the families. The *causus belli* in the present instance is to be found in the following circumstances: Upon the boundary line between the lots is a tight board fence, a part of which was built by plaintiff's husband; but, unfortunately, this barrier, while all sufficient to prevent the passage of the dove of peace, is neither high enough nor tight enough to prevent the interchange of brick bats or the bandying of opprobrious epithets. On May 30, 1898, the defendant, while at work in his garden, claimed to have narrowly escaped a brick hurled in his direction by one of the plaintiff's children, and in his indignation at the unprovoked bombardment threatened the lad with arrest. Plaintiff and her husband, being at work near by, heard the threat, and took up the quarrel. About this time plaintiff's husband discovered that a ladder belonging to defendant was hanging upon a peg or block attached to the partition fence, and, conceiving this to be a cloud upon his title, he forthwith attempted to remove it, while defendant, seeing the peril in which his property was placed, rushed to its defence. Whether plaintiff herself laid violent hands on the ladder is a matter of grave dispute. She denies it, and says that the height and depth of her offending consisted in her leaning up against the fence with one arm quietly hanging over the top thereof, and in stimulating her husband's zeal by audible remarks about the "crazy fool" who was bearing down upon them from the other side. She further avers that while occupying this position of strict neutrality the defendant assaulted her *vi et armis*, and with his clenched fist struck the arm which protruded over the fence top into his domain. Defendant denies the striking, and says that plaintiff, instead of being a peaceable and impartial observer of the skirmish, was herself a principal actor, and that in aid of her husband she climbed upon some convenient pedestal, and, hanging herself across the fence, reached down, and with malice aforethought seized the ladder and wrenched it from its resting place. Thereupon, actuated by a natural and lawful desire to protect his property from such ravishments, and being goaded on by statements from the other side of the fence reflecting upon his mother and casting doubt upon his proper rank in the animal kingdom, he gently, and without unreasonable force, laid his open hand upon plaintiff's arm, and mildly but firmly suggested the propriety of her "keeping on her own side of the fence." . . .

3. It is also said that the Court erred in instructing the jury that, if plaintiff leaned over the partition fence and attempted to interfere with the ladder, defendant had the right to use such force upon her as was reasonably necessary to cause her to desist, and to expel her from

his premises. . . . The general doctrine announced in the instruction is, in our judgment, correct. . The mere fact that plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line, as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends, not only downward to the centre of the earth, but upward *usque ad coelum*, — although it is, perhaps, doubtful whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction. The maxim, "*Ubi pars est ibi est totum*," — that where the greater part is there is the whole, — does not apply to the person of a trespasser, and the Court and jury could therefore not to be expected to enter into any inquiry as to the side of the boundary line upon which plaintiff preponderated, as she reached over the fence top. It was enough that she thrust her hand or arm across the boundary to technically authorize the defendant to demand that she cease the intrusion, and to justify him in using reasonable and necessary force required for the expulsion of so much of her person as he found upon his side of the line, being careful to keep within the limits of the rule, "*Molliter manus imposuit*," so far as was consistent with his own safety. Under the instructions of the Court, the jury must have found that defendant kept within the scope of his legal rights in this respect, and that the alleged assault was not established by the evidence. . . .

The judgment of the District Court is affirmed.

239. ARTHUR K. KUHN. "*The Beginnings of an Aerial Law*" (1910. American Journal of International Law, IV, 109, 122). Blackstone in his Commentaries<sup>1</sup> says:

"Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. '*Cuius est solum eius est usque ad coelum*' is the maxim of the law." . . .

The advent of aerial navigation gives a new significance to the Latin maxim quoted in the foregoing passage and awakens interest in its origin and scope. . . . It will be observed that the sources of the maxim, both in the common and the civil law, do not indicate a right of property in the air or airspace as such, even if this were conceivable. The principle is, by reasonable interpretation, one for the better enjoyment of the land and refers to the airspace so far as it is appurtenant to the land. . . .

If the view favored by the writer be adopted, then the dictum of Lord Ellenborough is quite maintainable, though it may have led him to a wrong conclusion in the particular case. Each case must rest upon its own circumstances and special facts. If the passage of aircraft over a piece of land really interferes with its actual enjoyment, the Courts are able to grant a remedy for the wrong in fact. The mere passage through the airspace above the land should not in itself constitute the wrong. It is in this light that we interpret the language of Sir Frederick Pollock:<sup>2</sup>

<sup>1</sup> Cooley's Blackstone, 4th ed., Book II, p. 18.

<sup>2</sup> Pollock on Torts, 8th ed., p. 348.



"Clearly it would be a trespass to sail over another man's land in a balloon (much more in a controllable airship) at a level within the height of ordinary buildings and it might be a nuisance to keep a balloon hovering over the land at even a greater height."

Sir Frederick is equally of the opinion that a trespass is not constituted by passage through the airspace at the great height reached by modern projectiles. He seems inclined to believe "that the scope of possible trespass is limited by that of effective possession," though unfortunately does not further pursue the thought. . . .

The maxim of the law already referred to should not be extended to conditions which did not exist and were not conceived of at the time of its origin. Its phraseology, *usque ad coelum*, had been referred to by an English judge as at best a "fanciful phrase."<sup>1</sup> The view here favored, by which the land-owner's rights in the airspace are regarded as strictly appurtenant to the soil and to be accorded only when essential to the enjoyment of the latter, will tend to reconcile the interests of the land-owner with the progress of the new art. The latter is deserving of every reasonable encouragement through law. On the other hand, it should not be over-favored at the expense of individual interests. There are extremists who declare indeed that the whole of the airspace is a highway free for all, or if not so already, it must be so declared by legislation, or by an exercise of eminent domain. Apart from the legality or practicability of such a procedure, the discussion of which would lead us too far afield, it is well to remember the primitive philosophy so naïvely expressed by Lord Coke, and which is true to-day as it was then:

"This element of the earth (the land) is preferred before the other elements; first and principally, because it is for the habitation and resting place of man: for man cannot rest in any of the other elements, neither in the water, air or fire."<sup>2</sup>

The solution of the conflict of interests seems to have been accomplished very well on the continent of Europe. Even before the advent of progress in air navigation, the Code of the Canton of Grisons provided:<sup>3</sup>

"Property in land extends to the airspace (above) and the earth beneath, so far as these may be of productive value to the owner."

The German Civil Code<sup>4</sup> also recognizes the extension of property upwards and downwards, but in a clause<sup>5</sup> for which air navigation was largely responsible,<sup>6</sup> it is declared:

"But the owner cannot prohibit such interferences undertaken at such a height or depth that he has no interest in the prevention."

The Swiss Code reaches the same result by an affirmative statement<sup>4</sup> that property in land extends in the airspace and under the earth so far as there is any material interest in the exercise of ownership.

The opening of the airspace to the aerial navigator brings with it, on his

<sup>1</sup> Brett, Master of the Rolls, in *Wandsworth Board of Works v. United Telephone Company* (1884), 13 Q. B. D. 904, at p. 915.

<sup>2</sup> Coke upon Littleton, ut cit.

<sup>3</sup> In effect 1862, § 185,

<sup>4</sup> To take effect 1912; § 667.

<sup>5</sup> German Civil Code (in effect 1900), § 905

<sup>6</sup> Meurer, op. cit., p. 14.

part, concomitant responsibility. The law of gravitation is constant and inevitable and he who seeks temporarily to overcome its effects must reckon with an extraordinary responsibility for injuries to person or property in the event of failure. . . . If the owner of land upon a highway is held to the duty of insuring safety as against objects falling and injuring the passer-by, how much more should the aerial navigator be held to a like degree of responsibility. Meili well points out that in the modern world we are supposed to look forwards, on both sides of us and behind us, and now we are called upon to look even above us.<sup>1</sup>

## (2) *Subjacent Space*

240. GEORGE A. BLANCHARD AND EDWARD P. WEEKS. *The Law of Mines, Minerals, and Mining Water Rights*. (1877. p. 30) The text of Blackstone requires qualification, especially as regards the copyhold and customary lands of England, and in case of mines, custom has, in many places, made an exception to the general rule. . . .

A title to mines may be shown distinct from the title to the surface, and the mines may form distinct possessions and different inheritances. . . . Coals and minerals in place are land. It is no longer doubted that they are subject to conveyance as such. Nothing is more common, in Pennsylvania, than to find the surface right in one man, and the mineral right in another. It is not denied, in such a case, that both are land-owners, both holders of a corporeal hereditament. Our English ancestors found difficulty in conceiving of a corporeal interest in an unopened mine, separate from the ownership of the surface, because livery of seizin was, in their minds, inseparable from a conveyance of land, and livery could not be made of an unopened mine. The consequence was, that they were disposed to regard such rights as incorporeal, though they are not rights issuing out of land, but the substance itself. In modern times, however, livery of seizin is generally supplied by the deed and its registration, and there is nothing incongruous in considering a grant of the substratum a grant of land, as much as is a conveyance of the surface itself. It is often by far the most valuable, and sometimes embraces all for which the land is worth owning. Even in England, so long ago as the reign of James I, it was held that ejectment would lie for a coal mine. (*Comyn v. Wheatley*, Cro. Jac. 150.)

In the United States, unfettered as we are by the necessity of livery of seizin and abounding in mineral districts, it has not been seriously doubted that the ownership of a coal bed, or seam, is a corporeal interest in land. Cases not unfrequently occur in which the owner of lands sells merely the surface right, retaining the minerals which lie in place below the surface. Now, as his whole interest was corporeal before the sale, and as, by his deed, only the surface passed, that which remains ungranted must also be corporeal. . . .

The distinction between the ownership of the surface and the ownership of the mine is, perhaps, even more broadly drawn under the continental mining systems than in England or the United States. . . . (1) The laws of Spain and Mexico, like those of France and Belgium, recognize two distinct rights or interests in land: an agricultural or pastoral interest, and a mining interest.

<sup>1</sup> *Das Luftschiff und die Rechtswissenschaft*, p. 14. In the event of collision between voyaging air craft, the determination as to who is the guilty party will be a fine point indeed for the solution of the sufferers beneath. *Ibid.* p. 15.

The first is described as a property in the surface (*la propiedad del suelo*), and the other as a property in the mineral (*la propiedad de la mina*). Both of these interests in the substance of which the earth is composed are considered as interests in land, as real estate, and as corporeal hereditaments, and both belong to the class variously denominated in Spanish law, *bienes raices*, *fundos*, *heredades*, *tierras*, *possessiones*, *predios*, *fincas*, etc. . . . (2) All continental publicists who have written upon this subject lay down the fundamental rule that mines, from their very nature, are not a dependence of the ownership of the soil; that they ought not to become private property in the same sense as the soil is private property, but that they should be held and worked with the understanding that they are by nature public property, and that they are to be used and regulated in such a way as to conduce most to the general interests of society. Whether this object can be best attained by conditional grants, or by licenses to individuals and companies, or by general permission to work them upon specified conditions, is a question to be determined by that power in a State whose mission it is to watch over the welfare of society at large; that is, by the sovereign authority, whatever that authority may be called, and howsoever constituted. (Delebecque, *Traité des Mines*, Tome 1, p. 17; Halleck's *Introduction to De Fooz*, Sec. 3.) De Fooz gives three general reasons, which he says lie at the foundation of the rule. 1st. The nature of things. — That experience has shown that subdivision and individual ownership of land are favorable to culture and increase of production, but that mines have no immediate relation to the surface, and the ordinary superficial divisions and measurements of land cannot be applied to them. . . . 2nd. The general principles of legal rights. — That legal appropriation is the result of human industry applied to the thing appropriated. Thus, man appropriates portions of the earth's surface by sowing it, planting it, and building upon it; and the portions so appropriated to his individual use he causes to produce new matters, which are necessary for his own subsistence, and comfort of others. But this has no analogy to mine working. The miner takes from the earth what already exists there; he produces nothing new. . . . 3rd. Public policy, based upon public utility and the welfare of society, requires that these two ownerships should be kept separate, or at least that the one should not be made to depend upon the other. Experience has proved that where the surface-owner is made *ipso facto* the mine-owner, the mining interest does not flourish. Mines to the value of many millions are often, and indeed usually, embraced within the limits of a few acres, so that the smallest land-owner may become the largest mine-owner in the State, and the working of these mineral substances becomes dependent upon the will of a single individual. . . .

But whatever may have been the origin of the rule, or the reasons of its adoption as a law of property, it is certain that, since the disruption of the Roman Empire, mines in nearly every civilized country, whether in public or private land, have been considered as belonging to the public, and subject to the control of the authority established in the State to represent its sovereign power, and to watch over the general interest of society.

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241. CHARTIERS BLOCK COAL COMPANY v. MELLON  
 SUPREME COURT OF PENNSYLVANIA. 1893  
 152 Pa. 286, 25 Atl. 597

APPEAL from Court of Common Pleas, Allegheny County.  
 Bill in equity by the Chartiers Block Coal Company against W. L. Mellon and others for an injunction. The injunction was denied, and affirmed.  
 plaintiff appeals.  
 J. S. Ferguson and D. T. Watson, with them J. G. MacConnell, for appellant. This is a proper case for injunction because it will prevent repeated trespass and irreparable mischief from escaping gas for which there is no adequate remedy at law. . . . The predecessor in title of defendants in each of these cases conveyed all the coal underlying the surface of the land and gave appellants privileges for its mining and removal, and appellants were actually in possession, mining and removing the coal. These predecessors reserved no right of way through the coal, and appellants have not granted to any one such right, and therefore defendants possess no such right. . . .

J. McF. Carpenter, for appellee. We contend that we have a right of way from necessity; but our right to drill through the coal of another, to obtain and utilize that which we own and which we can obtain in no other way, is not dependent merely upon "right of way" as commonly understood. . . . Aside from the trifling bit of coal necessarily removed in drilling there is no injury shown as having occurred or as likely to occur. Mining rights are peculiar and exist from necessity, and the necessity must be recognized and the relative rights of land and mine owners adjusted and protected accordingly: Sanderson v. Coal Co., 113 Pa. 139.

PAXSON, C. J. This is a case of first impressions, and of very grave importance, and in view of these facts we have been asked to express our opinion of the law bearing upon it, notwithstanding it is an appeal from a decree awarding a preliminary injunction. The facts are probably as fully before us now as they will ever be. The contest arises between the owner of the surface or his lessees and the Chartiers Block Coal Company, the plaintiff below and appellant, which is the owner in fee of the coal beneath the surface. The company purchased the coal on December 22, 1881, and the deed conveying it granted not only all the coal, but also the mining rights and privileges, including the right to enter mines and carry away all the coal; the right to make openings or entries, air courses, water courses, drainage, and shafts, with right of ingress and egress for the purpose of making such openings, with right of way for taking such coal or any other coal and minerals through the entries; and also the right to enter upon the surface of the land for the purpose of taking into and placing on the same any material that it may desire and need in its coal operations; and, when

making entries or shafts, the right to deposit the debris and slack near the openings. The grantor, in conveying the coal with these privileges, reserved to himself no right, privilege, or easement in said coal, or any part thereof, and no right of way through said coal from the surface, to obtain gas or oil, or any other substance. It is not likely, at the time the grant was made, that it occurred either to the grantor or the grantee of the coal that underneath the latter there might lie another substance of perhaps greater value than the subject of the grant itself. It now appears that the coal is underlain with the oil and gas bearing sand, which can only be reached by sinking wells from the surface through the strata of coal. Shortly before the filing of this bill it began to be known that oil or gas existed in large quantities in that part of Allegheny County where the appellant's works are situated, and active operations had begun in the early summer of 1891 by oil operators, to obtain this oil and gas. About this time the surface owner made leases for oil and gas purposes, and the lessees began at once to drill. This bill was then filed by the appellant company for the purpose of obtaining an injunction against the defendants, to restrain them from further drilling wells then commenced, and from drilling any other well or wells which would pass through the coal. The bill was filed upon the allegation and belief that the defendants had no right whatever to drill the wells. The plaintiff company also claimed that it was impossible for such wells to be drilled in such a manner as to allow the removal of all the coal without exposing the mine to leakage from gas from said wells, and rendering the mine operations so hazardous to plaintiff's property and plaintiff's employes as to very greatly injure and depreciate the value of said coal property, if not wholly to destroy the value thereof.

The case was heard below upon bill, answer, and affidavits. The Court, as we understand the decree, refused to grant a preliminary injunction as against any well or wells on said tract of land which at the date of the decree had been drilled by the defendants through the Pittsburgh vein of coal, and also refused to enjoin the defendants from drilling wells on said tract at any place or places where they will not pass through said Pittsburgh vein of coal, but will pass through lower strata of coal. The Court awarded an injunction, however, as to any wells not already drilled which would pass through the Pittsburgh vein. . . . Subsequently the decree was modified so as to remove the injunction from the two wells now commenced, but which have not gone down through the Pittsburgh coal vein, on defendants' giving bond as before stated. . . .

This is a new question and one that is full of difficulty. The discovery of new sources of wealth, and the springing up of new industries which were never dreamed of half a century ago, sometimes present questions to which it is difficult to apply the law, as it has heretofore existed. It is the crowning merit of the common law, however, that

it is not composed of ironclad rules, but may be modified to a reasonable extent to meet new questions as they arise. This may be called the "expansive property of the common law." Mining rights are peculiar, and exist from necessity, and the necessity must be recognized, and the rights of mine and land owners adjusted and protected accordingly. We have an illustration of this in *Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. Rep. 453. The mining of coal and other minerals is constantly developing new questions. Formerly a man who owned the surface owned it to the center of the earth. Now the surface of the land may be separated from the different strata underneath it, and there may be as many different owners as there are strata. *Lillibridge v. Coal Co.*, 143 Pa. St. 293, 22 Atl. Rep. 1035. The difficulty is to so apply the law as to give each owner the right of enjoyment of his property or strata without impinging upon the right of other owners, where the owner of the surface has neglected to guard his own rights in the deed by which he granted the lower strata to other owners. In the earlier days of the common law the attention of buyers and sellers and therefore the attention of the Courts, was fixed upon the surface. He who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended upward to the clouds and downward to the earth's centre. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income derived from it was the result of agriculture. The comparatively recent development of the sciences of geology and mineralogy, and the multiplication of mechanical devices for penetrating the earth's crust, have greatly changed the uses and the values of lands. Tracts that were absolutely valueless, so far as the surface was concerned, have come to be worth many times as much per acre as the best farming lands in the commonwealth, because of the rich deposits of coal, or iron, or oil, or gas known to underlie them at various depths. These deposits are sometimes found, however, beneath well-cultivated farms, so that the surface has a large market value apart from the value of the deposits of coal or other minerals under it. In such cases the owner is rarely able to utilize the lower stores of wealth to which he has title, by mining operations conducted by himself, and for this reason he sells them to some person or corporation to be mined and to be moved. So it often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving to each purchaser a deed or conveyance in fee simple for his particular deposit or stratum, while he retains the surface for settlement and cultivation, precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers or strata becomes a subject of taxation, of incumbrance, levy, and sale, precisely like the surface.

So far our way is clear of difficulty, because the several owners of the mineral deposits are exercising their right to have access to their respective estates against their vendor. Our question is over the right



of the vendor to reach strata underlying a stratum which he has conveyed to another. Having sold the coal underlying the surface, is he to be forever barred from reaching his estate lying beneath the coal? Prior to the sale of the coal, his estate, as before observed, reached from the heavens to the center of the earth. With the exception of the coal, his estate is still bounded by those limits. It is impossible for him to reach his underlying estate, except by puncturing the earth's surface, and going down through the coal which he has sold. While the owner of the coal may have an estate in fee therein, it is at the same time an estate that is peculiar in its nature. Much of the confusion of thought upon this subject arises from a misapprehension of the character of this estate. We must regard it from a business, as well as a legal, standpoint. The grantee of the coal owns the coal, but nothing else, save the right of access to it, and the right to take it away. Practically considered, the grant of the coal is the grant of a right to remove it. This right is sometimes limited in point of time; in others it is without limit. In either event, it is the grant of an estate determinable upon the removal of the coal. It is, moreover, a grant of an estate which owes a servitude of support to the surface. When the coal is all removed, the estate ends, for the plain reason that the subject of it has been carried away. The space it occupied reverts to the grantor by operation of law. It needs no reservation in the deed, because it was never granted. The grantee has the right to use and occupy it while engaged in the removal of the coal, for the reason that such use is essential to the enjoyment of the grant. It cannot be seriously contended that, after the coal is removed, the owner of the surface may not utilize the space it had occupied for his own purposes, either for shafts or wells, to reach the underlying strata. The most that can be claimed is that, pending the removal, his right of access to the lower strata is suspended. The position that the owner of the coal is also the owner of the hole from which it has been removed, and may forever prevent the surface owner from reaching underlying strata, has no authority in reason, nor, do I think in law. The right may be suspended during the operation of the removal of the coal to the extent of preventing any wanton interference with the coal mining, and for every necessary interference with it the surface owner must respond in damages. The owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate, either above or below him. The right of the surface owner to reach his estate below the coal exists at all times. The exercise of it may be more difficult at some times than at others, and attended with both trouble and expense. No one will deny the title of surface owner to all that lies beneath the *strata* which he has sold. It is as much a part of his estate as the surface. If he is denied the means of access to it, he is literally deprived of an estate which he has never parted with. In such case the public might be debarred the use of the hid-

den treasures which the great laboratory of nature has provided for man's use in the bowels of the earth. Some of them, at least, are necessary to his comfort. Coal, oil, gas, and iron are absolutely essential to our common comfort and prosperity. To place them beyond the reach of the public would be a great public wrong. Abounding, as our State does, with these mineral treasures, so essential to our common prosperity, the question we are considering becomes of a quasi public character. It is not to be treated as a mere contest between A. and B. over a little corner of earth. We have already seen that, when the owner of the surface parted with the underlying coal, he parted with nothing but the coal. He gave no title to any of the strata underlying it, and it is not to be supposed for a moment that the grantor parted with or intended to part with his right of access to it. We are of opinion that he has such right of access. The only question is how that right shall be exercised, by what authority, and under what limitations.

While we do not fully sustain the reasons given by the learned judge below, we will not interfere with this decree for another reason. The plaintiff company has not yet sustained any irreparable injury by reason of the sinking of these wells, and it may never do so. We find ourselves upon a new road, without chart or compass to guide us, and we propose to move slowly. . . . For these reasons we will not disturb the decree of the Court below. The appellant company has its remedy at law, and to that we will remit it. The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

WILLIAMS, J. I concur in the decree made in this case, and in the opinion which so ably vindicates it, but I would go further. I would lay down the broad proposition that the several layers or strata composing the earth's crust are, by virtue of their order and arrangement, subject to reciprocal servitudes; and, as these are imposed by the laws of nature, and are indispensable to the preservation and enjoyment of the several layers or strata to and from which they are due, the Courts should recognize and enforce them. . . .

GREEN and McCOLLUM, JJ. We fully concur in this opinion.<sup>1</sup>

<sup>1</sup> [ESSAYS:

*Simeon E. Baldwin*, "The Law of the Airship." (1910, *American Journal of International Law*, IV, 95.)

*Arthur K. Kuhn*, "Aerial Navigation in its Relation to International Law." (1908, *Proceedings of the American Political Science Association*, 1908, p. 83.)

*Lyttelton Fox*, "The Law of Aerial Navigation." (1909, *North American Review*, CXI, 101.)

*C. C. Moore*, "Aerial Navigation Law." (1908, *Law Notes*, XII, 108.)

NOTES:

"Subterranean encroachments of earth." (H. L. R., VI, 100.)

"Trespass by underground mining: accrual of action." (H. L. R., IX, 147.)

"Quicksand under surface: removal by adjoining landowner." (H. L. R., X, 183.)

"Disseisin of surface: whether disseisin of underlying strata." (H. L. R., XI, 417.)

SUB-TOPIC B. AFFLUENT ELEMENTS  
(AIR, WATER, GAS, OIL, ELECTRICITY)

242. WILLIAM ALDRED'S CASE

KING'S BENCH. 1611

9 Co. Rep. 57 a

WILLIAM ALDRED brought an Action on the Case against Thomas Benton, which began Trin. 7 Jacobi, Rot. 2802. in Banco, that whereas the Plaintiff, 29 Septemb' anno 6 Jac. was seised of an House, and a Parcel of Land in Length 31 Feet, and in Breadth 2 Feet and a half, next to the Hall and Parlour of the Plaintiff of his House aforesaid in Harleston in the County of Norfolk in Fee; and whereas the Def. was possessed of a small Orchard on the East Part of the said Parcel of Land.

(1) Praedictus Thomas malitiose machinans & intendens ipsum Willielmum de easiamento & proficuo messuagi & parcelli terrae suorum praedictorum impedire & deprivare, the said 29 Day of Septemb. anno 6 Jacobi quoddam magnum lignile in dicto horto ipsius Thomas construxit & erexit, ac illud adeo exaltavit, &c. quod per lignite illud, &c. tam omnia fenestrae & luminaria ipsius Willielmi aulae & Camerarum suarum, quam ostium ipsius Willielmi aulae suae praedictae penitus obstupata fuerunt, &c.

(2) & praedictus Thomas ulterius machinans & malitiose intendens ipsum Willielmum multipliciter praegravare, & ipsum de toto commodo, easiamento & proficuo totius messuagii sui praedicti penitus deprivare, praedicto 29 die Sept. anno 6 supradicto, quoddam aedificium pro suis & porcis suis in horto suo praedicto tam prope aulam & conclave ipsius Willielmi praedicti erexit, ac sues & porcos suos in aedificio in horto illo posuit, & illos ibidem per magnum tempus custodivit, ita quod per faetidos & insalubres odores sordidorum praedictorum suum & porcorum praedicti Thomae in aulam & conclave praedictam ac alias partes praedicti messuagii ipsius Willielmi penetrantes & influentes, idem Willielmus & famuli sui, ac aliae personae in messuagio suo praedicti conversantes & existentes, absque periculo infectionis in aula & conclavi praedicta ac aliis locis messuagii praedicti continuare seu remanere non potuerunt.

Praetextu cuius idem Willielmus totum commodum, usum, easiamentum, & proficuum maximae partis messuagii sui praedicti per totum tempus praedictum totaliter perdidit & amisit ad damnum ipsius

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"Asphalt under surface: removal by adjoining owner." (H. L. R., XIII, 299.)

"Overhanging building: injunction: balance of convenience." (H. L. R., XIV, 300.)

"What constitutes a trespass: Encroachments on land above and below surface." (H. L. R., XIX, 369.)

Willielmi 40 l. &c. And the Defendant pleaded Not guilty; and at the assises in Norfolk he was guilty of both the said Nusances, and Damages assessed. And now it was moved in arrest of Judgment. . .

But it was resolved, That the Action for it is (as this Case is) well maintainable; for in a House 4 Things are desired, habitatio hominis, delectatio inhabitantis, necessitas luminis, & salubritas aeris, and for Nuisance done to three of them an Action lies, sc.

1. to the Habitation of a Man, for that is the principal End of a House.

2. For Hindrance of the Light; for the ancient form of an Action on the Case was significant, sc. quod Messuagium horrida tenebritate obscuratum fuit, therewith agree 7 E. 3. 50 b. 22 H. 6. 14. by Markham, II II. 4. 47. And as to this there was a Case adjudged in the King's Bench, Trin. 29 El. Tho. Bland brought an Action on the Case against Thomas Moseley, and declared how that James Bland was seised in Fee of an ancient House in Netherousegate in the Parish of St. Michael in the County of the City of York; and that the said James, and all those whose Estate he had in the said House, from Time whereof, &c. have had and have used to have for them and their Tenants, for Life, Years, and at Will in the West side of the said House seven Windows or Lights against a Piece of Land containing half a rood, in the Parish aforesaid, adjoining to the said House, which Piece of Land from Time whereof, was without any building, until the 28 Day of Septemb. anno 28 El. and shewed the Length and Breadth of the said Windows for all the Time aforesaid, by force of which Windows the said James, and all those whose Estates he had in the said House from Time whereof, &c. have used to have for them and their Tenants aforesaid divers wholesome and necessary Easements and Commodities, by reason of the open Air and Light, &c. And that the said James the 20 Sep. an. 28 El. demised to the Pl. the said House for 3 Years; and that the Def. maliciously intending to deprive him of the said Easements, & obscurare Messuagium praedictum horrida tenebritate, &c. 20 Nov. ann. 29 Eliz. had erected a new Building on the said Piece of Land, so near &c. that the said 7 Windows were stopped, whereby the Pl. left the said Easements, &c. Et maxima pars Messuagii praedicti horrida tenebritate obscurata fuit, &c. In Bar of which Action the Defendant pleaded, quod infra praedictam civitatem Eboracum talis habetur, & a toto tempore cuius contrarii memoria non existit, habebatur consuetudo, videlicet, quod si quis habuerit fenestras & visum per easdem versus terram vicini sui, vicinus ille visum illarum fenestrarum obstruere super terram illam solebat & posset, sicut melius viderit sibi expedire; by Force of which Custom he justified the stopping of the said Windows; and upon that the Pl. demurred in Law; and it was adjudged by Sir Chr. Wray Ch. Justice, and the whole Court of K's Bench, That the Bar was insufficient in Law to bar the Pl. of his Action, for two Reasons: 1. When a Man has a lawful Easement or Profit, by Prescription from Time whereof, &c. another Custom, which is also from

Time whereof, &c. can't take it away, for the one Custom is as ancient as the other. . . . And Wray Ch. Justice then said, That for stopping as well of the wholesome Air as of Light an Action lies, and Damages shall be recovered for them, for both are necessary, for it is said, & vescitur aura aetherea; and the said Words horrida tenebritate, &c. are significant, and imply the Benefit of the Light. But he said, That for Prospect, which is a Matter only of Delight, and not of Necessity, no Action lies for stopping thereof, and yet it is a great Commendation of an House if it has a long and large Prospect, unde dicitur, Laudaturque domus longos qui prospicit agros. But the Law don't give an action for such Things of Delight. And Solomon says, Ecclesiast. 11. 7. Dulce lumen est & delectabile oculis videre solem. Et olim (ut Plutarchus in Conv. 7. Sap. resert.) Rex Aethiopum interrogatus Quid optimum? respondebat, Lucem; quis enim natura duce tenebras non exhorrescit?

And if the Stopping of the wholesome Air, &c. give Cause of Action, a fortiori an Action lies in the Case at Bar, for infecting and corrupting the Air.<sup>1</sup>

### 243. LETTS v. KESSLER

SUPREME COURT OF OHIO. 1896

54 Oh. St. 73, 42 N. E. 765

ERROR to the Circuit Court of Cuyahoga County.

The plaintiff below, defendant in error here, filed her petition in the Court of Common Pleas against defendant below, plaintiff in error here, averring that she was the owner by purchase under a land contract of certain premises in the city of Cleveland, that defendant owned and occupied the lot on the east side thereof, that she used her premises as a hotel and boarding house, that he was erecting a high board fence on his ground which would obstruct her windows and deprive her of light and air, that said fence was not being erected for any useful or ornamental purpose, but from motives of pure malice alone, and for the express malicious purpose of annoying plaintiff, and excluding light and air from her house so as to render her house uninhabitable, to injure the value thereof, and that said fence would exclude the light and air and thereby greatly injure the value of her house. She prayed that he might be restrained from completing said fence, and that upon the final hearing a mandatory injunction might compel its removal.

Defendant below demurred to this petition, and the demurrer was overruled and exceptions taken. The ruling upon this demurrer is

<sup>1</sup> [VINEY, *Abridgment*, (1622, "Nuisance," G.). Winch, J., said that where one erected a house so high that the wind was stopt from the windmills in Finsbury Fields, it was adjudged that the house should be broken down. Winch 3, Pasch. 19 Jac. [1622], Anon.]

reported in 7 Circuit Court Rep. 108. He then filed an answer in substance a general denial, with an averment that the fence was erected to prevent the rush of water and eve drip from her premises onto his. This she denied in her reply. The case went to the circuit on appeal, and that Court overruled the demurrer, and on the trial made a finding of facts containing in substance the allegations of the petition. . . .

*L. A. Willson and Edward David*, for plaintiff in error.

When we let down the bars and begin to inquire into men's motives, we enter upon dangerous ground. The law is that the motive makes no difference. . . . The maxim: "So use your own as not to injure another's property," extends only to legal injuries, and does not condemn the darkening of another's windows, or depriving him of a prospect, by building on one's own land, where no right has been acquired by rant or prescription.

*C. J. Estep and S. S. Ford*, for defendant in error. . . .

We also do not contend that in Ohio we can acquire by use or prescription, an easement in light and air to be supplied to one's windows from the premises of another. . . . The doctrine we contend for is not inconsistent with the law as we concede it to be, when we assert that a man cannot, being actuated by malice alone, and with the purpose of annoying his neighbor, and rendering his property undesirable, and subserving no useful or ornamental purpose, erect a structure to close up his windows.

BURKET, J. The only question in this case arises upon the following findings of fact by the Circuit Court:

"Said structure was erected upon the land of the defendant and belonged to him. The structure was erected by said defendant from motives of un-mixed malice toward said plaintiff, and for no useful, or ornamental purposes of the property of said defendant."

It is not claimed that the person of the plaintiff was interfered with in this case, so that we have for consideration only the rights of property.

The fence complained of is upon the land of the defendant and belongs to him. Plaintiff fails to aver, and the Court fails to find, that she has any right to, or upon, the lot of defendant below by contract, statute, or any other way known to the law for acquiring a right to, in, or upon lands, unless such right may be acquired by, and transferred to her, by means of the aforesaid "motives of un-mixed malice." This is a manner of acquiring on the one hand, and of transferring on the other, a right to property unknown to the law.

But it is urged in her behalf, that even if she had no right of property, and even if he was the owner of the lot, that he could not use his own land for the purpose of erecting structures thereon which subserve no useful or ornamental purpose, and are erected through motives of un-mixed malice towards his adjoining neighbor.

It is and must be conceded that he might, by erecting a building on his lot, shut off her light and air to exactly the same extent as is done



by this fence, and that in such case she would be without right and without remedy, even though done with the same feelings of malice as induced him to erect the fence; thus making his act lawful when the malice is seasoned with profit or some show of profit to himself, and unlawful when his malice is unmixed with profit; the injury or inconvenience to her, meanwhile, remaining the same in both cases. If through feelings of malice he desires to shut the light and air from her windows, it is nothing to her whether he makes a profit or loss thereby. Her injury is no greater and no less in the one case than in the other. As to her, it is the effect of the act, and not the motive.

In effect he has the right to shut off the light and air from her windows by a building on his own premises, and she is not in effect concerned in the means by which such effect is produced, whether by a building or other structure; nor is she concerned as to the motive, nor as to whether he makes or loses by the operation. In the one case she might have a strong suspicion of his malice, while in the other such suspicion would be ripened into a certainty. But this is nothing to her as affecting a property right. As long as he keeps on his own property, and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced, and to permit her to do so, would not be enforcing a right of property, but a rule of morals. It would be controlling and directing his moral conduct by a suit in equity, by an injunction. To permit a man to cause a certain injurious effect upon the premises of his neighbor by the erection of a structure on his own premises if such structure is beneficial or ornamental, and to prohibit him from causing the same effect in case the structure is neither beneficial nor ornamental, but erected from motives of pure malice, is not protecting a legal right, but is controlling his moral conduct. In this State a man is free to direct his moral conduct as he pleases, in so far as he is not restrained by statute.

But it is said that such acts are offensive to the principles of equity. Not so. There is no conflict between law and equity in our practice, and what a man may lawfully do cannot be prohibited as inequitable. It may be immoral, and shock our notions of fairness, but what the law permits, equity tolerates. It would be much more inequitable and intolerable to allow a man's neighbors to question his motives every time that he should undertake to erect a structure upon his own premises, and drag him before a court of equity to ascertain whether he is about to erect the structure for ornament or profit, or through motives of unmixed malice.

The case is not like annoying a neighbor by means of causing smoke, gas, noisome smells, or noises to enter his premises, thereby causing injury. In such cases something is produced on one's own premises and conveyed to the premises of another; but in this case nothing is sent, but the air and light are withheld. A man may be compelled to

keep his gas, smoke, odors, and noise at home, but he cannot be compelled to send his light and air abroad. *Mullen v. Stricker*, 19 Ohio St. 135. If smoke, gas, offensive odors, or noises pass from one's own premises to or upon the premises of another to his injury, an action will lie therefor, even though the smoke, gas, odor or noise should be caused by the lawful business operations of defendant and with the best of motives. *Broom's Legal Maxims*, 372. In such cases it is the effect or injury, and not the motive, that is regarded. The true test is, whether anything recognized by law as injurious, passes from the premises of one neighbor to that of another. Anything so passing invades the legal rights of him whose premises it reaches, and such rights will be protected. But Courts cannot regulate or control the moral conduct of a man, unless authorized so to do by statute.

The following cases, cited by plaintiff in error, bear more or less upon the question involved in this case, and seem to produce a decided weight of authority in his favor: *Frazier v. Brown*, 12 Ohio St. 294; *Falloon v. Schilling*, 29 Kan. 292; *Mahan v. Brown*, 13 Wendell, 261; *Greenleaf v. Francis*, 18 Pick. 123; *Chatfield v. Wilson*, 28 Vt. 49. . . .

But it is strongly urged by counsel for defendant in error, that the maxim, "Enjoy your own property in such a manner as not to injure that of another person," applies in such cases as this, and that as it must be conceded that the fence in question is an injury to the property of the defendant in error, that his acts are in conflict with the above maxim.

At first blush this would seem to be so, but a careful consideration shows the contrary. The maxim is a very old one, and states the law too broadly. In this case, for instance, it is conceded that the plaintiff in error had the right to enjoy his property by erecting a house so as to do the same injury which was done by the fence, and that while that would be an injury to the property of defendant in error, she would be without remedy, and his act in erecting such house would not be regarded as violating the maxim. In *Jeffries v. Williams*, 5 Exch. 797, it was claimed, and in *Railroad Company v. Bingham*, 29 Ohio St. 369, it was held, that the true and legal meaning of the maxim is, "So use your own property as not to injure the rights of another." *Boynton, J.*, in that case says:

"Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong." . . .

The Circuit Court erred in overruling the demurrer to the petition, and in rendering judgment in favor of defendant in error upon the facts as found by the Court. The judgment of the Circuit Court is therefore reversed, and proceedings to render such judgment as the Circuit Court should have rendered upon the facts found, the petition of plaintiff below is dismissed at her cost. *Judgment reversed.*

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244. MASON *v.* HILL

KING'S BENCH. 1833

5 B. &amp; Ad. 1

THE first count of the declaration stated that before and at the time, etc., the plaintiff was lawfully possessed of a certain mill, manufactory, hereditaments, close, and premises, with the appurtenances, in the county of Stafford; and, by reason thereof, of right ought to have had and enjoyed the benefit and advantage of the water of a certain stream which had been used to run and flow, and during all that time ought to have run and flowed, in great plenty and purity, and still, of right, ought so to run and flow unto the said mill, etc., of the plaintiff, to supply the same with water for working, using, and enjoying the same respectively, and for other necessary purposes; yet the defendants, contriving, etc., by a certain dam and divers obstructions, placed in and across the said stream above the plaintiff's premises, impounded, penned back, and stopped the water of the said stream, and also wrongfully and injuriously laid down, into and near the said stream, above the plaintiff's premises, divers pipes and tiles, and kept and continued the said dam and obstructions so placed in and across the said stream, and the said pipes and tiles so laid down, for a long space of time, to wit, hitherto; and thereby, during all that time, unlawfully and wrongfully diverted and turned divers large quantities of water of the said stream, which ought to have flowed to the said mill, etc., respectively, away from the said mill, etc., and stopped and prevented the same from flowing along the usual and proper course to the said premises. And also that the defendants wrongfully and injuriously heated and spoiled the water which ran and flowed unto the said mill, etc., so that it became of no use to the plaintiff, whereby he was prevented from using his mill, etc., in so extensive and beneficial a manner as he otherwise would have done. In the second count, the plaintiff stated himself to be possessed of a close and lands, with the appurtenances, and of a mill and manufactory situate therein, near to the said stream, and claimed a right to have the stream run to the said close and premises for supplying the same with water for the necessary purposes thereof. In the third count, a similar right was claimed for the convenient enjoyment of certain hereditaments, lands, and premises, with the appurtenances. There was a fourth count, for turning foul water upon the plaintiff's premises. Plea, not guilty. At the Stafford Spring Assizes, 1831, the jury found a special verdict. . . . The case was argued in last Easter Term, before DENMAN, C. J., LITTLEDALE, J., and PARKE, J., by

The *Solicitor-General* for the plaintiff.

It has already been decided, after argument in this very case (3 B. & Ad. 304) that the plaintiff, who is the proprietor of lands contigu-

ous to a stream, might, as soon as he was injured by the diversion of the water from its natural course, maintain an action against the party so diverting it; and that it was no answer to the action, that the defendants first appropriated the water to their own use, unless they had twenty years' undisturbed enjoyment of it in the altered course. All the authorities were cited and commented on. . . .

*Peake, Sergt., contra.*

The principal question is, whether the right to the use of flowing water can be acquired by the owner of adjoining land, unless it has been enjoyed for twenty years. . . . It was said, upon the former argument in this case, that flowing water, like light and air, is *publici juris*. If that be so, it cannot belong to the owner of the land adjoining its channel until it is appropriated. Mr. Justice Blackstone, in his *Commentaries*, Vol. 2, 14, 18, states water to be one of those things the property in which is acquired by occupancy. . . .

DENMAN, C. J., in this term, delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows:

The substance of the special verdict is this: The defendants' mill was erected in 1818; the plaintiff's in 1823, on a piece of land, the former owner and occupier of which had, for twenty years prior to 1818, appropriated the water of the stream and springs for watering his cattle and irrigating that land. At the time when the defendants' mill was erected, the then owner and occupier of the plaintiff's land gave a parol license to the defendants to make a dam at a particular place above where the Sitchwell Tree stood, and to take what water they pleased from that point to their mill, which water was so taken, and returned by pipes into the stream, above the spot where the plaintiff's mill was afterward erected. In 1818, the defendants conducted part of the water of the Over Canal Springs, which had before flowed into the stream, into a reservoir for the use of their mill. After the plaintiff erected his mill, namely, in 1828, he appropriated to its use all the surplus water, viz., that which flowed over and through the dam; that from the Over Canal Springs, which was not conducted into the reservoir; and all from the Sitchwell Spring (which was another feeder of the brook), and also that which was returned by the defendants into the stream. In January, 1829, the plaintiff demolished the dam at the Sitchwell Spring. The defendants erected a new dam lower down, and by means of it diverted from the plaintiff's mill, at some times, all the stream, including all the water so appropriated; at others, a part of it, and returned the remainder in a heated state into the stream.

And the questions upon this special verdict are, whether the plaintiff is entitled to recover for the diversion of the whole water of the stream, or of any and what part of it, or for the heating of the part returned. . . .

The last question is, whether the plaintiff ought to recover in respect of that portion of the water which was diverted from the Over Canal

Springs, and collected in a tank in 1818. This was taken without license, and appropriated by the defendants to the use of their mills before any other appropriation, but has not been so appropriated for twenty years; and the point to be decided is, whether the defendants, by so doing, acquired any right to this against the plaintiff, through whose field it would otherwise have flowed in its natural course; and we are of opinion that they did not.

This point might, perhaps, be disposed of in favor of the plaintiff, even admitting the law to be as contended for by the defendants, that the first occupant acquires a right to flowing water; for, by this special verdict, all the water of the brook is found to have been appropriated by Ashley the father, and used for twenty years up to the year 1818 for watering his cattle and irrigating the field, now the plaintiff's. A right to use the water thus acquired by occupancy, in right of the field, must have passed to the plaintiff, and could not be lost by mere non-user from 1819 to 1829; and the total or partial abstraction of the water may be an injury to such a right in point of law, though no actual damage is found by the jury to have been sustained in that respect.

But we do not wish to rest a judgment for the plaintiff on this narrow ground. We think it much better to discuss, and, as far as we are able, to settle the principle upon which rights of this nature depend.

The proposition for which the plaintiff contends is that the possessor of land through which a natural stream runs has a right to the advantage of that stream, flowing in its natural course and to use it when he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below; that neither can any proprietor above diminish the quantity or injure the quality of water which would otherwise descend, nor can any proprietor below throw back the water without his license or grant; and that, whether the loss by diversion of the general benefit of such a stream be or be not such an injury in point of law as to sustain an action without some special damage, yet, as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.

The proposition of the defendants is that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, including the proprietor of the land below, who has no right of action against him, unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes, and in default of his having done so, may altogether deprive him of the benefit of the water. . . .

We think that this proposition has originated in a mistaken view of the principles laid down in the decided cases of *Bealy v. Shaw*, 6 East, 208; *Saunders v. Newman*, 1 B. & A. 258; *Williams v. Moreland*, 2 B. & C. 913. It appears to us, also, that the doctrine of

Blackstone and the dicta of learned judges, both in some of those cases, and in that of *Cox v. Mathews*, 1 Ventr. 137, have been misconceived. . . .

The last and principal authority cited is that of *Williams v. Moreland*, 2 B. & C. 910. The case itself decides no more than this: that the plaintiff having in his declaration complained that the defendants had, by a floodgate across the stream above, prevented the water from running in its regular course through the plaintiff's land, and caused it to flow with increased force and impetuosity, and thereby undermined and damaged the plaintiff's banks, could not recover, the jury having found that no such damage was sustained. The judgments of all the judges proceed upon this ground, though there are some observations made by my brother Bayley, which would seem, at first sight, to favor the proposition contended for by the defendants.

These observations are, that

"Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is coextensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such a right ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose." (2 B. & C. 913.)

The dictum of Lord Chief Justice Tindal, in *Liggins v. Inge*, 7 Bing. 692, is to this effect:

"Water flowing in a stream, it is well settled by the law of England, is *publici juris*. By the Roman law, running water, light, and air were considered as some of those things which were *res communes*, and which were defined, things, the property of which belongs to no person, but the use to all. And, by the law of England, the person who first appropriates any part of this water flowing through his land to his own use has the right to the use of so much as he then appropriates against any other;"

and for that he cites *Bealey v. Shaw and Others*, 6 East, 208, which case, however, is no authority for this position, as far as relates to the owner of the land below; and probably, therefore, the Lord Chief Justice intended the expression "any other" to apply only to those who diverted or obstructed the stream. To these dicta may be added the passage from Blackstone's Commentaries, Vol. 2, 14:

"There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. Such, also, are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untamable disposition, which any man may seize upon and keep for his own use or pleasure.



All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterward."

And, 2 Blackstone's Commentaries, 18:

"Water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it."

None of these dicta, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities that the first occupier or first purpose has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water.

The Roman law is (2 Inst. Tit. 1, S. 1) as follows:

"Et quidem, naturali jure, communia sunt omnium hæc: aer, aqua profluens, et mare, et hoc littora maris."

It is worthy of remark that Fleta, enumerating the *res communes*, omits "*acqua profluens*." (Lib. 3, Chap. 1.) Vinnius, in his Commentary on the Institutions, explains the meaning of the text. . . . And he proceeds to describe the use of water,

"*acqua profluens ad lavandum et potandum unicuique jure naturali concessa*."

The law as to rivers is,

"*flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque*."

And Vinnius, in his commentary on this passage, says:

"Unicuique licet, in flumine publico navigare et piscari."

And he proceeds to distinguish between a river and its water — the former being, as it were, a perpetual body, and under the dominion of those in whose territories it is contained; the latter being continually changing, and incapable, whilst it is there, of becoming the subject of property, like the air and sea. In the Digest, Book 43, Tit. 13, in public rivers, whether navigable or not, it appears that every one was forbidden to lower the water, or narrow the course of the stream or in any way to alter it, to the prejudice of those who dwelt near. Tit. 12 distinguishes between public and private rivers; and in Sec. 4 it is said that private rivers in no way differ from any other private place.

From these authorities, it seems that the Roman law considered running water, not as a *bonum vacans*, in which any one might acquire a property, but as public or common, in this sense only, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that par-

ticular portion which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only.

We think that no other interpretation ought to be put upon the passage in *Blackstone*, and that the dicta of the learned judges above referred to, in which water is said to be *publici juris*, are not to be understood in any other than this sense; and it appears to us that there is no authority in our law, nor, as far as we know, in the Roman law, (which, however, is no authority in ours) that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein. . . .

We are, therefore, clearly of opinion that the plaintiff is entitled to recover in respect of the abstracting of the water taken from the Over Canal Springs, as well as the other injuries complained of, and for which damages have been assessed by the jury.

As to the right to recover for the injury sustained, by the water being returned in a heated state, there can be no question.

Whether he could have maintained an action before he had constructed his mill, or applied the water of the stream to some profitable purpose, we need not decide. . . . It must not, therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water without a special use or special damage shown.

But, be that as it may, the plaintiff in this case, who has sustained actual damage, is entitled to the judgment of the Court.

*Judgment for the plaintiff.*

## 245. TYLER *v.* WILKINSON

UNITED STATES CIRCUIT COURT, DISTRICT OF RHODE ISLAND. 1827

4 *Mason*, 397, *Fed. Cas. No.* 14312

BILL in equity [by Ebenezer Tyler and others against Abraham Wilkinson and others] to establish the right of the plaintiffs to a priority of use of the waters of Pawtucket River, &c. The cause was argued at great length, by *Whipple* and *Webster*, for plaintiffs, and by *Cozzens* and *Searle*, for defendants, at the last November term, and continued for advisement to this term when the following opinion was delivered.

STORY, Circuit Justice. This is a very important case, complicated in facts, and voluminous in testimony. It will not, however, be necessary to go over the details of the proofs, or even of the arguments, urged at the bar, further than may serve to explain the opinion of the Court, and give a clear understanding of the points in controversy.

The river Pawtucket forms a boundary line between the states of

Massachusetts and Rhode Island, in that part of its course where it separates the town of North Providence from the town of Seekonk. It is a fresh water river, above the lower falls between these towns, and is there unaffected by the ebb or flow of the tide. At these falls there is an ancient dam, called the lower dam, extending quite across the river and several mills are built near it, as well on the eastern as on the western side of the river. The plaintiffs, together with some of the defendants, are the proprietors in fee of the mills and adjacent land on the eastern bank, and either by themselves or their lessees are occupants of the same. The mills and land adjacent, on the western bank, are owned by some of the defendants. The lower dam was built as early as the year 1718, by the proprietors on both sides of the river, and is indispensable for the use of their mills respectively. There was previously an old dam on the western side, extending about three quarters of the way across the river, and a separate dam for a saw-mill on the east side. The lower dam was a substitute for both. About the year 1714 a canal was dug, or an old channel widened and cleared on the western side of the river, beginning at the river a few rods above the lower dam, and running round the west end thereof, until it emptied into the river about ten rods below the same dam. It has been long known by the name of "Sergeant's Trench," and was originally cut for the passage of fish up and down the river; but having wholly failed for this purpose, about the year 1730 an anchor-mill and dam were built across it by the then proprietors of the land; and between that period and the year 1790, several other dams and mills were built over the same; and since that period more expensive mills have been built there, which are all owned by some of the defendants. About thirty years before the filing of the bill, to wit, in 1792, another dam was built across the river at a place above the head of the trench, and about 20 rods above the lower dam; and the mills on the upper dam, as well as those on Sergeant's trench, are now supplied with water by proper flumes, &c., from the pond formed by the upper dam. The proprietors of this last dam are also made defendants.

Without going into the particulars of the bill (for in consequence of intervening deaths and devises, the cause is now before the Court upon a supplemental bill, in the nature of a bill of revivor), it is necessary to state, that the bill charges that the owners of Sergeant's trench are entitled, as against the owners of the lower dam, only to what is called a waste-water privilege, that is, to a right to use only such surplus water, as is not wanted by the owners of the lower dam and lands for any purposes whatever. In other words, that the right of the owners of Sergeant's trench is a subservient right to that of the plaintiffs, and takes place only as to any water which the plaintiffs may not, from time to time, have any occasion to use for any mills erected, or to be erected, by them. It charges a fraudulent combination between the owners of the upper dam and Sergeant's trench, injuriously to appropriate and

use the water, and that the latter appropriate a great deal more water than they are entitled to by ancient usage, and waste the water to the injury of the plaintiffs. The object of the bill is to establish the right of the plaintiffs, and to obtain an injunction and for general relief.

The principal points, which have been discussed at the bar, are, first, what is the nature and extent of the right of the owners of Sergeant's trench; and, secondly, whether that right has been exceeded by them to the injury of the plaintiffs.

Before proceeding to an examination of these points, it may be proper to ascertain the nature and extent of the right, which riparian proprietors generally possess, to the waters of rivers flowing through their lands. Unless I am mistaken, this will relieve us from a great portion of the difficulties which incumber this cause, and lead us to a satisfactory conclusion upon its merits. I shall not attempt to examine the cases at large, or to reconcile the various dicta, which may be found in some of them. The task would be very onerous; and I am not aware that it would be very instructive. I have, however, read over all the cases on this subject, which were cited at the bar, or which are to be found in Mr. Angell's valuable work on water courses, or which my own auxiliary researches have enabled me to reach. The general principles, which they contain and support, I do not say in every particular instance, but with a very strong and controlling current of authority, appear to me to be the following:

Prima facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque ad flum aquæ*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and

extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, "*Sic utere tuo, ut non alienum lædas.*"

But of a thing, common by nature, there may be an appropriation by general consent or grant. Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietors the right to the use in common, as an incident to the land; and whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be, either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment, without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. . . .

These are the general principles, which appear to me applicable to the present case. They will be found recognized in many cases; but are in none more fully and accurately weighed and discussed than in *Bealey v. Shaw*, 6 East, 208; *Williams v. Moreland*, 2 Barn. & C. 910; and *Wright v. Howard*, 1 Sim. & S. 190, — in England; and in *Ingraham v. Hutchinson*, 2 Conn. 584; *Merritt v. Parker*, 1 Cox [1 N. J. Law], 460; *Palmer v. Mulligan*, 3 Caines, 307; *Platt v. Johnson*, 15 Johns. 213; and *Merritt v. Brinkerhoff*, 17 Johns. 306, — in America.

With these principles in view, the general rights of the plaintiffs cannot admit of much controversy. They are riparian proprietors, and, as such, are entitled to the natural flow of the river without diminution to their injury. As owners of the lower dam, and the mills connected therewith, they have no rights beyond those of any other persons, who might have appropriated that portion of the stream to the use of their mills. That is, their rights are to be measured by the extent of their actual appropriation and use of the water for a period, which the law deems a conclusive presumption in favor of rights of this nature. In their character as mill-owners, they have no title to the flow of the stream beyond the water actually and legally appropriated to the mills;

but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, so far as it has not been already acquired by some prior and legally operative appropriation. No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights, as riparian proprietors, are general; and it is incumbent on the parties, who seek to narrow these rights, to establish by competent proofs their own title to divert and use the stream.

And this leads me to the consideration of the nature and extent of the rights of the trench owners. . . .

In this view of the matter, the proprietors of Sergeant's trench are entitled to the use of so much of the water of the river as has been accustomed to flow through that trench to and from their mills (whether actually used or necessary for the same mills or not), during the twenty years last before the institution of this suit, subject only to such qualifications and limitations, as have been acknowledged or rightfully exercised by the plaintiffs as riparian proprietors, or as owners of the lower mill-dam, during that period. But here their right stops; they have no right farther to appropriate any surplus water not already used by the riparian proprietors, upon the notion, that such water is open to the first occupiers. That surplus is the inheritance of the riparian proprietors, and not open to occupancy.

The question, then, resolves itself into a matter of fact: — What has been the quantity accustomed to flow in the trench, and what the qualifications and limitations accompanying the flow during this period? . . .

It is impracticable for the Court to do more, in this posture of the case, than to refer it to a master to ascertain, as near as may be, and in conformity with the suggestions in the opinion of the Court, the quantity to which the trench owners are entitled, and to report a suitable mode and arrangement permanently to regulate and adjust the flow of the water, so as to preserve the rights of all parties.

In respect to the question of damages for any excess of the use of the water by the trench owners, beyond their right, within six years next before the filing of the bill, I have not thought it my duty to go into a consideration of the evidence. It is a fit subject, either for reference to a master, or for an issue of quantum damnificatus, if either party shall desire it.

The decree of the Court is to be drawn up accordingly; and all further directions are reserved to the further hearing upon the master's report, &c.

*Decree accordingly.*

## 246. WEBB *v.* PORTLAND MANUFACTURING COMPANY

CIRCUIT COURT OF THE UNITED STATES. 1838

3 Sumner 189, Fed. Cas. No. 17322

[Printed ante, as No. 20.]



247. RENO SMELTING, MILLING & REDUCTION WORKS  
v. STEVENSON

SUPREME COURT OF NEVADA. 1889

20 Nev. 269

APPEAL from the District Court of the State of Nevada, Washoe County. *R. R. Bigelow*, District Judge. The facts are sufficiently stated in the opinion.

*John F. Alexander*, Attorney General, *Robert H. Lindsay* and *Thomas H. Wells*, for appellants.

I. The judgment and decree rendered herein should be reversed. It is not supported by the allegations of the complaint. The complaint bases plaintiff's right to recover in any event, either upon its legal or equitable cause of action upon a prior appropriation of the waters of the Truckee River, and there is no allegation in said complaint which justifies a decree based upon riparian ownership. . . . II. The quantity of water to which the appropriator is entitled is measured by his means of appropriation, as applied to the natural existing state of the stream, and the configuration of the ground through and over which it runs. . . . III. The common law of England must be understood as having been adopted only in cases where it is applicable to the habits and conditions of our society, and in harmony with the genius, spirit and objects of our institutions. . . . IV. We base our argument on the right to make a reasonable use of water without damage to either party. Plaintiffs are appropriators, and their act shows that in this case to confine them to the rights riparian would prevent beneficial use by them of the water needed at their works. . . .

*R. S. Mesick*, for respondent.

I. The findings of fact made and conclusions drawn by the District Court and the judgment entered are fully supported by the pleadings in the case. As against a mere intruder it is sufficient for a plaintiff to allege mere possession under claim of right. (Ang. Wat. Cour. Sec. 407.) The defendants are mere intruders. . . . IV. Appellants asseverate that, notwithstanding the words of the statute book of the State and the decisions of this Court to the contrary, the common law of England does not prevail in the State of Nevada in reference to the subject of water rights, but that the subject had, by some process, passed under the dominion of something called the common law of the Pacific Coast. Just what appellants mean by the phrase common law of the Pacific Coast, they have not made clear. But we are prepared to maintain that there is no law to be found upon the statute books of either the United States or of any State, nor any decision of their Courts, which lends any support whatsoever to the idea that the owner of a fee simple title to land, through which flows a stream of water not appropriated while the land was part of the public domain, is lawfully subject,

except by the right of eminent domain or his own fault, to the loss of any portion of that stream upon his own land and against his will, whether he have immediate use for it or not. (Heath v. Williams, 25 Me. 209; 43 Am. Dec. 279-80; Const. of Nevada, Art. XVII, Sec. 2; Vansickle v. Haines, 7 Nev. 249.)

By the Court, BELKNAP, J.:

This action is brought for the purpose of determining rights to the use of water upon the following facts: The plaintiff is a corporation engaged in the reduction of ores. It is the owner in fee of ten acres of land on the Truckee River, upon which its reduction works are situated. Long prior to the commission of the grievances alleged in the complaint, it built a dam in the river at a point above its own land, but with the consent of those whose lands were affected thereby. The water is used to furnish power to operate machinery at the works, and is conveyed from the dam by means of a ditch and flume. The height of the dam is such that the waters of the river flow over it about ten inches above its crest, and, unless the water is maintained at this height, sufficient cannot be diverted to fill the ditch and flume. The State of Nevada is the owner in fee of the land next below that of the plaintiff on the river. The insane asylum of the State is situated thereon, and the defendants, by virtue of their offices of governor, controller, and treasurer of the State, respectively, are commissioners for the care of the insane, and, as such, control the affairs of the asylum. In their capacity as commissioners they have caused the pond of water made by the dam of the plaintiff to be tapped by a flume, and thereby carried a portion of the waters to the asylum grounds for motive power. The District Court enjoined this diversion of the waters. Plaintiff upon this appeal neither claims nor disclaims a right by virtue of a prior appropriation, but urges an affirmance of the judgment upon the sole ground that it is a riparian proprietor, and, as such, is entitled to the natural flow of the water through its land.

The rights of riparian proprietors are thus stated by Chancellor Kent:

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run, (*currere solebat*,) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. '*Aqua currit et debet currere ut currere solebat*.' is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot reasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it." (3 Kent Comm. 439.)

"It is wholly immaterial," says Judge Story, in *Tyler v. Wilkinson*, 4 Mason, 400,

"whether the party be a proprietor above or below, in the course of the river. The right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all."

But the rule of the common law has never been applied by the Courts of this State, except as hereinafter mentioned. The condition of settlers upon the public lands of the State necessitated a diversion of running waters from their natural channels for agricultural purposes, and our Courts have, with the exception stated, protected the first appropriator to the extent of his appropriation to any beneficial use, and no obligation has been imposed upon him to return the water to its natural channel. The history of this subject is clearly stated by Mr. Justice Field, in *Atchison v. Peterson*, 20 Wall. 510, as follows:

"By the custom which has obtained among miners in the Pacific States and Territories, where mining for precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law, declaratory of the rights of riparian owners, were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection."

Referring to the rule as above stated, and which accords to the different riparian proprietors an equal right to the use of the waters of the stream, the opinion proceeds:

"This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale, and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages, and regulations everywhere recognized the inherent

justice of this principle, and the principle itself was at an early period recognized by legislation, and enforced by the Courts in those States and Territories."

And in *Basey v. Gallagher*, Id. 670, after referring to the views above quoted, the Court says:

"The views there expressed and the rulings made, are equally applicable to the use of waters on the public lands for purposes of irrigation. No distinction is made in those States or Territories by the customs of miners or settlers, or by the Courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one."

. . . The statute is as follows:

"The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this State, shall be the rule of decision in all the Courts of this State."

. . . The statute is silent upon the subject of the applicability of the common law, but we think the term "common law of England" was employed in the sense in which it is generally understood in this country, and that the intention of the Legislature was to adopt only so much of it as was applicable to our condition. An examination of the authorities will render this apparent. . . .

From these authorities we assume that the applicability of the common-law rule to the physical characteristics of the State should be considered. Its inapplicability to the Pacific States, as shown in *Atchison v. Peterson*, supra, applies forcibly to the State of Nevada. Here the soil is arid, and unfit for cultivation unless irrigated by the waters of running streams. The general surface of the State is table land, traversed by parallel mountain ranges. The great plains of the State afford natural advantages for conducting water, and lands otherwise waste and valueless, become productive by artificial irrigation. The condition of the country, and the necessities of the situation, impelled settlers upon the public lands to resort to the diversion and uses of waters. This fact of itself is a striking illustration, and conclusive evidence of the inapplicability of the common-law rule.

The system which the necessities of the people established was recognized and confirmed by the legislation of Congress — first, by the Act of July 26, 1866, which declares, in its ninth section, "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; . . ." and, second, by the desert land Act, which encourages the appropriation and use of water upon such of the public lands as will not, without irrigation, produce an agricultural crop, by authorizing the sale of a greater amount of such land than the purchaser could otherwise acquire, upon proof of his having conducted water upon it for the purpose of irrigation.

This Act applies only to the Pacific Coast States and Territories. (U. S. Stat. 1877, 377.) The legislation of the State also has encouraged the diversion of water by an Act approved March 3, 1866, the general object of which is expressed in its title as follows: "An Act to allow any person or persons to divert the waters of any river or stream and run the same through any ditch or flume, and to provide for the right of way through the lands of others." (Gen. Stat. 362-365.)

And the adjudication of the Courts, with the exception mentioned, have sustained the doctrine of appropriation upon which the people acted. That the doctrine should be upheld, as well after the issuance of the patent of the government as before, we quote the views of Mr. Justice Ross, in a dissenting opinion in *Lux v. Haggin*, 69 Cal. 450:

"The doctrine of appropriation thus established was not a temporary thing, to exist only until some one should obtain a certificate or patent for forty acres, or some other subdivision of the public land bordering on the river or other stream of water. It was, as has been said, born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the status of water rights with respect to public lands. No valid reason exists why the government, which owned both the land and the water, could not do this. It thus became, in my judgment, as much a part of the law of the land as if it had been written in terms in the statute books, and in connection with which all grants of public land from either government should be read. In the light of the history of the State, and of the legislation and decisions with respect to the subject in question, is it possible that either government, State or national, ever contemplated that conveyance of forty acres of land at the lower end of the stream that flows for miles through public lands should put an end to subsequent appropriation of the waters of the stream upon the public lands above, and entitle the grantee of the forty acres to the undiminished flow of the water in its natural channel from its source to its mouth? It seems to me entirely clear that nothing of the kind was ever intended or contemplated."

The case of *Coffin v. Ditch Co.*, 6 Colo. 443, recognizes appropriation as the law of the State of Colorado. Some of the principles announced in that case are applicable here:

"It is contended by counsel for appellants,"

say the Court,

"that the common law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority or right to water by priority of appropriation thereof was first recognized and adopted in the Constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the State. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive. Except in a few favored sections, artificial irrigation, for agriculture, is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it arises, when appropriated, to the dignity of a distinct usufructuary estate or right of property. It has always been the policy of the national, as well as the Territorial and State

governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing, by irrigation, portions of our unproductive territory. . . The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and State governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection, as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain, and it is immaterial whether or not it be mentioned in the patent, and expressly excluded from the grant."

Our conclusion is that the common-law doctrine of riparian rights is unsuited to the condition of our State, and that this case should have been determined by the application of the principles of prior appropriation. *Judgment reversed, and cause remanded for a new trial.*

## 248. ACTON v. BLUNDELL

EXCHEQUER CHAMBER. 1843

12 M. & W. 324

THE case is stated in the opinion of the Court.

The judgment of the Court was delivered by

TINDAL, C. J. The question raised before us on this bill of exceptions is one of equal novelty and importance. The plaintiff below, who is also the plaintiff in error, in his action on the case, declared in the first count for the disturbance of his right to the water of certain underground springs, streams, and water-courses, which, as he alleged, ought of right to run, flow and percolate into the closes of the plaintiff, for supplying certain mills with water; and in the second count for the draining off the water of a certain spring or well of water in a certain close of the plaintiff, by reason of the possession of which close, as he alleged, he ought of right to have the use, benefit, and enjoyment of the water of the said spring or well for the convenient use of his close. The defendants by their pleas traversed the rights in the manner alleged in those counts respectively.

At the trial the plaintiff proved that, within twenty years before the commencement of the suit, viz., in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land of one of the defendants, at about three-quarters of a mile from the plaintiff's well, and about three years after sunk a second, at a somewhat less distance; the consequence of which sinking was, that by the first the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill. The learned judge before whom the cause



was tried directed the jury that if the defendants had proceeded and acted in the usual and proper manner on the land, for the purpose of working and winning a coal-mine therein, they might lawfully do so, and that the plaintiff's evidence was not sufficient to support the allegations in his declaration as traversed by the second and third pleas. Against this direction of the judge the counsel for the plaintiff tendered the bill of exceptions which has been argued before us. And after hearing such argument, and consideration of the case, we are of opinion that the direction of the learned judge was correct in point of law.

The question argued before us has been in substance this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to and regulates a water-course flowing on the surface.

The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established: each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above. The law is laid down in those precise terms by the Court of King's Bench in the case of *Mason v. Hill*, 5 B. & Ad. 1, 2 Nev. & M. 747, and substantially is declared by the Vice-Chancellor in the case of *Wright v. Howard*, 1 S. & S. 190, and such we consider a correct exposition of the law. And if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal-pits, and the direction given by the learned judge would be wrong.

But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing, on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.

The ground and origin of the law which governs streams running in their natural course would seem to be this: that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious; that the enjoyment has been long continued — in ordinary cases, indeed, time out of mind — and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what

has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law, (which would seem to be the opinion of Fleta and of Blackstone) the origin of which is lost by the progress of time; or it may not be unfitly treated, as laid down by Mr. Justice STORY, in his judgment in the case of *Tyler v. Wilkinson*, in the Courts of the United States (4 Mason's Am. Rep. 401) as "an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law." But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time; it may well be that it is only yesterday's date that they first took the course and direction which enabled them to supply the well. Again, no proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil.

But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface; he receives as much from his higher neighbor as he sends down to his neighbor below; he is neither better nor worse; the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbor, he may impose on such neighbor the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of

mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined: in the present case, the nearest coal-pit is at the distance of half a mile from the well: it is obvious the law must equally apply if there is an interval of many miles.

Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.

No case has been cited on either side bearing directly on the subject in dispute. . . .

The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe. The authority of one at least of the learned Roman lawyers appears decisive upon the point in favor of the defendants; of some others the opinion is expressed with more obscurity. In the Digest, Lib. 39, Tit. 3, *De aqua et aquae pulviae arcandae*, Sec. 12, "Denique Marcellus scribit: Cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem; et sane non debet habere, si non animo vicini nocendi sed suum agrum meliorem faciendi id fecit." . . .

It is scarcely necessary to say that we intimate no opinion whatever as to what might be the rule of law if there had been an uninterrupted user of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or

drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

We think, therefore, the direction given by the learned judge at the trial was correct, and that the judgment already given for the defendants in the Court below must be affirmed.

*Judgment affirmed.*

## 249. MEEKER v. EAST ORANGE

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1909

77 N. J. L. 623, 74 Atl. 379

ERROR to Supreme Court.

Actions by Frank W. Meeker against the City of East Orange. Judgment for defendant (70 Atl. 360), and plaintiff brings error. Reversed.

*Ralph E. Lum*, (*Guild, Lum & Tamblyn*, on the brief), for plaintiff in error.

*Jerome D. Gedney*, for defendant in error.

PITNEY, Ch. Plaintiff brought two actions in one of the District Courts of the city of Newark to recover damages for the diversion by the defendant of percolating underground water. In each case the District Court rendered judgment in favor of the defendant, and upon appeal to the Supreme Court the judgments were affirmed. By writs of error the records are brought here for review.

The cases were submitted to the trial Court upon agreed statements of fact. In one case it is stipulated that plaintiff owns and occupies a farm of about 100 acres, situate in the valley of Canoe brook, in the townships of Millburn and Livingston, in the county of Essex. He is a milkman, and has for a number of years used his farm for the pasture and support of his cows and horses. Canoe brook and two small streams tributary thereto flow through his farm. Upon the farm there is also a spring, inclosed by a springhouse, the water of which has for years been used by the plaintiff for drinking purposes and for the storing and keeping of his milk. His cattle in pasture have for years resorted to the brook and its tributaries for drinking water. The defendant, the City of East Orange, under the authority of "An Act to enable cities to supply the inhabitants thereof with pure and wholesome water," approved April 21, 1876 and the Acts supplemental thereto and emendatory thereof (P. L. 1876, p. 366; Gen. St. 1895, pp. 646-650, §§ 902-917), acquired a tract of land containing about 680 acres situate in the valley of Canoe brook and in the township of Millburn, and installed thereon a water plant consisting of about 20 artesian wells, situate farther down the stream than plaintiff's farm and distant upwards of a mile therefrom. In the construction of these wells, and of the works, mains, and reservoirs connected therewith, the city has expended more than \$1,000,000. A few years prior to the commencement of the action, the city began to

take water from the wells, and has thus taken percolating underground water, which, but for its interception, would have reached the plaintiff's spring or stream. No water other than percolating water has been taken, and no water has been taken out of any surface stream or from the spring of the plaintiff after it (the water) has appeared upon the surface or in any surface or stream. In this action the plaintiff seeks damages for the diversion of the underground water that otherwise would have reached his spring and streams.

In the other action the agreed statement of facts differs only in that it shows the existence upon plaintiff's farm of a well which for years had provided water for the various purposes of the plaintiff, and that as a result of the defendant's operations it had taken percolating underground water which otherwise would have reached this well, and had also taken percolating underground water from beneath the surface or soil of the plaintiff's land to such an extent that his crops will not now grow as they did formerly, and the taking of such percolating water has damaged the plaintiff's hay and crops, and also has reduced the level of the water in his well. For this diversion damages are sought.

The judgments under review are based upon the theory that the city has an absolute right to appropriate all percolating water found beneath the land owned by it, and to use the water for purposes entirely unconnected with the beneficial use and enjoyment of that land, to the extent, indeed, of making merchandise of the water and conveying it to a distance for the supply of the inhabitants of East Orange, and that although by such diversion the plaintiff's spring, well, and stream are dried up, and his land rendered so arid as to be untillable, it is *damnum absque injuria*. The judgments are attacked upon the ground that the law recognizes correlative rights in percolating subterranean waters, that each landowner is entitled to use such waters only in a reasonable manner and to a reasonable extent beneficial to his own land, and without undue interference with the rights of other landowners to the like use and enjoyment of waters percolating beneath their lands, or of water courses fed therefrom.

The law respecting the rights of property owners in percolating subterranean waters is of comparatively recent development; the first English decision bearing directly upon the question having been rendered in 1843. *Acton v. Blundell*, 12 M. & W. 324, 13 L. J. Exch. 289. This was followed by *Chasemore v. Richards* (1859) 7 H. L. Cas. 349, 29 L. J. Exch. 81, 5 Jur. N. S. 873, 1 Eng. Rul. Cas. 729. These cases may be taken as establishing for that jurisdiction the rule upon which the judgments under review are based. They were followed by a considerable line of decisions in this country, in which the English rule was adhered to, and which will be found discussed in Washburn on Easements, 363-390; Angell on Water Courses, §§ 109-114p; 30 Am. & Eng. Encyc. Law (2d Ed.) 310-313. The soundness of the English doctrine was, however, challenged by the Supreme Court of New Hamp-

shire in a well-considered case decided in 1862 (*Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179), where it was elaborately reasoned that the doctrine of absolute ownership is not well founded in legal principles, and is not so commended by its practical application as to require its adoption; that the true rule is that, the rights of each owner being similar, and their enjoyment dependent upon the action of other landowners, their rights must be correlative and subject to the operation of the maxim *sic utere*, etc.; so that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property, in view of the similar rights of others. This decision was followed by *Swett v. Cutts* (1870) 50 N. H. 439, 9 Am. Rep. 276, where the Court again laid down that the landowner has not an absolute and unqualified property in all such water as may be found in his soil, to do what he pleases with it, as with the sand and rock that form part of the soil, but that his right is to make reasonable use of it for domestic, agricultural, and manufacturing purposes, not trenching upon the similar rights of others. The doctrine, thus enunciated, has come to be known in the discussion of the topic as the rule of "reasonable use."

The question as to which of these contrary rules obtains in this State has not been set at rest by any previous adjudication in this Court. In *Ocean Grove v. Asbury Park* (1885) 40 N. J. Eq. 447, 3 Atl. 168, both parties were seeking a general supply of water for the respective summer resorts. Ocean Grove obtained by boring upon its own land a supply of water for its inhabitants. Asbury Park sought water by boring upon lands of third parties with the consent of the latter. Vice Chancellor Bird refused an injunction upon the ground that subterranean percolating waters are the absolute property of the owner of the fee, citing the leading English cases and some American decisions that follow them. His decision could, perhaps, have been based upon the doctrine of reasonable use, because neither party was proposing to confine its use of the waters to the beneficial enjoyment of the lands from which they were taken. . . .

In the absence of any anciently established rule of the English common law upon the subject, and of any contrary decision in this Court, and in view of what will shortly appear, that the decisions in other jurisdictions are conflicting, with the trend of modern decisions in this country strongly in favor of adopting the doctrine of reasonable use, this Court is at the present time open to decide the cases at bar in accordance with sound reason and general principles of law and justice.

A brief review of the leading English decisions will not be out of place. *Acton v. Blundell* (1843) 12 M. & W. 324, 13 L. J. Exch. 289, held that a landowner has no such right or interest in a subterranean water course as to enable him to maintain an action against a landowner who, in carrying on mining operations upon his own land in the usual manner, drains away the water from the land of the first-men-



tioned owner and lays his well dry. This decision might well have been based upon the doctrine of reasonable use; but it was rested upon the absolute ownership, on the part of the mine-owner, of all that lay beneath the surface of his land. . . .

In *Chasemore v. Richards* (1859) 7 H. L. Cas. 349, 29 L. J. Exch. 81, 5 Jur. N. s. 873, 1 Eng. Rul. Cas. 729, the facts were that the plaintiff was the occupier of an ancient mill on the River Wandle; that he and his predecessors for more than 60 years had used and enjoyed as of right the flow of the river; and that the river was supplied above the plaintiff's mill in part by the rainfall on a district many thousand acres in extent, comprising the town of Croydon and its vicinity; the water sinking into the ground to various depths and then flowing and percolating through the strata to the river, part rising to the surface, and part finding its way underground in courses which continually varied. The defendant represented the members of the local board of health of Croydon, who, for the purpose of supplying that town with water, sunk a well upon their own land in the town and about a quarter of a mile from the river, and pumped out large quantities of water for the supply of the town, thereby intercepting underground water that otherwise would have found its way into the river, and so to the plaintiff's mill. The question was whether the plaintiff could maintain an action for this diversion, abstraction, and interception of the underground water. The Court of Exchequer, upon the authority of *Broadbent v. Ramsbotham*, 11 Exch. 602, 25 L. J. Exch. 115, gave judgment for the defendant, which was affirmed by the Court of Exchequer Chamber, Justice Coleridge dissenting (2 Hurl. & Norm. 168); the House of Lords affirmed the judgment under review upon grounds that practically overrule the decision in *Dickinson v. Grand Junction Canal Co.* The decision in *Chasemore v. Richards* has been treated as finally settling the law for England, and has been followed or approved in numerous subsequent English cases.

A few of the earlier American decisions may also be noted. In *Greenleaf v. Francis* (1836) 18 Pick. (Mass.) 117, the Supreme Court of Massachusetts held that, in the absence of rights acquired by grant or adverse user, a landowner may dig a well on any part of his land, notwithstanding he thereby diminishes the water in his neighbor's well, unless in so doing he is actuated by a mere malicious intent to deprive his neighbor of water. Although this case is sometimes cited as authority for the rule afterwards established in England, the reasoning of the opinion is consistent with the doctrine of "reasonable user." The same is true of *Roath v. Driscoll* (1850) 20 Conn. 533, 52 Am. Dec. 352. *Wilson v. City of New Bedford* (1871) 108 Mass. 261, 11 Am. Rep. 352. Here the city had constructed a reservoir from which water percolated underground to the plaintiff's cellars about a thousand feet distant, and prevented the natural passage of water underground into the natural stream on which the dam of the reservoir was con-

structed. The Court sustained the plaintiff's right of action, citing *Chasemore v. Richards* without disapproval, but holding that the principle upon which it is decided did not prevent the plaintiff from having a recovery. *Chase v. Silverstone* (1873) 62 Me. 175, 16 Am. Rep. 419, held that a defendant who dug a well on his own land in good faith for the obtaining of water for his own domestic uses was not liable to damages that incidentally resulted to plaintiff by means of the diversion of water that had been accustomed to percolate or flow in an unknown subterranean current into the plaintiff's spring. The decision is fully justifiable under the doctrine of "reasonable user," and, indeed, is so justified in the opinion. But the Court goes further and cites with approval *Acton v. Blundell*, *Chasemore v. Richards*, and later English cases.

But it is not too much to say that the rule adopted in *Chasemore v. Richards*, and the reasoning upon which it was rested, have not withstood the test of time, experience, and ampler discussion, and it is entirely clear that the strong trend of more recent decisions in this country is in the direction of a repudiation of the English rule and the adoption of the doctrine that there are correlative rights in percolating underground waters; that no landowner has the absolute right to withdraw these from the soil to the detriment of other owners, and is limited to reasonable uses. . . .

A brief review of some of the recent decisions will suffice. The earlier cases in New York repeatedly approved the rule as laid down in *Acton v. Blundell* and *Chasemore v. Richards*. *Ellis v. Duncan* (1885) 21 Barb. 230, affirmed by Court of Appeals, see 29 N. Y. 466, 45 N. Y. 363, 6 Am. Rep. 100; *Goodale v. Tuttle* (1864) 29 N. Y. 459, 466; *Pixley v. Clark* (1866) 35 N. Y. 520, 527; 91 Am. Dec. 72; *Village of Delhi v. Youmans* (1871) 45 N. Y. 362, 6 Am. Rep. 100; *Phelps v. Nowlen* (1878) 72 N. Y. 39, 28 Am. Rep. 93; *Bloodgood v. Ayers* (1888) 108 N. Y. 400, 405, 15 N. E. 433, 2 Am. St. Rep. 443; *Van Wycklen v. City of Brooklyn* (1890) 118 N. Y. 424, 24 N. E. 179. But most, if not all, of these decisions would be equally justified under the doctrine of "reasonable user"; and in *Smith v. City of Brooklyn* (1899) 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664, the Court of Appeal sustained an action against the city for the diversion and diminution of natural stream upon the plaintiff's land, although it appeared that this was caused by the arrest and collection of underground waters which fed the stream by percolation through the earth, and in *Forbell v. City of New York*, (1900) 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 696, 79 Am. St. Rep. 666, the same Court held that a municipal corporation which, by the operation of a water system consisting of wells and pumps on its own land, taps the subsurface water stored in the land of an adjoining owner and in the contiguous territory, leads it to its own land, and by merchandising it prevents its return, whereby the value of the land of such owner is impaired for agricultural purposes,

is liable to him for the damages occasioned thereby. The Court in this case clearly rested its judgment upon the doctrine of "reasonable user." See, also, *Reisert v. City of New York* (1903) 174 N. Y. 196, 66 N. E. 731. . . . *Katz v. Walkinshaw*, (1902) 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 36, 64, held that the owner of a portion of a tract of land which is saturated below the surface with an abundant supply of percolating water cannot remove water from wells thereon for sale, if the remainder of the tract is thereby deprived of water necessary for its profitable enjoyment. *Cohen v. La Canada Land Co* (1907) 151 Cal. 680, 91 Pac. 584, 11 L. R. A. n. s. 752, held (distinguishing *Katz v. Walkinshaw* and other California cases) that percolating waters may be taken for use of land other than that where found, if this can be done without injury to adjoining owners. *Barclay v. Abraham* (1903) 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365, held that, while a landowner has a right to make such beneficial use of water from underground reservoirs in the improvement of his estate as he may choose, there is no right to draw water from such underground reservoir merely for the purpose of wasting it, to the injury of other landowners having equal rights to use and means of access to it, or of maliciously depriving them of its beneficial use. *Pence v. Carney* (1905) 58 W. Va. 296, 52 S. E. 702, 6 L. R. A. n. s. 266, 112 Am. St. Rep. 963, held that the owner of land who explores for and produces subterranean percolating water within the boundary of his land is limited to a reasonable and beneficial use of such water, when to otherwise use it would deplete the water supply of a valuable natural spring of another on adjoining or neighboring land, and thereby materially injure or destroy such spring. *Erickson v. Crookston Waterworks Co.* (1907) 100 Minn. 481, 111 N. W. 391, 8 L. R. A. n. s. 1250, 10 Am. & Eng. Ann. Cas. 843, held that the law of correlative rights applies to the use by adjoining landowners of waters drawn from an artesian basin, and that such proprietors must so use their wells as not to unreasonably injure their neighbors. *Erickson v. Crookston Waterworks Co* (1908) 105 Minn. 182, 117 N. W. 435, 17 L. R. A. n. s. 650, was a second appeal after a second trial of the case above, reported under the same title. On the present occasion the Court reiterated the doctrine of "reasonable user."

A review of the reasoning upon which the English doctrine respecting percolating underground waters rests will demonstrate, as we think, that this reasoning is unsatisfactory in itself, and inconsistent with legal principles otherwise well established. Thus, in *Acton v. Blundell*, 12 M. & W. Exch. 349, Tindal, C. J., in undertaking to show the inapplicability to percolating waters of the law that governs running streams, declared that the ground and origin of the law respecting the latter would seem to be that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been public and notorious, that the enjoyment has been long-continued, and

uninterrupted, and therefore based upon the implied assent and agreement of the proprietors of the different lands from all ages, while underground waters, being concealed from view, there can be no implied mutual consent or agreement between the owners of the several lands respecting them. But, as has been since repeatedly pointed out, the right of the riparian owner to the flow of a natural stream arises *ex jure naturæ*, and not at all from prescription or presumed grant or acquiescence arising from long-continued user. See remarks of Parke, B., in *Broadbent v. Ramsbotham*, as reported in 25 L. J. Exch., at page 121; and remarks of Lord Wensleydale in *Chasemore v. Richards*, 7 H. L. Cas., at pages 382, 383, 29 L. J. Exch. 87, 1 Eng. Rul. Cas. 752, 753, and cases cited.

Again, in *Acton v. Blundell*, 12 M. & W. 351, the Chief Justice said:

"If a man who sinks a well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the soil."

Obviously he failed to note that there is a middle ground between the existence of an absolute and indefeasible right and the absence of any right that the law will recognize and protect. There is room for the existence of qualified and correlative rights in both landowners. The English rule seems to be rested at bottom upon the maxim, "*Cujus est solum, ejus est usque ad cælum et ad inferos.*" Thus, in *Acton v. Blundell*, 12 M. & W. 354, Tindal, C. J., said that the case fell within

"that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure."

Here the impracticability of applying the rule of absolute ownership to the fluid, water, which by reason of its nature is incapable of being subjected to such ownership, is apparently overlooked. If the owner of Whiteacre is the absolute proprietor of all the percolating water found beneath the soil, the owner of the neighboring Blackacre must, by the same rule, have the like proprietorship in his own percolating water. How, then, can it be consistent with the declared principle to allow the owner of Whiteacre to withdraw, by pumping or otherwise, not only all the percolating water that is normally subjacent to his own soil, but also, and at the same time, the whole or a part of that which is normally subjacent to Blackacre? Where percolating water exists in a state of nature generally throughout a tract of land, whose parcels are held in several ownership by different proprietors, it is, in the nature of things, impossible to accord to each of these proprietors the absolute right to withdraw *ad libitum* all percolating water which may be reached by a well or pump upon any one of the several lots, for such withdrawal

by one owner necessarily interferes to some extent with the enjoyment of the like privilege and opportunity by the other owners.

Again, the denial of the applicability to underground waters of the general principles of law that obtain with respect to waters upon the surface of the earth is in part placed upon the mere difficulty of proving the facts respecting water that is concealed from view. But experience has demonstrated in a multitude of cases that this difficulty is often readily solved. When it is solved in a given case, by the production of satisfactory proof, this reason for the rule at once vanishes. It is sometimes said that, unless the English rule be adopted, landowners will be hampered in the development of their property because of the uncertainty that would thus be thrown about their rights. It seems to us that this reasoning is wholly faulty. If the English rule is to obtain, a man may discover upon his own land springs of great value for medicinal purposes or for use in special forms of manufacture, and may invest large sums of money upon their development; yet he is subject at any time to have the normal supply of such springs wholly cut off by a neighboring landowner, who may with impunity sink deeper wells and employ more powerful machinery, and thus wholly drain the sub-surface water from the land of the first discoverer.

In the case before us, the City of East Orange might have its underground water supply cut off or materially impaired by the establishment of deeper wells and more powerful pumps upon some neighboring tract, even upon the tract owned by the plaintiff. In short, under that rule, might literally makes right, and we are remitted to:

“The simple plan,  
That they should take who have the power,  
And they should keep who can.”

For a further elaboration of the grounds upon which the English rule is open to criticism, and upon which the doctrine of “reasonable user” of subterranean percolating waters is supported, reference may be made to the dissenting opinion of Mr. Justice Coleridge, in *Chasemore v. Richards*, 2 H. & N. 188-195; to the judgment of Lord Wensleydale in the House of Lords in the same case (7 H. L. Cas. 384-389, 29 L. J. Exch. 87, 88, 1 Eng. Rul. Cas. 754-777); and to the opinions in the recent American cases above cited.

Upon the whole, we are convinced, not only that the authority of the English cases is greatly weakened by the trend of modern decisions in this country, but that the reasoning upon which the doctrine of “reasonable user” rests is better supported upon general principles of law and more in consonance with natural justice and equity. We therefore adopt the latter doctrine. This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining or the like, although

the underground water of neighboring proprietors may thus be interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it thereby result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pastorage, or other legitimate uses.

It results that the judgments of the District Court and of the Supreme Court must be reversed.

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250. OHIO OIL COMPANY *v.* INDIANA OIL COMPANY

SUPREME COURT OF THE UNITED STATES. 1900

177 U. S. 190, 20 Sup. 576

ARGUED December 18, 19, 1899. Decided April 9, 1900.

In error to the Supreme Court of the State of Indiana to review a decision affirming a judgment sustaining a statute prohibiting the waste of natural gas and oil. *Affirmed.*

See same case below, 150 Ind. 698, 50 N. E. 1125.

Statement by Mr. Justice WHITE.

The title, preamble, and first section of a law enacted in 1893 by the State of Indiana (Acts 1893, p. 300) are as follows:

"An Act Concerning the Sinking, Safety, Maintenance, Use, and Operation of Natural Gas and Oil Wells, Prescribing Penalties and Declaring an Emergency. Whereas, great danger to life and injury to persons and property is liable to result from the improper, unsafe and negligent sinking, maintenance, use and operation of natural gas and oil wells; therefore,

"Sec. 1. Be it enacted by the general assembly of the State of Indiana, That it shall be unlawful for any person, firm, or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes or other safe receptacle, for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes, or other safe and proper receptacles."

The issue which this record presents, on the subject of the law just referred to, is this: Did the enforcement of the first section of the statute produce as to the persons whose obedience to its commands were coerced by injunction, a taking of private property without adequate compensation; that is, did the execution of the statute amount to a denial of due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States?



The controversy was thus initiated: The State of Indiana, through its attorney general, filed a complaint in the Circuit Court of the county of Madison in the State of Indiana, against the Ohio Oil Company, a corporation organized under the laws of the State of Ohio, but authorized to carry on its business in the State of Indiana, as it had complied with the regulations enacted by that State as to foreign corporations doing business therein. The cause of complaint was thus stated:

"Plaintiff says that for many years heretofore there has existed, underlying the counties of Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells, and other counties of the State of Indiana, a large subterranean deposit of natural gas, occupying a reservoir of large extent, with well-defined boundaries, and utilized for fuel and light by the people of those counties and many other counties and cities of Indiana, including Indianapolis, Fort Wayne, Richmond, Logansport, Anderson, Muncie, Marion, Kokomo, and others of the most populous cities of said State, to which cities said gas is conducted, after being brought to the surface of the earth, through pipes and conduits, by means of which many hundreds of thousands of the people of the State of Indiana are now, and have been for more than ten years last past, continuously supplied with gas for light and fuel; that said natural gas underlying the counties aforesaid and other portions of the State is contained in and percolates freely through a stratum of rock known as Trenton rock, comprising a vast reservoir in which the gas is confined under great pressure, and from which it escapes, when it is permitted to do so, with great force.

"The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural-gas deposit to the State and to its citizens is many millions of dollars. . . .

"That the State of Indiana, relying upon the permanent supply of natural gas, has at great expense equipped many of its public institutions, including the State house, the Central and other hospitals for the insane, the asylums for the blind and deaf and dumb, the institution for the care of orphans of American soldiers, and other public institutions owned and maintained by the State of Indiana and its various municipal subdivisions, together with the courthouses in many counties, and a vast number of public schools, for the use of natural gas as a fuel, by which the cost of maintaining the public buildings and institutions above named has been materially lessened and the comfort and happiness of their inmates and occupants immensely increased.

"That the supply of natural gas underlying the territory aforesaid is so placed in such Trenton rock that the diminution or consumption of said gas taken from said reservoir affects and reduces correspondingly the common supply. . . .

"That underlying a portion of said natural-gas territory and at the same levels, occupying the interstices — said Trenton rock in common with said gas, are large quantities of petroleum oil; and that, because of the volatile character of said gas and the pressure under which it is confined in said Trenton rock when said reservoir is tapped by wells drilled into the same from the surface of the earth, said gas and oil will and do escape into the open air in great volumes, unless securely confined in tanks or other proper receptacles.

"That on or about the 25th day of May, 1897, said defendant, the Ohio Oil Company, drilled near the city of Alexandria, in said Madison county, a number of wells into said gas and oil bearing rock, producing natural gas and petroleum as aforesaid in large quantities, which wells are known by the name of

the land owner upon whose land they are situated, which name and the description of said wells are as follows, to wit."

The complaint then enumerated five gas and oil wells which had been opened and were being operated by the defendant for extracting oil, and averred as follows:

"That instead of securely anchoring said wells and each of them when so drilled, so as to confine within the same or within tanks or pipes or other safe receptacles the natural gas produced therefrom within two days after said wells were respectively completed and gas and oil were struck therein, the said defendants, ever since the completion of said wells, all of which have been completed for periods varying from four to nine months, have unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas have been greatly diminished, and the property of its citizens in and near said gas territory dependent upon the continued supply of said natural gas for fuel, as aforesaid, has been greatly damaged and decreased in value.

That the defendants and each of them avow their purpose to permit said gas to escape continuously and indefinitely hereafter from such wells, and refuse to make any effort to confine the same, but declare their purpose to drill other wells in said gas territory and permit the gas therefrom to flow and escape into the open air, and that if said gas continues to flow from said wells the supply of natural gas upon which the citizens of said State depend, as aforesaid, will be greatly diminished; that the pressure of said gas, as found in said Trenton rock, will be greatly diminished, and that by the diminution of said pressure water will accumulate in said rock stratum and ultimately entirely displace and overcome said gas supply.

"Plaintiff therefore says that, because of the wrongful acts of defendants above described, heretofore committed and now continuing its property and that of its citizens has been and will continue to be essentially interfered with, and the comfortable enjoyment of the lives of its citizens greatly interrupted."

Averring the irreparable injury to result from allowing the wells to continue to flow, as stated. . . . The prayer was as follows:

. . . "And the plaintiff further prays that upon the final hearing of this cause said defendant company, its officers, servants, agents, and employees, be perpetually enjoined and prohibited from further suffering said gas to escape, and that they be forever thereafter commanded to confine said gas safely and securely in pipes, tanks, or other proper receptacles, and for all proper relief."

The temporary injunction issued as prayed for. The defendant appeared and demurred to the complaint as not stating a cause of action. This was overruled. The defendant then answered as follows:

"The defendant, further answering, says that before and at the commencement of this action it had in good faith been and then was engaged in the business of producing oil by drilling therefor in the earth and rock below in said county of Madison, and that in the carrying on of said business it has expended many thousands of dollars in the leasing of territory, the purchase of machinery and equipment thereof, and for the drilling of a number of wells and for pipes and pipe lines, all of which it then owned and still owns.

"The defendant admits that it drilled the well complained of herein, but

says that said well was so drilled in good faith solely for the purpose of raising and producing oil, the defendant not being engaged in the business of producing or transporting natural gas in said county and having there no plant for that purpose, and such gas in such case being of no value to defendant, and there being reasonable grounds to believe that oil existed in said territory in sufficiently paying quantities to be utilized.

"That said well complained of was not drilled in or near any village, town, or city, but, on the contrary, was drilled in the country and remote from any dwelling, and the same, as so constructed and operated, is not dangerous to life or property. . . .

"And the defendant further says that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as may be in such well is suffered to escape, and the defendant charges the fact to be, therefore, that if such gas shall be shut into such well in such case that it will be impossible to raise or produce oil in any such well, and thereby defendant's said business, together with its said plant, property, and profits, will be entirely destroyed and the people of said county and State will be deprived of the use and profits of such oil, which is vastly of more value than natural gas in said well; and the defendant says it so operated said well with the highest skill, and with the most improved machinery and appliances known to the world, and with employees of the highest skill, and that no more gas was suffered to escape from such well than was consistent with the due operation of said well with the highest skill." . . .

Referring to the law of Indiana, the context of which has already been stated, the answer contained this averment:

"This defendant further alleges that said Act of the general assembly of the State of Indiana, as above set out, violates the Fourteenth Amendment of the Constitution of the United States in this, that it deprives the defendant and others of liberty and property without due process of law, and denies to defendant and others the equal protection of the laws."

The State demurred to the answer as not alleging facts sufficient to constitute a defence. This demurrer was sustained. The defendant refusing to answer further, a decree granting a permanent injunction was entered. An appeal having been prosecuted to the Supreme Court of the State of Indiana, in that Court the decree of the trial Court was in all respects affirmed. 150 Ind. 698, 50 N. E. 1125. This writ of error was thereupon allowed.

Messrs. *M. F. Elliott* and *George Shirts* for plaintiff in error.

Messrs. *C. C. Shirley*, *W. L. Taylor*, and *Merrill Moores* for defendant in error.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court:

The assignments of error all in substance are resolvable into one proposition, which is, that the enforcement of the provisions of the Indiana statute as against the plaintiff in error constituted a taking of private property without adequate compensation, and therefore

amounted to a denial of due process of law in violation of the Fourteenth Amendment.

When this proposition is analyzed by the light of the facts which are admitted on the record, it becomes apparent that the foundation upon which it must rest involves two contentions which are in conflict one with the other; in other words, the argument by which alone it is possible to sustain the claim becomes, when truly comprehended, self-destructive. Thus, it is apparent, from the admitted facts, that the oil and gas are commingled and contained in a natural reservoir which lies beneath an extensive area of country, and that as thus situated the gas and oil are capable of flowing from place to place, and are hence susceptible of being drawn off by wells from any point, provided they penetrate into the reservoir. It is also undoubted that such wells, when bored from many points in the superincumbent surface of the earth, are apt to reach the reservoir beneath. From this it must necessarily come to pass that the entire volume of gas and oil is in some measure liable to be decreased by the act of any one who, within the superficial area, bores wells from the surface and strikes the reservoir containing the oil and gas. And hence, of course, it is certain, if there can be no authority exerted by law to prevent the waste of the entire supply of gas and oil, or either, that the power which exists in every one who has the right to bore from the surface and tap the reservoir involves in its ultimate conception, the unrestrained license to waste the entire contents of the reservoir by allowing the gas to be drawn off and to be dispersed in the atmospheric air, and by permitting the oil to flow without use or benefit to any one. These things being lawful, as they must be if the acts stated cannot be controlled by law, it follows that no particular individual having a right to make borings can complain, and thus the entire product of oil and gas can be destroyed by any one of the surface owners. The proposition, then, which denies the power in the State to regulate by law the manner in which the gas and oil may be appropriated, and thus prevent their destruction, of necessity involves the assertion that there can be no right of ownership in and to the oil and gas before the same have been actually appropriated by being brought into the possession of some particular person. But it cannot be that property as to a specified thing vests in one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right of property. The whole contention, therefore, comes to this: That property has been taken without due process of law, in violation of the Fourteenth Amendment, because of the fact that the thing taken was not property, and could not, therefore, be brought within the guarantees ordained for the protection of property.

The confusion of thought which permeates the entire argument is two fold: First, an entire misconception of the nature of the right of the surface owner to the gas and oil as they are contained in their natural

reservoir, and this gives rise to a misconception as to the scope of the legislative authority to regulate the appropriation and use thereof. Second, a confounding, by treating as identical, things which are essentially separate; that is, the right of the owner of land to bore into the bosom of the earth, and thereby seek to reduce the gas and oil to possession, and his ownership after the result of the borings has reached fruition to the extent of oil and gas by himself actually extracted and appropriated. In other words, the fallacy arises from considering that the means which the owner of land has a right to use to obtain a result is in legal effect the same as the result which may be reached. We will develop the misunderstanding which is involved in the matters just stated.

No time need be spent in restating the general common-law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them. And we need not, therefore, pause to consider the scope of the legislative authority to regulate the exercise of mining rights and to direct the methods of their enjoyment so as to prevent the infringement by one miner of the rights of others. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 171 U. S. 60, 43 L. ed. 74, 18 Sup. Ct. Rep. 895.

The question here arising does not require a consideration of the matters just referred to, but it is this. Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed situs under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit. In *Brown v. Spilman*, 155 U. S. 665, 669, 670, 39 L. ed. 304, 305, 15 Sup. Ct. Rep. 245, 247, these distinctive features of deposits of gas and oil were remarked upon. The Court said:

"Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal, and other minerals which have a fixed situs,

cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes in to his well, it becomes his property. *Brown v. Vandergrift*, 80 Pa. 142, 147; *Westmoreland & C. Natural Gas Co.'s Appeal*, 25 W. N. C. 103."

In *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724, the Supreme Court of Pennsylvania considered the character of ownership in natural gas and oil as these substances existed beneath the surface of the earth. The Court said:

"The learned master says gas is a mineral, and while in situ is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing or even to percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain,' as said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. 147, 148, . . . They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas."

A brief examination of the Indiana decisions on the subject of oil and natural gas, and the right to acquire ownership thereto will make it apparent that from the peculiar nature of these substances Courts of that State have announced the same rule as that recognized by this Court in *Brown v. Spilman*, 155 U. S. 665, 669, 670, 39 L. ed. 304, 305, 15 Sup. Ct. Rep. 245, and which has been applied by the Supreme Court of the State of Pennsylvania. . . .

Without pausing to weigh the reasoning of the opinions of the Indiana Court in order to ascertain whether they in every respect harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the State of Indiana to be as follows: Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and con-



trol by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits, without violating the rights of the other surface owners.

If the analogy between animals *feræ naturæ* and mineral deposits of oil and gas, stated by the Pennsylvania Court and adopted by the Indiana Court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end to the case. This follows because things which are *feræ naturæ* belong to the "negative community"; in other words, are public things subject to the absolute control of the State, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid, their future taking. *Geer v. Connecticut*, 161 U. S. 519, 525, 40 L. ed. 793, 795, 16 Sup. Ct. Rep. 600. But whilst there is an analogy between animals *feræ naturæ* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *feræ naturæ* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *feræ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the law-maker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. *Geer v. Connecticut*, 161 U. S. 519, 525, 40 L. ed. 793, 795, 16 Sup. Ct. Rep. 600. On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take

from a common source of supply the two substances which in the nature of things are united, though separate.

It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *feræ naturæ*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed.

Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. Indeed, the entire argument upon which the attack on the statute must depend involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them in and to the substances contained in the common reservoir of supply, then, as a necessary result of the right of property, its indivisible quality, and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction. . . .

These considerations are sufficient to dispose of the case. . . . We cannot say that the statute amounts to a taking of private property, when it is but a regulation by the State of Indiana of a subject which especially comes within its lawful authority. *Affirmed.*

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251. CUMBERLAND TELEGRAPH & TELEPHONE  
COMPANY v. UNITED ELECTRIC RAILWAY COMPANY

SUPREME COURT OF TENNESSEE. 1894

93 *Tenn.* 492, 29 *S. W.* 104

APPEAL from Circuit Court, Davidson county; W. K. McALISTER, Judge.

Suit by the Cumberland Telegraph & Telephone Company against the United Electric Railway Company. From a judgment for defendant, plaintiff appeals. Reversed in part.

*Vertrees & Vertrees*, for appellant. *East & Fogg* and *J. C. Bradford*, for appellee.

PICKLE, Special Judge. This is a suit by a telephone company against an electric street-railway company to recover damages inflicted upon the telephone plant by the contiguous railway plant. The plaintiff has appealed from an adverse judgment, and assigned errors. The facts are practically undisputed, and, so far as they are material or pertinent to the questions to be determined, are as follows:

The plaintiff, a Kentucky corporation, had, prior to 1889, established in the city of Nashville a telephone plant upon the "single-wire" plan or system. The earth, under this system, is used as the return conductor to complete the electrical circuit, and the overhead single wire must have earth connections at both ends, at the exchange, and at the subscribers'. These earth connections of plaintiff's wires were effected upon private property at both ends, upon the company's property at the exchange, and upon the subscriber's property, by his consent at the other end. The poles upon which plaintiff's wires were stretched were planted in the public streets by permission of the city council, and by authority of a general statute of this State, which empowers telephone and other like companies, both foreign and domestic, to construct, operate, and maintain, upon consideration of certain benefits conceded to the State and general government, their lines along and over the public highways and streets of the cities and towns of this State, provided that the ordinary use of such public highways, streets, etc., be not thereby obstructed. Acts 1885, c. 66. In telegraphy, of which telephony is but another form, it has been universal practice for half a century to use the earth as the return circuit. The plaintiff plant was constructed in accordance with an approved system, and the one chiefly used in all the large cities of the United States. The electric currents required and used in the operation of plaintiff's plant cause no hurtful disturbance anywhere of natural electric conditions.

The plaintiff's plant, thus constructed, was in perfect condition and successful operation, rendering satisfactory service to its patrons, when, in 1889, the defendant, a domestic corporation, having obtained control of the street railways of Nashville, which had, with one unimportant

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*I. THE DAMAGE ELEMENT*

... has been operated by horse power, constructed and put into operation thereon a single-trolley overhead electric railway system. The defendant's action in this particular was authorized by general public statute of the State, which provided that street-railway companies that had hitherto used animal power for the operation of their cars might, with the consent of the city authorities, adopt electricity as a motive power. Acts 1887, c. 65; Acts 1889, c. 40. The required consent of the city authorities was obtained by defendant. While there are two systems of electric railways, the single-trolley system and the double-trolley system, the former is the more approved and satisfactory, and the one in general use. It is better adapted than the double-trolley system to single-track railways like defendant's. It is likewise cheaper. The defendant's plant was properly constructed and equipped according to the single-trolley system. The earth is used as a return circuit in the operation of street railways constructed upon the single-trolley plan, but not for those operated upon the double-trolley plan. The defendant, in the operation of its plant, generates or collects electricity in such unusual quantities, and applies and uses it in such violent, turbulent, and varying currents, as to produce a nonnatural and disturbed condition electrically, not only within the streets, but for the distance of half a mile on either side. The plaintiff's entire plant was for a time paralyzed, and its utility destroyed, by the construction and operation of defendant's plant or system. The injuries, so fatal to plaintiff's franchise and plant, resulted by several methods that it is important to describe.

First. Injury resulting from what is known as "conduction" or "leakage." Currents of electricity of great strength and force are generated and applied by defendant in the propulsion of its cars. These abnormal currents of the electrical fluid are poured out or permitted to escape into the streets. They overflow the streets and invade private property for half a mile on either side, and, finding the earth connections of the telephone wires at the exchange, and at the subscribers', pass up into those wires and the telephone instruments, and by reason of their great force and volume substantially destroy the utility of the telephone plant. This interference can be obviated in only one way, viz. by a metallic return circuit for one of the plants. The only metallic return circuit for a railway yet discovered is that known as the "double-trolley" system. The double-trolley system is more expensive than the single-trolley system, and inferior in other respects for the operation of single-track railways. A recent invention, known as the "McLeuer Device," has been proved by experience to be an effective remedy for the disturbances caused by conduction. This McLeuer device consists of a large copper wire, supported on poles, with which the outgoing telephone wires are connected at both ends, and which serves as a return circuit instead of the earth. The McLeuer device is the most effective and least expensive remedy that has been discovered for the disturb-

ances caused by conduction. The plaintiff was compelled, in order to reclaim its plant, to put in this McLeuer device at a cost of \$3, 660.58.

Second. Injury resulting from what is called "induction" or parallelism." The wires of the telephone company and of the railway company are parallel upon some of the streets. It is a physical fact of much importance in electric mechanism that when two wires of two circuits are parallel to each other, and there is a current of varying intensity on one of them, this will produce in the other, in the opposite direction, a current of electricity of similar variation. The amount of induction depends upon variation in current, the distance of the wires from each other, and the length of the parallelism of the wires. The current upon the trolley wire and the feed wire of the railway is quite variable in quantity and intensity, owing to the drain upon the store of the electricity by the moving and stopping of the car. Nor is the electricity, as generated, exactly uniform in its flow from the dynamo. The result is, wherever the telephone wire is parallel with the trolley wire and feed wire, there is induced upon the telephone wire a current whose variation corresponds with the variations of the electrical current on the electric railway wires, thereby producing such disturbances as render the use of the telephone plant impracticable. But one practicable remedy has been discovered for the disturbances caused by induction; that is, to destroy the parallelism of the wires of the two circuits. This remedy is practicable for the telephone company alone. The expense incurred by plaintiff on this account was \$856.30.

Third. The plaintiff expended \$816 in putting up higher poles on Main street, in consequence of conflict produced by the erection of defendant's poles and wires. The plaintiff's poles occupied one side of Main street, and defendant's poles were put up on both sides of said street, and conflicted with plaintiff's poles and wires, so as to render it necessary for plaintiff to put in new and higher poles. The majority of the Court think the defendant could have reasonably avoided this conflict by supporting its wires upon a single line of poles with arms, erected through the middle of the street, or upon the opposite side from the telephone poles and wires. Judge SNODGRASS and the writer of this opinion do not concur in this finding of fact.

The contention of the parties will be stated and disposed of in order, and so much of the Court's charge as may be deemed material will be stated in the proper connections. The fact that plaintiff sustained loss in consequence of the construction and operation of defendant's plant is admitted by defendant. The amount of that loss is accurately ascertained, and is not a matter of controversy. The sole question for determination is defendant's liability for that loss. The loss by conduction is distinct from that resulting from induction and from conflict of the poles and wires of the two systems. The two items last named — loss by induction and by conflict of poles and wires — may be conveniently considered together as involving the same or similar

questions. But loss by conduction will be considered apart from other matters.

1. Is defendant liable for loss that plaintiff sustained from induction and from conflict of the poles and wires of the two systems? This loss, unlike that caused by conduction, occurs upon and within the streets, and is a direct and immediate result of plaintiff's occupation and use of the streets simultaneously with defendant, and would be obviated or remedied by the withdrawal of either party from the streets. It is important to ascertain the exact status and relative rights of these companies as regards their use and occupation of the public streets. . . . We hold the electric street railway a legitimate use of the streets within the original general purpose of dedication, and therefore an ordinary use. . . . Judges WILKES and BRIGHT do not concur in the conclusion that electric street railways are an ordinary use of the streets.

By whose negligence or fault has plaintiff sustained the loss under consideration? Clearly, upon the facts as found by the majority, the loss caused by conflict of poles and wires is imputable to defendant's fault or want of care. Having power to have avoided this conflict without injury to its plant, it was defendant's duty to do so. The conflict was the result of defendant's unnecessary act.

On the other hand, the loss by induction cannot be imputed to any fault or negligence of defendant. Its plant was, as regards this matter, properly constructed and operated. Defendant could not obviate induction without abandoning the streets where it occurred. Induction is such obstruction of the streets as plaintiff is forbidden to create. . . . A child upon defendant's track, in front of its moving car, is not, in a strict sense, an obstruction; but who will say that the fact does not seriously interfere with defendant's free and unembarrassed use of the street? . . . The plaintiff cannot recover for the loss sustained from induction. It results from its unlawful obstruction of defendant's use of the streets. The consideration of other questions is irrelevant in this connection.

2. Is defendant liable for loss sustained by plaintiff from the effects of conduction? The loss by conduction, unlike that caused by induction, does not result from plaintiff's obstruction of defendant's use of the streets for an ordinary purpose. This interference would occur, and cause precisely the same loss to plaintiff, and in precisely the same manner, if plaintiff had no poles or wires upon the streets. . . . This brings us to the consideration of a novel and very important question. It is insisted by defendant that plaintiff cannot recover the damages caused by conduction except upon the theory that it has the right to the exclusive use of the whole earth for electric purposes. A monopoly of the earth's use for any purpose, or by any person, is, of course, inadmissible. The plaintiff, however, repudiates this ambitious and extravagant claim, and insists that its demand is the more modest and reasonable one for the exclusive use of electricity upon its own premises,



in an authorized and harmless manner, without injurious disturbance from nonnatural electric conditions, caused by the defendant's acts. . . . In the operation of defendant's plant large and turbulent artificial currents of the electrical fluid were generated and poured into the streets beyond defendant's control. These currents, following a natural law, left the streets and overflowed private property for half a mile on either side. It was upon the private property of plaintiff and its subscribers, and not elsewhere, that these abnormal electric currents found and ascended plaintiff's ground wires, and throttled its plant. The injury by conduction can be obviated at an expense which entails no great hardship upon either party. We think, upon these facts, that plaintiff has the right to the protection of the Courts in the enjoyment of its property. Franchises, easements, and the ability to use property, though intangible, have value, and are, equally with tangible property, entitled to the recognition and protection of the Courts. If the plaintiff's claim, that contemplates no more than a lawful and harmless use of its own property, shall be characterized as a demand for the monopoly of the whole earth, what shall be said of defendant's larger demand for a hurtful use, not only of the streets, but of private property for half a mile on either side? The plaintiff's request is: "Let me alone in that use or application of electricity upon my own premises that causes no harm or disturbance to any one anywhere." The defendant's command is, "Get out of my way!" to all feeblers electrical enterprises that may have the misfortune to come within the range of its power. The plaintiff proposes an adjustment of conflicting claims with defendant by the rule embodied in the enlightened maxim, "sic utere," etc., while defendant insists upon the application of that ruder maxim, "might makes right." . . . To concede defendant's claim is to give to it an injurious use of plaintiff's property, and at the same time to deny plaintiff the harmless use of its own. The argument that assumes that plaintiff is claiming the whole earth as a return circuit, and therefore appropriating a common right to its exclusive use, because "plaintiff's portion of the earth cannot be isolated and separated electrically from the balance of the earth," is one which, if pressed to its logical results, would work a revolution in the law as to the use of the earth, the water, and the air. How, if this argument be sound, can any one insist that the air and water, that by the operation of natural law visit his premises and support life, shall not be rendered noisome and impure by the injurious acts of his neighbor? It is impossible that this portion of the air and water can, in advance be "isolated and separated from the balance." Is not the right to the use of air and water as "common" as that to use electricity? If the right to the harmless use upon one's own premises without injurious disturbance from others of air or water or electricity is made to depend upon his ability to isolate and separate in advance his portion of these elements from the "balance," that right resolves itself into an "airy nothing." . . . The doctrine that reason

sanctions and justice approves, as it appears to us, is that the lawful, harmless, and accustomed use upon one's land alike of water, air, or electricity, cannot be lawfully obstructed or impaired by the injurious act of another, attended with such disturbance of natural and existing conditions and consequent loss as that caused by conduction in this case, especially when the party performing the injurious act had the power to obviate and remedy the injury or loss without greater sacrifice, comparatively, than is required of defendant in this case to remedy conduction. It is not material that the injurious act is done upon the premises of one other than the injured party, as if the channel of a stream is cut upon adjoining lands, and the water diverted, or the waters on them arrested in their regular flow, and then turned loose in flooding quantities.

To sustain plaintiff's claim accords with the analogies of the law, as will appear from the following cases: A manufacturer of cocoa matting used a delicate chemical to bleach his matting, which was then hung out on his own land, in the air, to dry. Another manufacturer made sulphate of ammonia, and the vapors escaping in the air combined with the bleacher's chemicals, and blacked his mats. It was shown that if the cocoa-mat maker had used another chemical, just as good or better, his mats would not have been affected. But it was held that he had the right to use any chemical he pleased, which would not hurt anybody else, and that he had the right to have the air come to his lands pure and untainted. *Cooke v. Forbes*, L. R. 5 Eq. 166. A manufacturer discharged the refuse from his works into a surface stream. It corroded the boilers of another factory below, which used water from the stream for steam purposes. The upper manufacturer was enjoined. *Merrifield v. Lombard*, 13 Allen, 16. A manufactory of copper in one case, and of lead in another, gave off vapors which were carried by the winds upon the lands of another, and injured growing crops, fruit trees, and flowers. They had to close down. *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Appeal of Pennsylvania Lead Co.*, 96 Pa. St. 116. A brewer bored a deep well, and got water for use in making his ale. There was no running stream below. His neighbor had a similar well, but used it as a sink. The sewerage percolated the brewer's lands, and polluted the water so it could not be used in making ale. The brewer was protected in the use of his well. *Ballard v. Tomlinson*, 29 Ch. Div. 115. The Standard Oil Company stored oil in its warehouse. The oil barrels leaked. This leakage soaking into the earth, percolated Mr. Kinnaird's land, and ruined his spring. It was held the company had no right to thus use its property. *Kinnaird v. Oil Co.*, 89 Ky. 468, 12 S. W. 937. A silk maker required water of great softness and purity to wash and dye his silks. He got it out of the Charnot. A public water company built a reservoir above, and so collected the water that when it was discharged the purity of the water was affected. The company had to quit. *Clowes v. Waterworks Co.*, 8

Ch. App. 126; Gould, Waters, § 219; Water Co. v. Watson, 29 N. J. Eq. 372.

Although the precise question determined in this case has not hitherto been necessarily involved in the decision of any case, it has, nevertheless, been considered by some of the Courts. Hudson River Tel. Co. v. Watervliet Turnpike & R. Co., 32 N. E. 148 (decided in 1892). . . . National Telephone Co. v. Baker [1893] 2 Ch. 201. The same doctrine is maintained by Judge Taft, then judge of the Superior Court of Cincinnati, and now a justice of the Federal Circuit Court of Appeals, in the case of City & Suburban Tel. Ass'n v. Cincinnati Inclined Plane Ry. Co.

The injury by conduction constitutes such invasion or taking of plaintiff's property as renders defendant liable for the damage done. It is a direct and immediate result of defendant's injurious act. It imposes a burden upon plaintiff's property that impairs its use and value. The loss is fixed and definite in amount. It can make no difference that no material thing was taken, or that the loss resulted, not from contact of material things, but through the agency of the subtle and impalpable electric fluid. The important consideration is that a thing of value has been taken from plaintiff for the benefit of defendant as the representative of the public, and for that thing compensation must be made. . . .

As the result upon the whole case, the judgment below is affirmed as to the loss by induction, and reversed in all other respects. And upon the written stipulation of the parties that final judgment shall be entered here there will be entered in this Court judgment in favor of plaintiff and against defendant for \$3,660.58 for loss by conduction, and \$816 for loss by conflict of poles and wires, with interest from date when expended, and all costs of this cause.

Judge CALDWELL concurs in the result of this opinion on the question of conflict of poles and wires and on the question of induction, but does not agree on the question of conduction. . . .

SNODGRASS, J. (dissenting). I cannot agree with the majority of the court as to liability of defendant for injury by conflict of poles on the streets. . . .

On the main point in controversy — the right of damages for injuries inflicted by conduction — I also disagree with the majority. The majority opinion is founded and can be founded alone on the idea that the complainant has the natural right to the use of the earth as a return circuit, for the complainant does not profess to own the intervening earth between points where its wires on the premises of its several subscribers are buried and its plant. It is only in consequence of this use of the earth, and its natural right to use it, that the telephone company's intersecting locations at various places are of value. Disconnect these from the right to use the adjacent earth owned by others than itself intervening between these points and its exchange, and it has no valuable prop-

erty in its buried wires on the premises of subscribers. So that, in order to deny the defendant the right to use the earth for a return circuit, this very right must be conceded to complainant. And it must logically be conceded that, having first taken possession, it has acquired a monopoly of the earth. The position destroys itself, for it must, to be true, assume the existence of a right in one which has to be taken for granted in order to disprove that the same right exists in another.

It is no answer to this to say that complainant has a natural current, not disturbing electrical conditions, or a harmless current. It is not a natural current, but an artificial one, depending for its existence on the generation and specific direction of increased electric fluid, and along an artificial channel. It is not harmless any more than the other, except that it is not powerful enough to overcome or practically interfere with the other, and in the sense that, in this contact, it produces no obviously injurious results. But it is unnatural, and the hurtful or harmless character, as compared to the other, is different in degree merely, and not in kind, as both are alike artificial and powerful. No scientist has yet been able to show how or where the injurious contact first occurs. Whether it originates on the land where the wires are buried, or elsewhere on the circuit, and pursues its entire round, is a matter of speculation merely. The hurtful overflow or disturbance may, in fact, originate at a point entirely away from the telephone wire's intersection with the earth, and on land which the telephone company does not claim; but, assuming the contact and disturbance to commence there, then it could not work an injury, unless, in connection with that particular land, the complainant had undertaken to use the earth away from it as a circuit; and so the injury is not to the specific property, but to the circuit of the earth thus sought to be appropriated and monopolized. Complainant's use of the earth as a return circuit was, of course, on the theory we are treating it, a rightful appropriation by complainant, because that of a property of the earth for such as is common to all. But it cannot, for that very reason, be an exclusive or monopolistic appropriation. If a right at all, it can only be a natural, common right, and cannot be asserted against the exercise of a like right which may impair it, because it cannot be exclusive property; for such use of the earth as may be made exclusive by monopolizing can never be recognized as property.

Principles deduced from cases of poisoned air, polluted water, obstructed light, etc., are inapplicable, as drawn from plausible, but faulty analogies. These are injuries resulting in specific places to persons having the right to the free and exclusive enjoyment of so much of these elements as are their own, or necessary to their own use. . . . That complainant's private property is not affected, independently of its claim to the use of the earth as a circuit, is manifest, for no electric fluid could affect such property in the form of land leased or owned by complainant, unless the circuit — the artificial circuit — was established. . . .

The assumption that complainant has the same right to the use of the electric circuit established over adjacent lands as it has to the support of adjacent land, use of surrounding air, or of water distantly flowing and finally passing through its property, is obviously fallacious, because all these are natural elements in natural condition, ultimately naturally brought, without artificial means or special appropriation thereby, for complainant's use. But complainant's claim to a special artificial use of the earth throughout that portion claimed by it, as well as by others, if it is a special artificial use, is not helped by reference to natural conditions, under which its right to the enjoyment of natural elements is conceded; for, if treated as a natural right, complainant's claim to the earth as a circuit cannot exist to the exclusion or hindrance of an equal natural right in another. . . .

I have discussed the questions involved only upon principle, but my conclusions on both propositions are sustained by authority. The first proposition is directly adjudged by the Courts of last resort in New York and Ohio, and my conclusion as to the second seems to have the approval of the greater number of Courts which have considered it, though not all together in theory. . . . I have not, however, attached much importance to the preponderance of decided cases. The question is practically a new one. The cases on it are few, the reasons for each often different from the others, and none absolutely conclusive. I have preferred to rest this dissent upon its own reasoning.

WILKES, J. (dissenting). I concur in the opinion of the majority as to the liability of the electric railway company for damages for the interference of the poles and wires of the railway company with those of the telephone company on Main street, East Nashville, upon the ground upon which it is placed by the majority. I also concur with the majority as to the liability of the railway company for all damages caused by conduction, and think the conclusion can properly be arrived at upon the grounds taken by the majority. But I am unable to concur with the majority that the use of the streets by an electric railway company is an ordinary use of the streets in the sense of the statute and charter provision. . . .

BRIGHT, Special Judge. I concur in this opinion.

252. W. E. B. *Correspondence of the Boston Transcript*. Washington, Jan. 25, 1910. Because the working of the wireless telegraph operators is a matter entirely outside the comprehension and knowledge of the average layman, the troubles with which this class of communicators has to deal are unappreciated to a great degree. It seems to be an agreed premise that regulation of some sort is needed and at once, and it seems further to be agreed that the suggestion as presented to the House by Representative Roberts of Massachusetts opens up the most feasible method for such control. His suggestion is that the President be empowered to name a board which shall include men from the Government service and from the commercial companies, as well as an expert civilian, and that this board shall proceed to formulate regulations as experts and submit these regulations to the House later for enactment into



law. That the suggestion will pass the House in due course there is little doubt, and that the report of the board will be accepted would appear also to be reasonable. Since the suggestion as to legislation in this form was made Mr. Roberts has been receiving communications in great number from the several Governments, departments and from the commercial companies as well, all directed to the end of showing in detail the need for regulation of some sort.

The greater proportion of the trouble seems to be due to unscrupulous amateurs who insist on working their private stations at all hours regardless of the needs of the public or the necessities of endangered humanity. As a case in point, the Bremen, carrying the usual large passenger list, was approaching the New England coast during the short time, a year or so ago, that the Nantucket Shoals Lightship was out of commission. The steamer was calling for the lightship for information as to weather conditions and location. She was answered, and was much shocked and surprised to find that the reckoning as computed by her navigator was apparently in error. Information that was untrue was also given regarding weather conditions. On reaching New York the matter was looked into and it was discovered that the lightship had been sunk a week prior to the sending of the messages and the work was that of amateurs. Had not the captain of the steamship been very confident of his location he might well have changed his course as a result of these messages and lost his ship and its human freight. Again, it is an ocean steamer that is to be blamed for interference fraught with the possibilities of death for the crew of a wrecked schooner. This occurred in New York harbor, the schooner being ashore some miles outside and the crew in danger. Effort was made to locate the revenue cutters in New York, and because of the attitude of the operator on the Bermudian, the ocean steamer in question, it was not possible to do this directly and the messages had to be relayed, causing a delay of hours. It develops that the Bermudian merely wished to report her location and could have waited a short time as well as not to do this.

The greatest trouble is caused by the use of high-powered stations by the amateurs, as these high-powered sending stations cannot be choked off. In every large city in the country are many of these stations, and in the city of Boston alone it is stated that 150 is a conservative estimate of the number in operation at present. Much of this trouble is due to the indiscriminate use of these stations by the men who own them and their lack of ability to realize and appreciate just what they are doing. Dealers in electrical supplies are also in a degree to blame, as they sell the amateurs the apparatus they desire without any effort to find out what the man knows of his art and well knowing that in the hands of a reckless or careless person much trouble and delay must follow.

Then there is the type of aerial Socialist who insists that there can be no property in the air and that he has as much right to use his apparatus at any time and in any way as those who may be sending important messages. Such a one, in the opinion of the government, is —, who takes delight in interfering with Government and private messages times without number, as the records of the wireless companies and the Navy Department show. . . . In the storm of Dec. 25, 1909, the following message was received by the revenue cutter Gresham: "Steamer Victorian is reported in collision somewhere off Cape Cod. Help is wanted at once, ten are reported drowned and many injured." Because of this message, received in the course of one of the worst storms ever known on the New England coast, the revenue cutter Gresham proceeded to weigh anchor and was all but on her way to assist when it was



proved that the message was sent by an amateur in Brockton. This instance alone is sufficient proof of the awful possibilities for loss of life and danger to shipping in the ungoverned use of wireless stations.

In Europe, regulation has been undertaken and in England a form of license has been adopted whereby the postmaster general has supervision over the entire range of wireless operations on ship stations. Further, because of the continued interference with official messages and commercial work, a convention was held in Berlin in 1906 at which the great majority of the sovereign Powers were represented, including the United States, and regulations were adopted whereby the several Governments agreed to certain recognition for the messages of each other and certain tolls.

All this is very satisfactory as far as it goes, but until such time as the amateur and the grasping manufacturer are under control in some way, the highest efficiency of which wireless telegraphy is capable can never be realized. The war for the control of the air between rival commercial companies has been quite intense in earlier days of the work, but has been discontinued now so that there is but little trouble between them. The greatest annoyances at present are the men who do not realize what they are doing, and those (by far the greater offenders) who realize fully what they are causing in the way of trouble and delay, but who persist in their actions because of a belief that they have a right which might be injured or derogated if legitimate business was allowed to go on; or who have some petty spite against an operator of a Government or commercial station.<sup>1</sup>

<sup>1</sup> [ESSAYS:

*Edward W. Hatch*, "Property Rights in Percolating Waters," (C. L. R., I, 505.)

*Simon G. Croswell*, "Conflicting Rights of Telephone Lines and Single Trolley Electric Railways in the Highways," (H. L. R., IX, 493.)

*Samuel C. Wiel*, "Running Water." (H. L. R., XXII, 190.)

*John B. Clayberg*, "Genesis and Development of the Law of Waters in the Far West." (M. L. R., I, 91.)

*Samuel C. Wiel*, "Priority in Western Water Law." (Y. L. J., 18, 189.)

*A. Miller Belfield*, "Is Electric Interference Actionable?" (1894, Northwestern Law Review, II, 97.)

—, "The Law of Electrolysis." (1899, A. L. R., XXXII, 280.)

NOTES:

"Percolating waters: correlative rights." (C. L. R., III, 429, 593; IV, 143, 305.)

"Water, property right in." (C. L. R., VIII, 148.)

"Percolating waters: New York doctrine." (C. L. R., VIII, 237.)

"Pollution of percolating waters." (C. L. R., VIII, 329.)

"Percolating waters: rights in." (C. L. R., IX, 543, 562.)

"Percolating waters: landowner's right of appropriation." (H. L. R., VII, 120, 369; VIII, 180; IX, 362; X, 190, 183; XI, 200; XIII, 151, 299, 414; XVI, 295.)

"Subterranean and percolating waters: Percolating waters: landowner's right of appropriation." (H. L. R., XVIII, 71.)

"Rights incident to ownership of land: underlying salt brine." (H. L. R., XX, 487, 503.)

"Diversion of subterranean percolating waters." (M. L. R., IV, 541.)

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:

*A. J. Willard*, "Principles of the Law: Personal Rights." c. XVII, Common Right to the Use of Natural Elements, pp. 148-154.

## Topic 2. Kinds of Harmful Acts violating the Right

253. SHELDON AMOS. *Science of Law*. (1874. Chap. VIII, pp. 170, 176, 178, 180). A right of ownership, in itself, however minute it is, carries with it a legally supported claim to use a definite thing, for certain more or less definite purposes, and for a definite or indefinite time. The meaning of this claim, or right, is that all other persons whatever are forbidden to interfere with the owner in the exercise of his power in respect of the thing owned, up to the point to which the limits of that power reach. . . . Ownership must almost always have direct reference to possession, whether present or future. It is important, then, to investigate the real nature of possession. The true order of ideas is the following: — In ordinary speech, and apart from any legal significance attaching to the word, the possession of a thing is the merely holding or grasping it. If the thing be too large to hold, possession means the being able at any moment to turn it to all its possible uses or, at the least, to detain it so effectually as to prevent any one else turning it to any possible use. Thus, according to the illustrations so constantly given, he who has the key of a cellar and can open it when he pleases, is the possessor of the wine in it. He who has the key of a stable and can take the horse out when he pleases, or can prevent any one else taking it out, is the possessor of the horse. This has been called "natural possession," and has in itself no legal idea attached to it whatever. It is clear that there may be good reason for protecting a person in simple possession of this nature. . . . The position, then, of a person thus permanently protected in his possession is the following: — He is treated henceforward not merely as an actual possessor, and as deserving of mere provisional protection and reinstatement in case of his being violently extruded, but he is now able to establish a claim to lasting possession against any one else whosoever. . . . It is a right of this sort which, at the earliest stage of legal progress, is exactly co-extensive with a right of ownership, or, in other words, with "property" or dominium, two terms which are frequently opposed to the term possession. . . . The series of tenants and prospective tenants of the same thing may, indeed, chance to be an indefinitely long one; it being true, however, at any given moment, that there is only one person, or assemblage of persons, who has a right to *immediate* possession. . . .

The results of this investigation are that ownership or property always has reference to possession, either immediate or prospective.

254. *Justice* OLIVER WENDELL HOLMES. *The Common Law*. (1881, pp. 214, 216, 241.) A legal right is nothing but a permission to exercise certain natural powers. The law does not enable me to use or abuse this book which lies before me; that is a physical power which I have without the aid of the law. What the law does is simply to prevent other men to a greater or less extent from interfering with my use or abuse.

To gain possession [of a thing] a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent. If what the law does is to exclude others from interfering with the object, it

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*Herbert Spencer*, "Justice," c. XI, The Rights to the Uses of Natural Media.  
*John Austin*, "Jurisprudence, or the Philosophy of Positive Law," 4th ed. vol. II, p. 838 (Lecture XLIX.)]

would seem that the intent which the law should require is an intent to exclude others. I believe that such an intent is all that the common law deems needful, and that on principle no more should be required. . . .

But what are the rights of *ownership*? They are substantially the same as those incident to possession. Within the limits prescribed by policy, the owner is allowed to exercise his natural powers over the subject matter uninterfered with, and is more or less protected in excluding other people from such interference. The owner is allowed to exclude all, and is accountable to none; the possessor is allowed to exclude all but one, and is accountable to no one but him. The great body of questions which have made the subject of Property so large and important are questions of conveyancing.

255. HENRY SIDGWICK. *Elements of Politics*. (1891. Chap. V, 1, p. 63.) It is not, however, the mere right of unhampered use which constitutes the most essential element in the Right of Property, as commonly conceived: but the right of exclusive use. . . . Whatever its rationale may be, it is this right of excluding all others permanently from any physical dealings with a particular portion of matter, which we have to regard as the most essential element in the Right of Property in material things.

256. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England*. (1765. Book III, c. X). [Printed ante, in No. 1, p. 5].

257. ARTHUR G. SEDGWICK and FREDERICK S. WAIT. *Treatise on the Trial of Title to Land*. (1886. 2d. ed., §80. p. 42.) Classes of injuries affecting realty. Injuries affecting real property are chiefly of two classes. First. Those that divest the owner of the possession, and usurp his right of dominion over the property. Secondly. Those that injure the land or diminish its value or disturb or impair the owner's enjoyment of it, without divesting the possession. Trespass, waste, and nuisance are examples of the latter class. The former injury, which is attended with a motion from or deprivation of possession, is denominated an ouster, and has been defined to be "a wrongful dispossession or exclusion of a party from real property who is entitled to the possession."

#### SUB-TOPIC A. INTRUSION OR IMPAIRMENT (TRESPASS. CASE)

258. REGISTRUM BREVIUM (1595). *Breve de clauso fracto*. (fol. 93b.) Rex, vicecomiti salutem. Quia A. fecit nos securos de clamore prosequendo, per R. de comitatu Lincoln & K. de comitatu Eborum: pone per vadium &c. quare vi & armis clausum ipsius A. apud N. fregit, & ducentos cuniculos suo, precii quadraginta solidorum ibidem inuentos cepit & asportuit &c. contra pacem nostram. Et tunc sic T. &c. Et indorsetur sic, per Ia & idem I, recepit plegios de prosequendo.

Rex &c. Quare &c. bladum & herbam ipsius A. ad valentiam tanti apud N. nuper crescentia conculcauit & consumpsit. Vel sic: blada ipsius A., ad valentiam tanti apud N. nuper crescentia, cum quibusdam aueriis depastus fuit, conculcauit & consumpsit, & alia enormia &c.

259. ANON. *The Attorney's Practice in the Court of Common Pleas*. (1746, 2d ed., vol. I, p. 120). Declaration in trespass for breaking the plaintiff's

close: Southampton. T. W. late of Christ-Church in the county of Southampton, Gentleman, was attached to answer J. P. of a plea, wherefore with force and arms he broke the close of the said J. P. at L. in the county aforesaid, and his grass and herbs to the value of 20*l.* there lately growing, with certain cattle grazed, trampled on and consumed, and did him other injuries, to the great damage of the said J. P. and against the peace of our Lord the present king; and whereupon the said J. P. by J. G. his attorney complains, that the said T. W. on the first day of June in the eleventh year of his present majesty's reign, with force and arms, etc. broke the close of the said J. P. at L. in the county aforesaid, and the grass, corn, barley, beans, pease, turnips, carrots, and cabbages, to the value of 10*l.* there then lately growing, with certain cattle, to wit, with horses, oxen, cows, hogs, and sheep, grazed, trampled on and consumed, and other injuries, etc. to the great damage, etc. and against the peace, etc. and whereupon he says that he is injured, and hath damage to the value of twenty pounds; And thereupon he brings suit, etc.

## 260. PREWITT *v.* CLAYTON

COURT OF APPEALS OF KENTUCKY. 1827

5 *T. B. Monr.* 4

OPINION of the Court, by Chief Justice BIBB. The plaintiff declared against defendant, that, on a day, year, and place stated, he, "with force and arms, upon the dwelling-house of the said plaintiff, did make an assault," "and then and there, with clubs, stones, and other implements, did violently stone, shatter, and break down the door of the said plaintiff's house aforesaid, and other violences and enormities," etc. The defendant demurred, and pleaded, also, not guilty. The Court overruled the demurrer, and the jury found the issue for the plaintiff, and assessed the damage; from the judgment rendered thereon the defendant appealed.

Two objections are taken in this Court. First. That the declaration does not alledge the fact to have been against the peace and dignity of the Commonwealth. Second. That the plaintiff has not declared for a trespass quare clausum fregit, nor alledged that the defendant broke and entered the close.

The first objection goes to form only, which can not be regarded under the statute of 1811.

As to the second, it cannot be pretended that stoning the plaintiff's dwelling-house, and with force and arms, with clubs and stones, shattering and breaking down the door, is not actionable, If breaking the door of a dwelling-house, by throwing stones and wielding clubs from the street, or from an adjoining close, is not a breach of the close of the owner of the dwelling, then the plaintiff was right in omitting to charge it as a breaking and entering into the close. If it does amount to a breaking of the close of the plaintiff, then the declaration, having plainly and substantially set forth the force, assault, and breaking of the door, has done enough. It was unnecessary, after stating the facts which

constitute a trespass quare clausum fregit, to call the trespass by its name. A bear, well painted, and drawn to the life, is yet the picture of a bear, although the painter may omit to write over it, "This is the bear."

The declaration alledges that the defendant, with force and arms, did "stone, shatter, and break down the door" of her dwelling-house. Is not this a trespass quare clausum fregit? The dwelling-house is one's close, his fortress, his sanctuary. This, the declaration alledges, was assaulted and broken with force and arms. How can a trespass quare clausum fregit be more plainly, more explicitly, and more substantially complained of and averred? It cannot be pretended that one who stands in a street, or in an adjoining close, and, by throwing stones and wielding clubs from thence, breaks and shatters the door of the domicil of another, is not guilty of a trespass. He is guilty of breaking the close, and it may be complained of quare clausum fregit. It is a breach of the close as effectually as if the like violence were done to a house in the country, after the wrong-doer had broken the outer close, entered a curtilage, and stoned the mansion-house. A personal bodily entry upon the land is not necessary to constitute a trespass quare clausum fregit. One who stands upon his own land, and with force and arms, by throwing stones and clubs, breaks his neighbor's house, is guilty of trespass quare clausum fregit. . . .

We do not think there is any cabalistic charm in the words "quare clausum fregit," or "broke and entered the close," which may not be supplied by the averment of the facts which constitute a breach of the close, and the damage arising from such breach. . . .

The judgment is affirmed, with costs.

## 261. PFEIFFER v. GROSSMAN

SUPREME COURT OF ILLINOIS. 1853

15 *Ill.* 53

THIS cause was tried before UNDERWOOD, Judge, at the March term, 1853, of the St. Clair Circuit Court.

*G. Koerner*, for plaintiff in error.

*P. B. Fouke*, for defendant in error.

TREAT, C. J. This was an action of trespass quare clausum fregit, brought in 1853, by Pfeiffer against Grossman. The plea was not guilty. It appeared in evidence that the plaintiff had title to a certain tract of land; that according to a survey made in 1854 a fence claimed by the defendant was on this tract. The fence inclosed about half an acre of the tract, part of which was in timber and the rest in cultivation. The fence was built by McGuire, who was in possession previous to the defendant. Prior to the survey there was some difficulty between the plaintiff and the defendant as to the boundary line, the latter claim-

ing to the fence. The defendant was dissatisfied with the survey, and continued in possession of the ground up to the fence, although notified by the plaintiff to remove the fence. After the suit was brought the defendant caused another survey to be made, which agreed with that made in 1851. It was stated by the plaintiff's counsel that the suit was brought for the purpose of establishing the boundary line between the parties. The Court refused to give these instructions: "That the putting a fence or letting it stay on the land of another is a trespass in the eye of the law, for which the aggrieved person is entitled to at least nominal damages; that the ploughing up of another man's land and cultivating it, although the land may thereby be improved, is trespass in law, for which the person aggrieved is entitled to at least still a nominal damages." The jury found the issue for the defendant, and the Court rendered judgment on the verdict.

The instructions not only asserted correct legal principles, but they were strictly applicable to the case. If a party puts a fence on another's land or ploughs up the soil, he is liable as a trespasser. Such acts are a violation of the owner's right of possession, to redress which the law gives him an action. And the action is maintainable, although the owner is not substantially injured. He is entitled to nominal damages for the intrusion upon his possession. The defendant cannot defeat the action by showing that the plaintiff is not materially prejudiced, or even that he is actually benefited. A right is invaded and a wrong committed, and that is a sufficient basis for an action. Every unauthorized entry on the land of another is a trespass, for which an action will lie. The law implies damage to the owner, and in the absence of proof as to the extent of the injury, he is entitled to recover nominal damages. Especially is this the case where the suit is brought for the purpose of settling a question or right. *Dixon v. Clow*, 24 Wend. 188; *Pastorius v. Fisher*, 1 Rawle, 27; *Bagby v. Harris*, 9 Ala. 173; *Plumleigh v. Dawson*, 1 Gil. 544; *Bolivar Manuf. Co. v. Neponset Manuf. Co.* 16 Pick. 241; *Whipple v. The Cumberland Manuf. Co.* 2 Story's R. 561.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

262. WILSON v. PHOENIX POWDER MANUFACTURING CO.

SUPREME COURT OF APPEALS OF WEST VIRGINIA. 1895

40 W. Va. 413, 21 S. E. 1035

BRANNON, Judge. The Phoenix Powder Manufacturing Company was sued in an action of trespass on the case in the Circuit Court of Wayne County by John G. Wilson, to recover damages to Wilson's dwelling house and other buildings resulting from an explosion of powder stored in buildings of the defendant company. The jury found a verdict for the plaintiff, subject to the defendant's demurrer to the plaintiff's evidence, on which demurrer the Court gave judgment



for the plaintiff, and the defendant resorted to the writ of error which we now decide.

I suppose the injury to the plaintiff's property was so direct and immediate from the explosion as to warrant an action of trespass under the strict principles of the common law. But that is irrelevant, as, the action here being trespass on the case, we need not consider the nice and finespun distinction as to direct and consequential injury, on which rested the choice between the two forms of action, resulting formerly in so many nonsuits, discussed in *Jordan v. Wyatt*, 4 Gratt. 151 and elsewhere, as the enactment found in section 8, chapter 103, Code, that "in any case in which an action of trespass will lie there may be maintained an action of trespass on the case," does away with it in this case. . . .

We cannot set aside the verdict for excessiveness of damages. Therefore we affirm the judgment.

264. *REGISTRUM BREVIUM*. (1595, fol. 106b.) *Writ in case for damage to realty*. [Printed ante, as No 7.]

265. W. S. *An Exact Collection of Choice Declarations etc. translated into English for the benefit and helpe of young Clerkes*. (1653. Part 3, p. 74.) Declaration in Trespass upon the Case for making of a banke by which the plaintiff's land was drowned: A. B. complains of I. P. the elder, and I. P. the younger in the custody of the Marshall, etc. of a plea wherefore whereas a certain course of water called C. ought to run in a certaine stream at C. in the County aforesaid for the serving of the Lands and Tenements, near the Water-course aforesaid, the aforesaid I. and I. not ignorant of the premises, plotting the aforesaid A. to worse and hurt in his Lands and Tenements goods, and chattels, a certaine banke on crosse the Water-course aforesaid at C. aforesaid they made, by reason of which the water aforesaid was hindered of his course aforesaid; By which six hundred acres of Pasture of his the said A. neer adjoyning to the Water-course aforesaid was so extraordinarily drowned, that the same A. the profit of that his pasture for a great time he lost; Whereby he sayes he is worsted and hath damage, etc.

266. *YEAR BOOK*, 12 Edward III (1338) (Rolls ed. p. 468). *Assisa de Nocumento*. J. was attached to answer W. in a plea wherefore upon his wall at E. near a certain house of the said W. there he placed stones of such a width that the rain falling on those stones comes down on the said house so that the walls and timber of the said house have become decayed and rotten and the said house is going to ruin, to the damage of the said W. And J. denies etc., and comes etc.

267. SIR EDWARD COKE, *Commentary upon Littleton*. (1628, Second Institute, 56b.) If a man hath a house near to my house, and he suffereth his house to be so ruinous as it is like to fall upon my house, I may have a writ *De Domo Reparanda*, and compel him to repair his house.

268. TENANT *v.* GOLDWIN

KING'S BENCH. 1705

1 *Salk.* 360

IN an action on the case the plaintiff declared, that he was possessed of a messuage, and in a cellar, part thereof, was wont to lay coals, beer, &c.: That the cellar joined to the defendant's messuage; and by a wall which the defendant debuit reparare was separated and defended from the defendant's privy, and that for want of repairing this wall, "faditates & sordida suricae praedicta in cellarium ipsius que rentis stuebant," &c. There was judgment by default, and damages upon the writ of inquiry: And, upon a motion in arrest of judgment. . . . Upon this it was afterwards argued. . . . That the flowing of this filth was actual trespass, like the case 6 E. 4. 7., Fitz. Tres. 110.: And that every man ought to use and keep his own, so as not to damnify his neighbour. . . . Towards the end of the term, the Chief Justice, HOLT, called for the postea, and gave judgment for the plaintiff. . . . The reason he gave for his judgment in the principal case was, because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour; and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's. . . . For he whose dirt it is must keep it that it may not trespass.

269. GRISWOLD & DAY *v.* BREGA & ROSTER

APPELLATE COURT OF ILLINOIS. 1895

57 *Ill. App.* 554[Printed *post*, Book II, as No. 536.]

SUB-TOPIC B. DISSEISIN (EJECTMENT); AND CERTAIN LEGAL RULES  
DEPENDENT ON DISSEISIN

271. REGISTRUM BREVIVM (1595). *Assisa novae disseisinae.* (fol. 229.)  
Rex, vicecomiti salutem. Praecipe A. quod iuste & sine dilatione reddat B.  
tantum terrae cum pertinentiis in K, de quo idem A. iniuste & sine iudicio

disseisiuit praedictum B. post primam transfretationem domini H. regis filii regis Iohannis in Vasconiam, vt dicit. Et nisi fecerit, &c. T. &c.

272. REGISTRUM BREVIUM (1595). *Breve de ejectione firmæ*. (fol. 227b.) Rex, vicecomiti Cumberi salutem. Si A. fecerit &c. tunc pone &c. B. quod sit coram iustitiariis &c. quare vi & armis manerium de I., quod C. praefato A. dimisit ad terminum qui nondum praeterijt, intrauit, & bona & catalla eiusdem A. ad valentiam tanti in eodem manerio inuenta cepit & asportauit, & ipsum A. a firma sua praedicta eiecit, & alia enormia ei intulit ad graue damnum &c. Et habeas &c.

273. W. S. *An exact Collection of Choice Declarations etc. translated into English for the benefit and helpe of young Clerkes*. (1653. Part 3, p. 5.) Declaration upon the Statute of the 8th year of Henry VIII of forcible entries: William Attersale, complaineth of John Fuller and M. his wife, and W. Parker, in the custody of the Marshall, etc. Of a Plea wherefore whereas in a Statute in Parliament, of the Lord Henry late King of England the sixth, after the Conquest at Westminster, in the eight yeare of his Reigne, held, established amongst other things, it should be continued, that if any person of any Lands or Tenements, with main strength be expelled and disseised, or peaceably is put out, and afterward is held out with Force, or any Feoffment or discontinuance thereof, after such entry, for the Right of the Possessor, to defraud and take away in any manner is made; the party in this behalfe grieved, may have against such disseisor, an Assise of new disseisin, or a writ of Trespass; and if the party grieved by Assise, or by Action of Trespass, shall recover, and by Verdict or in other manner, by due form of Law it shall be found, that the party Defendant in the Lands and Tenements, was by force of entry, or after his entry, should hold by force, the Plaintiff shall recover his treble Damages against the Defendant: And further shall make Fine and Redemption, as in the same Statute more fully is contained. Notwithstanding they the said J. M. and W. P. the said Statute little weighing, and the Penalty in the same little fearing, the first day of October, in the sixth yeare of the now King Edward the sixth, into two parts of one Message and twelve Acres of Land, with the Appurtenances of him the said W. A. in J. in the County aforesaid, with main force, that is to say, with Swords, Staves, Clubs, Bowes, and Arrowes they entred, and the said W. A. with main force expelled and disseised, and him so expelled and disseised, of the same two parts of the said Tenements with the Appurtenances, with the said main force withheld, and as yet doth withhold from the same, to the contempt of the said now King, and to the Damage of him the said W. A. 20l. and against the form of the said Statute, and against the Peace of the Lord the now King: And thereupon he bringeth his Suit, etc.

274. ANON. *The Attorney's Practice in the Common Pleas*. (1746. 2d ed., vol. I, p. 293.) Declaration in ejectment. Middlesex, to wit, John Doe, late of the parish of St. George the Martyr in the country of Middlesex, yeoman, was attached to answer Richard Roe of a plea, wherefore with force and arms he entered into five messuages with the appurtenances in the parish of Stebon-Heath, otherwise Stepney, in the county of Middlesex, which Thomas Bland and Conrade de Golls demised to the said Richard for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the

great damage of the said Richard, and against the peace of our sovereign lord the king; And whereupon the said Richard by Joseph Dobbys his attorney complains, That whereas the said Thomas and Conrade on the 25th day of April in the 6th year of the reign of his said majesty at the said parish of Stebon-Heath, otherwise Stepney, in the county aforesaid, had demised to the said Richard the said tenements with the appurtenances; To have and to hold the said tenements with the appurtenances to the said Richard and his assigns, from the 24th day of April aforesaid, unto the full end and term of five years thence next ensuing and fully to be complete and ended; by virtue of which demise the said Richard entered into the said tenements with the appurtenances, and was possessed thereof; And the said Richard being so possessed thereof, the said John afterwards, to wit, on the said 25th day of April in the said sixth year, with force and arms, etc. entered into the said tenements with the appurtenances which the said Thomas and Conrade had demised to the said Richard in farm aforesaid, for a term which is not expired, and ejected the said Richard from his said farm, and other wrongs, etc. to the great damage, etc. and against the peace, etc. whereupon the said Richard saith that he is injured, and hath damage to the value of 20*l*. And thereupon he brings suit, etc.

275. SIR EDWARD COKE. *Institutes of the Laws of England, or A Commentary upon Littleton*. (1628. fol. 17a, 153a.) "Seised"; Seisitus, commeth of the French word "seisin," i. e. possessor, saving that in the common law "seised" or "seisin" is properly applyed to freehold, and "possessed" or "possession" properly to goods and chattels; although sometime the one is used instead of the other. . . .

"Disseisin." Disseisina is a putting out of a man out of seisin, and ever implyeth a wrong. But dispossessing or ejectment is a putting out of possession, and may be by right or by wrong. "Omnis disseisina est transgressio, sed non omnis transgressio est disseisina. Si eo animo forte ingrediatur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseisinam sed transgressionem, &c. Quaerendum est a judice quo animo hoc fecerit, &c." And of ancient time a disseisin was defined thus: "Disseisin est un personel trespasse de tortious ouster del seisin."

"An assise of novel disseisin." "Assisa novae disseisinae. "Assisa" properly cometh of the Latin word "assideo," which is to associate or set together; so as properly "assise" is an association or sitting together. And the writ, whereby certain persons are authorized and called together, it is called "assisa novae disseisinae." . . . A disseisin after the last eire was called a new disseisin, or "nova disseisina." "Assisa" also signifyeth a jury, of them sitting together, and also a session of parliament, as Littleton hereafter in this Chapter sheweth.

276. ARTHUR G. SEDGWICK and FREDERICK S WAIT. *Treatise on Trial of Title to Land*. (1886. 2d ed., 725-732, in part, p. 562.) Without attempting to discuss in detail the various statutes of limitation applicable to real actions adopted by the different States, we may say generally that, being of the same origin, historically, and adopted upon common considerations of public policy, and having the same main object in view, namely, the quieting and settlement of titles to land *by barring any assertion of title by the true owner, provided he has been out of possession of the land for a fixed time*, the statutes differ from one another only in respect to the extent in time of the limitation imposed, and in respect

to minor provisions, such as those suspending the operation of the statute in favor of persons under disabilities. All these statutes are, in substance and effect, as follows: No person shall commence an action for the recovery of lands except within a certain number of years from the time when the right to bring such action accrued, or unless within the same number of years he, or one with whom he is in privity, has been in possession of the premises. As a rule, there are no provisions in the statutes of the different States declaring in terms that adverse possession shall confer a title upon the adverse possessor, nor any provisions as to what will constitute a disseizin of the true owner and an adverse possession in another; but questions of seizin and disseizin, entry and ouster and as to what acts will establish an adverse possession by a stranger, and, hence, whether the statute can be pleaded as a bar to an action by the owner, are left to be determined by the Courts, in each case, by the principles of the common law. . . .

The essence of the doctrine of limitations is, technically, therefore, the *non-possession of the true owner*, not, as under the theory of prescription, the *adverse enjoyment of some one else*. . . . Adverse possession makes a title in that it deprives the real owner of the power of asserting the true titles against the adverse occupant. . . .

Statutes of limitations applicable to actions for the recovery of land, like all statutes of limitations, are founded upon considerations of public policy; "to promote the peace and good order of society, by quieting possessions and estates, and avoiding litigation." Such statutes are for this reason characterized as statutes of "repose." . . .

The rightful owner of land is deemed to have the possession until he is ousted from it or disseized, and also, in the absence of limitations, that he is restored to possession when the hostile possession or disseizin ceases. Want of possession, therefore, in the true owner, necessarily implies an ouster of him by another through an entry and hostile possession. Hence, the ultimate test of the want of possession of the true owner, and his neglect to assert his right to the possession, upon which the statutes of limitation rest, is the existence of an adverse possession of another denying the true owner's right. What constitutes, then such an adverse possession of land as, under the statutes of limitation, will bar the right of the true owner to recover it? . . .

It may be laid down as an indisputable general rule of law, that to constitute an effectual adverse possession two things must concur: first, an ouster of the real owner followed by an actual possession by the adverse claimant; and, second, an intention on the part of the latter to so oust the owner and possess for himself; or, as it is sometimes called, there must be a "claim of right" or "title" in himself adverse to the true owner. The assertion has been made that the possession, to be adverse, must be under "claim or color of title," and even that the possession must have commenced under "color and claim of title." The latter statement is certainly inaccurate; for the books are replete with cases where a tortious entry upon and possession of lands, without any pretense of paper title or rightful claim, have ripened into a title by adverse possession. . . .

It is axiomatic that the possession which follows the title to land must cease before a hostile possession can commence. There cannot be two possessions, actual or constructive, of the same land at the same time. There must, therefore, be an ouster of the true owner and an entry by another before an adverse possession is established. . . .

Bearing in mind at the outset that the object of the statute is to cut off and defeat the claim or rights of the true owner, we arrive at the general principle that the criterion of the time when the statute begins to run is the ouster of the true owner and his consequent right to be reinstated in the possession, and that it is not in theory the entry of the adverse claimant. To determine then the character and sufficiency of an entry, as the foundation of an adverse possession, we inquire whether it is sufficient to constitute an ouster of the one entitled to the possession. . . . Entry and ouster, as well as possession, may be either actual or constructive. Thus the entry and ouster may be a physical invasion of the land, and an actual forcible ejectment of the possessor, or the adverse claimant being already in possession under, for example, a lease or agreement with the owner, and the owner out of the actual possession, the entry and ouster may be constructively accomplished by a hostile act on the part of the tenant equivalent in its legal effect to an actual invasion and ejectment. . . .

It is impossible to lay down a general rule as to what constitutes an effectual actual adverse possession of lands and what falls short of it. It is necessarily a question governed more or less by the facts of each case, and particularly by the character and situation of the land in question, and the uses to which it would naturally be put.

277. EDITOR'S NOTE. *Harvard Law Review*. (1907, XX, 563.) The English Privy Council recently decided that one who had had adverse possession of land for ten years acquired such an interest that, when the Crown resumed the land as if by eminent domain, his executors, as soon as the period of limitation had run after his entry, might require the land to be valued with a view to compensation. *Perry v. Clissold*, (1907) A. C. 73.

Two series of articles,<sup>1</sup> relied on by the Court in defining this right, point out that originally at common law [a mere] possession was protected against [a non-possessing] ownership. Then very early a disseisee was given a right to enter or gain back possession from his disseisor. This right was a mere chose in action, at first absolutely non-transferable and good only against the disseisor himself. It was founded simply on former possession and ouster. But the possession of the disseisor — the tangible thing — was the property, — transferable, inheritable, devisable, giving dower and curtesy, subject to execution and escheat. Possession with no outstanding rights to take it away made a complete ownership. It is so extensive that to-day a possessor who is free from such a right outstanding against him is commonly thought to have in himself, in addition to his possession, a valuable abstract right called title. The right to get back possession is now generally transferable and follows the land against most possessors. This change in point of view, this turning the absence of outstanding rights into the presence of an affirmative title, should not, logically, change the nature of the right of possession when the possessor is dealing with strangers to outstanding rights. As against all who have no outstanding rights, the possessor should have the ownership. This proprietary character of possession appears to-day in cases allowing an adverse possessor to maintain ejectment — a proprietary action — against any one not claiming under the outstanding title.<sup>2</sup> It is further supported by a few cases like the

<sup>1</sup> Prof. Maitland in 1 L. Quar. Rev. 324; 2 *ibid.* 481; 4 *ibid.* 24, 286; Prof. Ames in 3 Harv. L. Rev. 23, 313, 337.

<sup>2</sup> *Asher v. Whitlock*, L. R. 1 Q. B. 1. Contra, *Doe d. Carter v. Barnard*, 13 Q. B. 945.



present. The adverse possessor whose land is taken loses, as between himself and the State, not the mere expectancy of a property right, but one already in existence, for which logically he should have full recompense at once.

278. WELLS, J., in *School District No. 4 in Winthrop v. Benson*. (1850. 31 Me. 381, at 384.) If the plaintiffs have held the premises by a continued disseizin for twenty years, the right of entry by the defendants is taken away, and any action by them to recover the same, is barred by limitations. Stat. c. 147, 1. A legal title is equally valid when once acquired, whether it be by a disseizin or by deed; it vests the fee simple, although the modes of proof when adduced to establish it may differ. Nor is a judgment at law necessary to perfect a title by disseizin any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proof, and a continued disseizin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence.

An open, notorious, exclusive and adverse possession for twenty years, would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed.

279. STORY, J., in *Clarke v. Courtney*. (1831. 5 Pet. 319, at 353.) It may be proper to advert to the doctrine which has been already established in respect to the nature and extent of the rights growing out of adverse possession. Whether an entry upon land, to which the party has no title, and claims no title, be a mere naked trespass, or be an ouster or disseisin of the true owner, previously in possession of the land, is a matter of fact, depending upon the nature of the acts done, and the intent of the party so entering. The law will not presume an ouster, without some proof; and though a mere trespasser cannot qualify his own wrong, and the owner may, for the sake of the remedy, elect to consider himself disseised, yet the latter is not bound to consider a mere act of trespass to be a disseisin. If a mere trespasser, without any claim or pretence of title, enters into land, and holds the same adversely to the title of the true owner, it is an ouster or disseisin of the latter. But in such case, the possession of the trespasser is bounded by his actual occupancy; and, consequently, the true owner is not disseised, except as to the portion so occupied. But where a person enters into land, under a deed or title, his possession is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseised, to the extent of the boundaries of such deed or title.

## 280. FRENCH v. PEARCE

SUPREME COURT OF ERRORS OF CONNECTICUT. 1831

8 Conn. 439

THIS was an action of trespass quare clausum fregit; tried at Litchfield, February term, 1831, before WILLIAMS, J.

The plaintiff and defendant were adjoining proprietors of land; and the land in controversy was the border between them, which was wood-

land, unfenced. Both parties claimed under William French, the father of the plaintiff and of the defendant's wife. The plaintiff's title was admitted, unless the land was conveyed to the defendant's wife, by a deed dated the 11th of May, 1809; in which the line on the side adjoining the plaintiff was particularly described. A part of the description was "from a butternut tree a straight line to Platt's corner — said piece being the same land which the grantor bought of Rev. Mr. Benedict." The defendant contended, that as the deed to his referred to the land purchased of Mr. Benedict, he might shew where were the bounds of the lot; and claimed, that by those bounds, there was not a straight line from the butternut tree to Platt's corner. This was accompanied with evidence, by which he claimed to have shewn, that he had occupied and possessed the land in question for more than fifteen years, although not included in the straight line mentioned in the deed. The plaintiff denied the occupation of the defendant; and denied also any difference in bounds in consequence of the reference to Mr. Benedict's deed, and any adverse possession by the defendant.

The judge charged the jury, that in considering where were the boundaries of this lot of the defendant's wife, if the description in the deed was doubtful, they might take into consideration the possession or occupation of the defendant, for the purpose of determining those bounds. But if they should find, that the defendant has possessed the land in question, for more than fifteen years, claiming and intending only to occupy to the true line, as described in his deed and no further then his possession must be referred to his deed, and it would not be adverse to the plaintiff; and the jury notwithstanding such possession, must look to the deed, to determine the line of division.

The jury returned a verdict for the plaintiff; and the defendant moved for a new trial for a misdirection.

*J. W. Huntington* and *J. Strong*, in support of the motion. . . . The charge makes a distinction in the occupancy of land, founded on the intent of the occupant, and virtually repeals the statute, in all cases except where the occupant commences his possession by wilful trespass and continues it by intentional wrong. . . .

*Bacon*, contra. . . . To acquire a title by possession, that possession must be adverse. But land held by mistake, through ignorance of the dividing line, is not held adversely. Such a possession does not operate a disseisin. *Brown v. Gay*, 3 Greenl. 126. To constitute an adverse possession, it must be under a claim of title hostile to the real owner. 1 Swift's Dig. 163. Does a man, who encloses the land of another, through a mistaken apprehension of the dividing line, and not with a view to encroach upon the land of another, or to enjoy what is not his own, evince any hostility to the rights of the owner?

HOSMER, Ch. J. Whether the line of occupancy was the dividing line between the parties, was the point of controversy between them. . . .

By adverse possession is meant a possession hostile to the title of

another; or, in other words, a disseisin of the premises; and by disseisin is understood an unwarrantable entry, putting the true owner out of his seisin. Co. Litt. 153. b. 181.

The enquiry, then, is precisely this, what must be the character of the act, which constitutes an adverse possession?

This question was directly answered, in *Bryan v. Atwater*, 5 Day, 181, and by this Court. A clear and unquestionable rule was intended to be given. The Court commenced the expression of their opinion by saying:

"It will be necessary to ascertain precisely the meaning of the terms, adverse holding or adverse possession." †

The first principle asserted in that case is, that to render a possession adverse, it is not necessary that it should be accompanied with a claim of title and with the denial of the opposing title. The case next affirms that possession is never adverse, if it be under the legal proprietor and derived from him. After these preliminaries, it is enquired:

"But more particularly, what, in point of law, is an adverse possession? It is," say the Court, "a possession, not under the legal proprietor, but entered into without his consent, either directly or indirectly given. It is a possession, by which he is disseised and ousted of the lands so possessed." . . .

I have been thus particular in analyzing this case, in which the reasons were drawn up by a very able and eminent jurist; as it presents, in the plainest language, a sure and most intelligible land-mark, to ascertain when a possession is adverse. It is peculiarly observable, that by the reasons given, anxiously laboured as they were, it was intended to put the question at rest for the future. The possession alone, and the qualities immediately attached to it, are regarded. No intimation is there as to the motive of the possessor. If he intends a wrongful disseisin, his actual possession for fifteen years, gives him a title; or if he occupies what he believes to be his own, a similar possession gives him a title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no enquiry is made. It is for this obvious reason: that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor.

It is not necessary that I should proceed further, as the point of decision, in the case before us, has been settled by this Court, and with great precision. At the same time, it may be the more satisfactory to shew, that the determination here is in harmony with the decisions of other Courts.

In Westminster Hall, the character of an adverse possession is well established. The possession of a person denying the title of the owner, or claiming the premises, or taking the whole rents and profits without accounting, is held sufficient evidence of actual ouster. *Doe d. Fisher*

& al. *v. Prosser*, Cowp. 217. *Doe d. Hellings & ux. v. Bird*, 11 East, 49. *Stocker v. Berny*, 1 Ld. Raym. 741. s. c. by the name of *Stokes v. Berry*, 2 Salk. 421. . . .

In the State of New York, the entering on land under pretence of title, or under a claim hostile to the title of the true owner, constitutes an adverse possession. *Brandt d. Walton v. Ogden*, 1 Johns. Rep. 156. *Jackson d. Griswold v. Bard*, 5 Johns. Rep. 230. *Jackson d. Bonnel & al. v. Sharp*, 9 Johns. Rep. 162.

To the same effect is the law of Massachusetts.

"To constitute an actual ouster," said Parsons, Ch. J., "of him who was seized, the disseisor must have the actual exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession."

*Kennebeck Purchase v. Springer*, 4 Mass. Rep. 416, 418. *Boston Mill Corporation v. Bulfinch*, 6 Mass. Rep. 229. It is obvious, that a person who takes possession, does not the less claim to hold it against him who before was seised, because he conscientiously believes that he has right to possess. . . .

In the case of *Brown v. Gay*, 3 Greenl. 126, the question was, whether the tenant was in possession of certain land by disseisin. He owned a lot denominated No. 3, and was in possession of lot No. 4 claiming that it was part of the former lot. He was, therefore, in possession through mistake. This principle was advanced, by the Court, to wit:

"If the owner of a parcel of land, through inadvertency or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate a disseisin, so as to prevent the true owner from conveying or passing the same by deed."

If the learned Court meant to lay down the position, that although the possession was adverse and a disseisin, yet that it was of such a character as not to prevent the owner from transferring the land by deed, the case has no bearing on the one before us. But if it was intended to declare, that there was no disseisin at all, by reason of the before mentioned mistake, I cannot accede to the proposition. . . . I agree with the learned Court, that the intention of the possessor to claim adversely, is an essential ingredient. But the person who enters on land believing and claiming it to be his own, does thus enter and possess. The very nature of the act is an assertion of his own title, and the denial of the title of all others. It matters not, that the possessor was mistaken, and had he been better informed, would not have entered on the land. This bears on another subject — the moral nature of the action; but it does not point to the enquiry of adverse possession. Of what consequence is it to the person disseised that the disseiser is an honest man? His property is held, by another, under a claim of right; and he is subjected to the same privation, as if the entry were made with full knowledge of its being unjustifiable.

In the case of *Ross v. Gould*, 5 Greenl. 204, it is said,

“a disseisin cannot be committed by mistake, because the intention of the possessor to claim adversely, is an essential ingredient in disseisin.”

I do not admit the principle. It is as certain that a disseisin may be committed by mistake, as that a man may by mistake take possession of land, claiming title and believing it to be his own. The possession is not the less adverse, because the person possessed intentionally though innocently. But in the moral nature of the act, there is undoubtedly a difference, when the possessor knowingly enters by wrong. . . .

In the case before us, the plaintiff adduced evidence to show, that he entered on the land in question, and possessed it more than fifteen years, uninterruptedly and exclusively, under a claim and belief of right, and appropriating to his own use, without account, all the rents and profits. This was adverse possession and disseisin, and gave him title under the law of the State. Upon this principle, the charge was incorrect, and a new trial is advised.

The other judges were of the same opinion, except PETERS, J., who was absent.

*New trial to be granted.*

## 281. PERRINS *v.* BERGEN

SUPREME COURT OF NEW JERSEY. 1834

14 N. J. L. 355

THIS was an action on the case for overflowing a part of the plaintiff's land. A verdict had been given for the defendant, and the plaintiff had obtained a rule to show cause why the verdict should not be set aside and a new trial had. The substance of the testimony, and of the charge of the judge, who tried the cause, will be found in the opinions below, in which the Chief Justice concurred.

FORD, J. This was an action on the case for overflowing a part of the plaintiff's land with water by means of a dam that the defendant maintained across a stream of water below the plaintiff's lot. The declaration counted on the plaintiff's possession of a lot of 2.79 acres, and that the defendant caused 1.72 acre thereof to be overflowed. The defendant admitted the overflowing complained of, but denied that the plaintiff had title to the land, or any such possession that he could maintain an action for overflowing it.

The plaintiff gave in evidence a survey and location of the two acres and seventy-nine hundredths in the year 1808, and deduced title under it to himself. Soon after the location, he brought an ejectment against one Valley Cousins, the tenant in possession, and having obtained judgment, and a writ of habere facias possessionem, the sheriff, as appeared by the record and return, put him in full possession, the 29th of October,

1810; from which time, by himself and tenants, the plaintiff continued his possession till the commencement of the present suit in September, 1829, making a period of nineteen years. Such was the possession he proved. On the other hand it appeared that the defendant's dam occasioned water to stand on the low parts of the said lot, both before and at the time the sheriff delivered possession to the plaintiff, and has occasioned it to do the same ever since; and in this way the defendant had possession as much as the plaintiff, during those nineteen years, as his counsel insisted. The Court, in charging the jury, instructed them that an actual possession must be shown by the plaintiff to maintain this action, and as he had not made that out, the jury might reject his possession altogether. This direction, I conceive, was erroneous; it supposes the sheriff not to have delivered actual possession of that part of the lot on which the water was standing; whereas I consider it an actual possession that was delivered and that the water did not prevent its being so. The judgment in ejectment must certainly be executed; and if this was not actual possession, on account of water being on the land, it would be impossible, in such a case, to execute a judgment, and the law would have to be acknowledged impotent. The sheriff was not bound to drain the land. To do that deed, he must have entered on the defendant's land and prostrated his dam. He, therefore, gave to the plaintiff the actual possession of the premises, the land and the water both.

An idea seems to be entertained, that if the defendant overflowed the freehold of an owner higher up the stream, it gave him possession of the land he so overflowed, and ousted the owner. But if this can be construed an ouster, it follows that an ejectment may lie for overflowing land; which is not only unheard of, but would be without effect even after a judgment. All he could recover would be the land with the water on it; the injury would still be unredressed.

So far from being any ouster, it is not even a trespass, to flow the land of another with water by erecting a dam below his land; for the act, in itself, is lawful. Every man may build a dam, by common right, on his own land; and trespass never lies when the act is lawful in itself, and injurious only in its consequences. A man who fixes a spout to carry the water away from his house, performs a lawful act on his own premises; but if it shed the water upon the roof of his neighbor's house, or into his yard, he must be answerable for the injurious consequences in an action on the case, but an action of trespass will not lie against him. *Reynolds v. Clark*, Stra. 634.

It is, therefore, no dispossession, no ouster, nor even a trespass, to flow water backwards on another person's land; it is denominated in law a nuisance, an annoyance to the tenant in possession; and his only modern remedy is, by an action on the case, founded on his possession. It is not in the nature of a nuisance ever to work a dispossession of the tenant, if it be the consequence of a lawful act; as if one erect a



smelting house, or a sty, on his own land, so near to another man's house as that it incommodes his dwelling by the gas of the former, or nauseous smell of the latter, the annoyance is neither an ouster, or dispossession of the owner, nor will an ejectment, or trespass, lie for the injury; it is a nuisance the remedy for which is only by an action on the case. 3 Bl. Com. 220.

If such a nuisance, whether by smelting house, hog sty, or raising back water, has been continued in the same manner, peaceably and without interruption, twenty years, it thereby ripens into a right, and then it takes, in law, the name of an easement, but even an easement works no dispossession of the owner; the possession still remains in him as much as if the easement did not exist. Thus if the public have a high way over any man's land, or if an individual have a private way over it, such easements of theirs impair not the owner's possession; he may maintain trespass for digging the soil of such high way, or even private way, which shows the possession is his as much as if such easements were not in existence. Therefore whether it be a nuisance or easement, it does not impair the possession of the owner of the land; he remains as entirely in the actual possession as if such nuisance or easement were not in being.

Of consequence the direction given to the jury was evidently a mistake. The sheriff delivered to the plaintiff actual possession of the whole premises mentioned in the writ of possession, whether drowned by water or not. If the defendant's dam continued to drown it the nineteen years afterwards, it may have annoyed the plaintiff, but did not diminish his possession. Without touching other points involved in the cause, I am of opinion, on this ground alone, that there ought to be a new trial, and let the costs abide the event of the suit.

## 282. FOULKE *v.* BOND

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1879

41 N. J. L. 527

ON error to the Supreme Court.

The controversy in this case relates to the equal undivided one-half part of a tract of land in the county of Ocean. The premises in dispute are part of a tract of four hundred and twenty acres, situate in the counties of Ocean and Burlington, and called in the pleadings and evidence as lot number seventeen. . . . This action of ejectment was commenced in July, 1877. The verdict was for the defendant, whereupon the plaintiff after final judgment, sued out this writ of error.

For the plaintiff in error, *Fred. Voorhees* and *P. L. Voorhees*.

I. That the real estate in question is a tract of wild, uncultivated land or sand beach, without enclosure, and without any marked

boundaries or lines; that said tract is now owned by the plaintiff on the one part, and the defendant in this suit on the other part, and that the same has been so held in co-tenancy since the year 1851; and that the rules with regard to adverse possession, which govern between co-tenants, apply to the case. . . .

For the defendant in error, *John L. N. Stratton and B. Gummere*. . . .

II. The general rule is that a grantee of land under a deed giving color of title, and who is, for the term prescribed by the statute, in the actual possession of part of the land conveyed, will be held to be in constructive possession of the residue up to the boundaries set forth in his deed. Angell on Limitations, 400, 401. As modified in this State, actual occupancy of wild lands by enclosure is not required of a vendee claiming under color of title; if he actually occupies part, and exercises such use of the rest as is consistent with the character of the land, his possession is complete — he is not held to the possessionem pedis. *Den v. Hunt*, Spenc. 487, 492. The defendant has shown, in the fullest manner, his possession of the locus in quo far more fully and continuously than the law requires. . . .

The opinion of the Court was delivered by

DEPUE, J. At the trial, sixteen requests to charge were submitted by the plaintiff in error. Exceptions were taken to the refusal to charge in compliance with such requests, and three exceptions were taken specially to the charge as delivered. . . .

The judge refused the plaintiff's request to charge that the lands being unenclosed wild lands, the defendant could not acquire title by adverse possession to any part of the locus in quo, except only such portion as he had actually held enclosed for twenty years. This refusal gave rise to one of the exceptions on the record, as did also his instruction that "the rule of law is that when a man enters into possession of land under a deed, and exercises acts of ownership in different places over the tract, his possession will be presumed to be co-extensive with the boundaries of his deed, and his adverse title, if proven, will run according to those boundaries." . . .

It may be regarded as settled in this State by long usage, sanctioned by a uniform course of practice and supported by judicial decision, that mere entry on waste and uncultivated and unenclosed lands under a survey, or a conveyance or other claim of title, and occasional acts of trespass extending over the period of twenty years, though coupled with the payment of taxes, are not such acts of possession as will deprive the true owner of his title. Such acts are evidence of an adverse claim of title, but they do not amount to that actual, continued, and uninterrupted possession which is essential to title by adverse possession, for the reason that they do not amount to such twenty years' notice of an adverse possession as is intended by the statute. 4 Griff. Ann. Reg. 1269; *Cornelius v. Giberson*, 1 Dutcher, 1. . . .

The question whether possession has been held adversely continuously

for the period of twenty years, with the requisite notoriety, is one of fact for the jury. Ordinarily, it is said that as a matter of evidence, possession, which is open and visible, is required. But, nevertheless, actual occupancy by residence, cultivation or enclosure, or the erection of permanent improvements is not necessarily required. . . . When the nature and essential qualities of an adverse possession, which shall give title, are explained, the question becomes one of fact, whether, under the circumstances of the particular case, the party relying on title derived from such a source has satisfactorily shown that his possession has been such as to meet the requirements of the law. . . .

Occasional acts of trespass, extending over the period of twenty years, will not give title; but who shall define with what frequency they shall be repeated to amount to that continuity of possession which is an essential ingredient of title by adverse possession? The varied circumstances under which the question may be presented in its relations to extensive tracts of wild and uncultivated lands, make the adoption of any legal formula impracticable beyond the enunciation of the rule that possession, to give title, must be hostile to the title of the real owner, and actual, exclusive, continued and uninterrupted for the full period of twenty years, with such notoriety in the adverse enjoyment as that title by that means is being acquired against him. Whether in any case title has been acquired by length of possession, and to what extent, and within what limits must be determined by the actual facts. . . .

The defendant purchased in 1851. When the purchase was made there was upon the Jones parcel a boarding-house capable of accommodating one hundred guests, and on the Pharo lot a dwelling-house. The whole tract is one connected body. It consists of beach lands, sedge meadows, and ridges of sand, with intervals of meadow and pasture land, and patches of land capable of cultivation, and ocean front, over which the tide flows. The defendant entered immediately after his purchase. He enlarged the boarding-house, more than doubling its capacity, made an addition to the dwelling-house, built docks, erected and removed buildings, enclosed gardens, constructed roads and bridges, pastured and cut hay on the meadows, enclosed and cultivated parcels of the lands which were arable, and paid taxes on the whole tract. The evidence fully justifies the remark of the judge that the defendant exercised all the customary acts of ownership over the property, and his possession was uninterrupted after he took possession in 1851. During all that time he claimed to be sole and exclusive owner. He never recognized in any way the ownership of the plaintiff or his grantors, and they made no claim upon him for any part of the premises until this suit was brought.

The defendant, as the owner of a legal title to an undivided interest, was presumptively in possession of this whole tract, and the only issue capable of contention was whether his possession was in exclusion or

in subordination to the title of his co-tenant, and that question was correctly left to the jury.

There is no error apparent on the record, and the judgment should be affirmed.

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283. MASSEY *v.* TRANTHAM

SUPREME COURT OF SOUTH CAROLINA. 1802

2 Bay, 421

TRESPASS to try title to an island in the Catawba River, in Lancaster District. Motion to set aside a verdict, and for leave to enter a nonsuit.

This action was brought to try the title to a small rocky island in the Catawba River, adjoining an island called Fishing Island, near Rocky Mount, a place celebrated for a shad fishery; the island was good for nothing else; the whole of it was a rock, but a very advantageous place for catching shad-fish in the spring of the year. The plaintiff, in support of his title, produced a grant dated 6th of January, 1794, for fifty acres of land, including part of Fishing Island, and, as was supposed, the place in dispute. One or two witnesses were called, who proved that this place had been called Fishing Island for 20 years past, and the part in dispute "Little Island"; that it was a flat rock about forty feet square, or nearly about the size of the court-house here. The plaintiff rested his case upon his grant, and the explanations given by the witnesses.

Mr. *Richardson*, for the defendant, moved the Court for a nonsuit at this stage of the cause, on the ground that the plaintiff had proved no trespass committed on the premises in question, nor that the defendant had ever been upon the rock; and that in this action, it was essentially necessary, that the plaintiff should prove that a trespass of some kind or other was committed by the defendant on the premises, before he could be entitled to a verdict. . . .

The presiding Judge (BAY) overruled the motion for the nonsuit, on the ground that he did not conceive it necessary, in the action of trespass, to try titles, to prove any actual trespass where the object of the suit appeared to be to try title only, and not for damages done the freehold, or for mesne profits. That the Act of 1791, appeared to him to have a twofold object in view, first to abolish the old fictitious action of ejectment, and the string of subtilties attached to it; and at once to go on to the trial of the right of freehold, in the real names of the parties claiming the land in dispute. That in all cases, where damages were the object of the suit, an actual trespass must be proved; but where title only was the object, there it was unnecessary. . . .

As the first point submitted to the Court was a new one, and turned upon the construction of the Act of Assembly, which had made so material

an alteration in the law for recovering landed property, the Judges took time to consider this case, and after mature deliberation were of opinion, that the judge in the Circuit Court at Lancaster should have sustained the motion for a nonsuit, as in every action of trespass on lands, it enters into the very nature and spirit of the remedy, that some injury, however small, shall have been committed on the premises; and unless something of that kind be proved on the trial, there is nothing for the jury on which to found a verdict. A bare threat on the rock to prevent the plaintiff from fishing, or any obstruction of that sort on the part of the defendant, or preventing a canoe from landing there, would have been sufficient for the purpose of supporting the action; but as nothing of that nature was proved, the cause of action failed and the defendant was entitled to a nonsuit. The Act of 1791 did not alter the nature of the law in order to enable a party to maintain an action of trespass; it only changed the old action of ejectment into an easier and more intelligible mode of trying titles to lands by this suit, but left all its essential requisites attached to it in every other respect.

As the Judges were of opinion that the defendant was entitled to a nonsuit in this case, they did not go into a consideration of the second ground, or motion for a new trial. Rule for setting aside the verdict, and for leave to defendant to enter up the nonsuit made absolute. All the Judges present.

## 284. POTTER *v.* NEW HAVEN

SUPREME COURT OF ERRORS OF CONNECTICUT. 1868

35 *Conn.* 520

EJECTMENT, brought to the Superior Court of New Haven County, and tried on the general issue closed to the court, before PHELPS, J.

The declaration alleged that the plaintiff on the 1st day of May, 1863, was seized and possessed, of his own right in fee, of the land described, and that on that day the defendants entered and ejected him therefrom and had ever since held him out of possession, and claimed the sum of ten dollars damages and the possession of the premises. On the trial the plaintiff offered evidence to prove, and claimed that he had proved, that on the day mentioned he was the owner in fee of the premises described, and entitled to the possession thereof, and that on that day the defendants entered upon the premises, and removed certain dressed stone belonging to the plaintiff, which had been placed thereon by him, and claimed that he was entitled to recover of the defendants nominal damages and costs for the entry and the removal of the stone.

The Court held that the plaintiff could not recover for the trespass in the present action and rendered judgment for the defendants. The plaintiff thereupon moved for a new trial.

*L. H. Bristol*, in support of the motion.

*C. R. Ingersoll*, contra.

BUTLER, J. We are all satisfied that the judgment below was right. The plaintiff brought his action of disseisin, alleging that he was the owner of a tract of land, that the defendants entered upon it and ejected him therefrom, and thereafter deforced and continued to deforce and hold him out of the premises, to his damage the sum of \$10, and demanding the surrender of the possession together with the damages and costs.

The declaration is in the common form in use in this State in the action of disseisin. On the trial the plaintiff did not prove any ouster or dispossession, but simply that the defendants entered upon the land, upon a single occasion, and removed certain dressed stone of the plaintiff, which had been placed thereon by him; and claimed that he had a right in this action to recover nominal damages and costs, notwithstanding the act proved was a mere trespass. The Court overruled the claim and rendered judgment for the defendants, and the plaintiff moves for a new trial. . . .

We think the Court was clearly right. Our action of disseisin, or of ejectment as it is generally termed, has existed as a distinct action from an early period after the settlement of the State. It is in its nature applicable, and has uniformly been applied, to cases where the owner of land has been ousted and dispossessed and continued deforced up to the time when the action was commenced, and there has been no decision or practice to justify the claims of the plaintiff.

To the first claim of the plaintiff, that a party may recover nominal damages and costs in an action of disseisin without proving that the dispossession has been continued up to the time of trial, we assent; but that cannot help him. He did not prove an ouster and a continued dispossession up to the time when the action was commenced, nor in fact any ouster or deforcement at all. His case therefore is not the case he assumes it to be in his brief. It is not a case where the Court decided against him on the ground that he failed to prove that the defendants were still in possession at the time of trial, but one where the Court rested their decision on the ground that there had been no dispossession of the plaintiff at any time.

To the second claim of the plaintiff, that he has a right to recover damages for the trespass in this form of action, in a case where there never was any ouster or deforcement, we cannot assent. There are no averments in the declaration adapted to it, and there is no precedent or practice for it in this State, and it is not consistent with principle or public policy. Our action of ejectment was adopted and has been uniformly used for the recovery of land of which the plaintiff has been entirely dispossessed. We have at the same time a distinct action of trespass to recover damages for an injury to the possession where the plaintiff has not been dispossessed. Principle and sound policy require



that these actions should be kept distinct and separate, as they have hitherto been; there is a clear landmark between them which should not be broken down by permitting a plaintiff in ejectment, if he fails to prove an ouster, to prove a mere trespass however trifling and recover. We are not prepared to establish such a precedent and a new trial is not advised.

In this opinion the other judges concurred.

285. ARTHUR G. SEDGWICK and FREDERICK S. WAIT. *Treatise on the Trial of Title to Land*. (1886. 2d ed., 236, p. 156.) It is usually an indispensable part of the plaintiff's case in ejectment to show that, at the commencement of the action, the defendant was in possession of at least some portion of the lands to which the plaintiff seeks to establish title. . . . There are substantial objections to the practice of requiring the plaintiff in actions to try title to prove that the defendant is in possession and exercising acts of ownership over the land. It is often very difficult, and sometimes practically impossible, to distinguish between acts which constitute merely trespasses on the land and acts amounting to a claim of title or an exercise of ownership over it; and though trespass and ejectment are distinct remedies, which must not be confounded, it is not an easy task to find the dividing line. The practice of encumbering actions for the trial of title with this issue of the possession of the defendant often results in the miscarriage of the action, and places the claimant in an extremely awkward position. Thus questions of fact involving the title are sometimes submitted to the jury, together with disputed facts as to the possession or occupancy of the lands by the defendant, and the jury under the practice in some States is allowed to render a general verdict. If the verdict is rendered, and a judgment entered for the defendant on the ground that he has not withheld the possession, then the object of the action is not accomplished, and, though the plaintiff may have a perfect title to the land, yet there is a judgment record showing that he was defeated in an action of ejectment, in which that title was apparently involved. The questions involved in the trial of the title to land are so important that neither the Courts, the litigants, nor the juries ought to be called upon to consider the secondary and collateral question as to the possession of the defendant. The title alone should be brought in issue and not complicated and embarrassed by disputed questions of possession.

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## 286. LE BLOND *v.* PESHTIGO

SUPREME COURT OF WISCONSIN. 1909

140 *Wis.* 604, 123 *N. W.* 157

APPEAL from Circuit Court, Marinette County; *Samuel D. Hastings*, Judge.

Action by Katherine Le Blond against the Town of Peshtigo and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The complaint, in substance, charges that the town of Peshtigo is one of the duly organized towns of Marinette County, and that the

other defendants are, and at all the times mentioned in the complaint were, the duly elected, qualified, and acting supervisors of said town; that the defendants during the month of August, 1905, entered upon certain lands owned by and in the possession of plaintiff, and tore down fences, cut and removed valuable timber, and constructed a highway and drain thereon at a cost of \$500, which was paid by the defendant town; that said defendants never acquired any right by consent of the plaintiff or otherwise to appropriate any portion of her land; and that she has been damaged in the sum of \$900 by reason of the unlawful act complained of. The complaint further sets forth that ever since August 12, 1905, defendants have continued to unlawfully use the premises appropriated for a drain and public highway, and that certain of the defendants threaten and assert that, if plaintiff attempts to fence up the pretended drain and highway, they will tear down such fences and obstructions and continue to use the same, and that said defendants have ever since the 12th day of August, 1905, permanently deprived the plaintiff of the use and enjoyment of that portion of the premises appropriated by the defendants, and that plaintiff fears the defendants will carry out the threats aforesaid, and will harass, vex, and annoy the plaintiff, and that plaintiff has been put to irreparable injury, and will be put to the necessity of bringing a multiplicity of actions to protect her rights. By way of relief, plaintiff asks that the defendants, their agents and servants be enjoined and restrained from taking possession or attempting to take possession of the strip of land in question, and also from in any manner interfering with the enjoyment, use, and occupation thereof by the plaintiff, and that plaintiff recover \$900 damages done and suffered by reason of the unlawful acts complained of. One of the grounds of demurrer was that the complaint did not state facts sufficient to constitute a cause of action. This is the only ground relied on to sustain the order appealed from.

*L. M. Nelson* (*P. A. Martineau*, of counsel), for appellant. *W. B. Quinlan* and *Henry T. Scudder*, for respondents.

BARNES, J. (after stating the facts as above). By her complaint the plaintiff seeks to recover possession of her property and damages for the wrongs she has sustained. If, under the facts stated, she is not entitled to resort to a court of equity to secure this relief, then the demurrer was properly sustained.

1. As a general proposition, equity will not interfere to prevent a mere threatened trespass unless such trespass will work irreparable injury. . . . This allegation construed in connection with the relief prayed, is insufficient to make a case in equity unless it can be maintained on some other ground.

2. It is urged, however, that the action is brought to recover an easement only, and that ejectment will not lie where such recovery is sought, and that the plaintiff has no adequate remedy at law. It is clear that a mere action for trespass would not furnish an adequate

and complete remedy, and, if it be true that the complaint does not state the necessary facts to constitute a cause of action in ejectment, the plaintiff has planted her suit in the proper forum. . . . Section 3077, St. 1898, provides that the complaint in an action of ejectment shall set forth that the plaintiff has an estate or interest in the premises claimed, and shall state the nature and extent of such interest, whether in fee, dower, for life, or for a term of years, and that he is entitled to the possession of such premises, and that defendant unlawfully withholds the possession thereof from him. Section 3075, St. 1898, provides that the action of ejectment must be brought against an actual occupant of the premises claimed, if occupied, and if not so occupied, then it must be brought against some person exercising acts of ownership in the premises claimed, or against some one claiming title thereto or some interest therein. . . .

The complaint before us shows ownership in fee by the plaintiff, wrongful entry and occupation by the defendants, and permanent deprivation of the use and enjoyment of the strip of land appropriated. Every essential fact necessary to state a good cause of action in ejectment under section 3077, St. 1898, is to be found in the complaint. We construe the averment that plaintiff has been permanently deprived of the use and enjoyment of the strip of land in question as tantamount to a statement that she has been deprived of the possession of such strip. The complaint, however, does show that defendants entered upon the land for the purpose of building a highway and drain, and that the same were built, and that the highway has since been in use. Is the plaintiff suing to recover the possession of the land or for the recovery of a mere easement over it, and, if the latter, will ejectment lie? These are the vital questions involved in determining whether the complaint is fatally defective. . . . In *Racine v. Crotsenberg*, 61 Wis. 481, 21 N. W. 520, 50 Am. Rep. 149, the defendant took possession of what was claimed to be a public alley, and appropriated the same to his own exclusive use. Ejectment was brought to recover the easement which the public had in such alley. It was held that ejectment would not lie to recover a mere incorporeal right, and that it would only lie to recover things corporeal which might be the subjects of seisin, entry and possession. It was further held that sections 3077, 3084, St. 1898, were not broad enough to give the plaintiff a right of action, because the plaintiff had no estate "in fee, dower, for life, or for a term of years" in the real property sought to be recovered, as the statute required. This case is not authority to the proposition that, where the owner of the fee is excluded from the possession of his land by the use of an easement over the same, he may not recover such possession in ejectment. On the contrary, the case, inferentially at least, holds that such an action would lie. . . .

An easement is an incorporeal right, which can only be acquired by grant or prescription, and is incapable of manual delivery. Land, on the

contrary, is a tangible thing to which actual possession may be delivered. There is a substantial distinction between an action brought to recover an intangible right and one brought to recover actual manual possession of real property which has been lost to the owner by the exercise of an incorporeal right, or in any other way. In the one case possession of the thing sought cannot be delivered through a court of law; in the other it may. Here what the plaintiff seeks to recover is not the possession of some mere right or easement, but possession of a distinct part and parcel of her farm. Where, as here, the owner in fee has been deprived of the possession of real estate, the statute gives a right of action in ejectment to recover that possession, and it is immaterial whether the deprivation of such right has been caused by the exercise of an easement which wrongfully excluded plaintiff from her possession, or otherwise. If the only right plaintiff can now exercise over the strip of land in question is the right to use it as a highway in common with all others, then she has been deprived of her possession. *Strong v. Brooklyn*, 68 N. Y. 1. And the allegation of the complaint, which, on demurrer, must be taken as true, is that plaintiff has been deprived of the use and enjoyment of her property, and not of a mere easement over the same.

*Order affirmed.*

WINSLOW, C. J., dissents.<sup>1</sup>

<sup>1</sup> [ESSAYS :

*Frederic William Maitland*, "The Mystery of Seisin." (Essays in Anglo-American Legal History, 1909, III, 591.)

"Equity and the Forms of Action." (Lectures III, V, pp. 321, 351.)

*Arthur George Sedgwick* and *Frederick Scott Wait*, "The History of the Action of Ejectment in England and the United States." (Essays in Anglo-American Legal History, 1909, III, 611.)

NOTES:

"Prospective damage: Permanent nuisance." (C. L. R., IV, 605.)

"Adverse possession: Constructive: Under color of title." (C. L. R., IV, 605.)

"Adverse possession: Claim of freehold necessary." (C. L. R., V, 605, 620.)

"Trespass to realty inflicting no injury." (C. L. R., VI, 351, 361.)

"Adverse Possession: Knowledge that claim is unfounded: Whether essential." (H. L. R., VI, 385; VII, 241, 377; IX, 289, 467-470; X, 314; XI, 480, 553; XIII, 152; XIV, 374.)

"Nuisance threatening long existence." (H. L. R., XI, 118.)

"Disseisee's rights: Recovery for mesne profits." (H. L. R., XV, 486.)

"What constitutes a trespass: Forcible eviction of trespasser by owner." (H. L. R., XXI, 295.)

"Constructive Possession under Color of Title." (H. L. R., XXIII, 56.)

"Damages: For continuing nuisance." (M. L. R., III, 416.)

"Adverse Possession: Founded on mistake in boundary." (M. L. R., III, 402.)

"Adverse Possession: Color of title under void deed." (M. L. R., VI, 707.)

CHAPTERS ON THE JURAL NATURE OF POSSESSION:

*John Austin*, "Jurisprudence, or the Philosophy of Positive Law," vol. II, pp. 817, 836, 965 (Lectures XLVI, XLIX).

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. X, § 276, p. 260, § 331; p. 323; c. XII, § 380, p. 374.

*Jeremy Bentham*, "Theory of Legislation: Principles of the Civil Code," pt. II, c. I.

*Thomas E. Holland*, "Elements of Jurisprudence," 9th ed., c. XI, par. 5, p. 178.

*Sheldon Amos*, "Systematic View of the Science of Jurisprudence," c. X, par. F, p. 174.

*John W. Salmond*, "Jurisprudence," 2d ed., § 93.]

*Oliver Wendell Holmes, Jr.*, "The Common Law," (Lecture VI, p. 206.)

*Albert S. Thayer*, "Possession and Ownership." (L. Q. R., XXIII, 175.)]

**SUB-TITLE (II): PERSONALTY****Topic: Kinds of Harmful Acts violating the Right****SUB-TOPIC A. . IMPAIRMENT (TRESPASS. CASE)**

287. **REGISTRUM BREVIUM** (1595). *De mureligo projecto in columbari* (fol. 106a). Ostensus quare vi & armis clausum ipsius A. apud N. fregit, & quendam mureligum in columbari suum ibidem proiecit, per quod idem A. volatum columbaris sui praedicti per magnum tempus amisit, & alia enormia ei intulit, ad graue damnum &c.

288. **ANON.** *The Attorney's Practice in the Common Pleas.* (1746, 2d ed., vol. I, p. 466.) Declaration in trespass for shooting a greyhound: Leicester-shire, to wit, H. R. late, etc. was attached to answer B. D. in a plea, wherefore with force and arms a certain greyhound bitch, and a certain other bitch of the said B. of the price of 10*l.* at M. aforesaid in the county aforesaid, with a gun he shot at and killed, whereby the said B. not only lost the said bitches, but also certain young whelps, to wit, five young whelps of the said greyhound bitch, and certain young whelps of the said other bitch, which died for want of the said bitches to suckle them, to wit, at M. aforesaid; and a certain other greyhound bitch, and a certain other bitch of the said B. lately found at M. aforesaid, of the price of 10*l.* he shot at, hit, struck, smote and wounded, by means whereof the last mentioned two bitches afterwards at M. aforesaid died, whereby the said B. not only lost the said two last mentioned bitches, but also certain other young whelps, to wit, five other young whelps of the said last mentioned greyhound bitch; and certain other young whelps, to wit, five young whelps of the other of the two last mentioned bitches, which afterwards died for want of the two last mentioned bitches to suckle them, to wit, at M. aforesaid; and did other wrongs to the said B. to the great damage of the said B. and against the peace of our sovereign lord the king, that now is, etc. And whereupon the said B. by J. B. his Attorney complains, that the said H. on the 15th day of January in the year of our Lord 1736, with Force and arms, etc. . . . and did other wrongs to the said B. to the great damage of the said B. and against the peace of our said sovereign lord the king that now is, whereby the said B. saith that he is injured and damnified, to the value of 10*l.* And thereupon he brings suit, etc.

289. **ANON.** *The Attorney's Practice in the Common Pleas.* (1746, 2d ed., vol. I, p. 431.) Declaration in case for unskilfully managing a ship whereby she ran against a lighter and damaged plaintiff's goods therein. London, to wit, H. G. late, etc. mariner, was attached to answer to T. H. in a plea of trespass upon the case, and whereupon the said T. by G. N. his attorney complains, that whereas the said T. on the 28th day of December in the year of our Lord 1735, at London aforesaid, was possessed of divers goods and merchandizes, to wit, of 1000 baskets of Denia raisins, of value of 360*l.* then laden on board a certain lighter then being in the river Thames, and then moored at a certain key adjoining to the said river Thames at London aforesaid; And whereas the said H. upon the said 28th day of December in the said year of our Lord 1735, at London aforesaid, was possessed of and master of a certain ship or vessel called the Mary, then being in the said river Thames near the said key, yet the said



H. not being ignorant of the premisses, but devising and maliciously intending to hurt and injure the said T. in this behalf, upon the same day and year above mentioned at London aforesaid, so ill, unskilfully and negligently managed, governed and directed his said ship or vessel, the said ship or vessel of the said H. then and there pressed against the said lighter, and broke one of the sides of the said lighter, whereby the water then and there flowed into the said lighter so laden with the said raisins as aforesaid, and very much damaged and spoiled the said raisins so laden therein, whereby he says he is prejudiced, and hath damage to the value of 100*l*. And thereupon he brings his suit, etc.

290. PAUL *v.* SLASON

SUPREME COURT OF VERMONT. 1850

22 *Vt.* 231[Printed ante, as No. 21]<sup>1</sup>SUB-TOPIC B. DISSEISIN, *i. e.* CONVERSION

(TRESPASS DE BONIS ASPORTATIS. TROVER)

291. JAMES BARR AMES. "*The Disseisin of Chattels.*" (1890. Harvard Law Review, III, 23. Select Essays in Anglo-American Legal History, No. 67, III, 541.) The readers of "*The Seisin of Chattels*," by Professor Maitland, in the "*Law Quarterly Review*" for July, 1885, were doubtless startled at the outset by the title of that admirable article. But all must have admitted at the end that the title was aptly chosen. The abundant illustrations of the learned author show conclusively that from the days of Glanvil almost to the time of Littleton, "*seisin*" and "*possession*" were synonymous terms, and were applied alike to chattels and land. In a word, *seisin* was not a purely feudal notion.

Is it possible, however, to justify the title of the present article? Is it also a mistake to regard *disseisin* as a peculiarity of feudalism? History seems

<sup>1</sup> [NOTES:

The plaintiff's intestate died of delirium tremens, at a drinking bout, in his own house. His brother's wife, the defendant, came immediately after his death, took the deceased's valuables out of an unlocked drawer in his room, and put them for safety in another room in an unlocked cupboard. Later, some of them had disappeared from the cupboard. Would a verdict of nominal damages for trespass be sustainable? (1876, *Kirk v. Gregory*, L. R. 1 Exch. D. 55.)

The plaintiff's horse was hitched to a post in the highway. The defendant unhitched it, and led the horse to another post ten yards away and hitched it thereto. The horse there became entangled in his halter and was thrown to the ground and died by reason of his injuries. Is the defendant liable in trespass? (1867, *Bruch v. Carter*, 32 N. J. L. 554.)

The plaintiff's horse was tied to a post at the street curb. The defendant, during the plaintiff's absence, took the lines from the horse, thus leaving the plaintiff no means of driving the horse. It was done as a joke. Later the defendant refused to deliver up the lines on demand. Has the plaintiff an action of trespass? (1892, *Wartman v. Swindell*, 54 N. J. L. 589.)]

to answer these questions in the affirmative. The word "disseisin," it is true, was rarely used with reference to personalty. Only three illustrations of such use have been found,<sup>1</sup> as against the multitude of allusions to seisin of chattels noted by Professor Maitland. In substance, however, the law of disseisin was common to both realty and personalty.

A disseisor of land, it is well known, gains by his tort an estate in fee simple. "If a squatter wrongfully incloses a bit of waste land and builds a hut on it, and lives there, he acquires an estate in fee simple in the land which he has inclosed. He is seised, and the owner of the waste is disseised. . . . He is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs."<sup>2</sup> Compare with this the following, from Fitzherbert: "Note if one takes my goods, he is seised now of them as of his own goods, adjudged by the whole court;"<sup>3</sup> . . . These examples are sufficient to bring out the analogy between the tortious taking of chattels and the wrongful ouster from land. But in order to appreciate fully the parallel between disseisin of chattels and disseisin of land, we must consider in some detail the position of the disseisor and disseisee in each case.<sup>4</sup>

The disseised owner of land loses, of course, with the *res* the power of present enjoyment. But this is not all. He retains, it is true, the right in *rem*; or, to use the common phrase, he has still a right of entry and a right of action. But by an inveterate rule of our law, a right of entry and a chose in action were strictly personal rights. Neither was assignable. It follows, then, that the disseisee cannot transfer the land. In other words, as long as the disseisin continues, the disseised owner is deprived of the two characteristic features of property, — he has neither the present enjoyment nor the power of alienation. . . .

The position of the disseisor of land is, in most respects, the direct opposite of that of the disseisee. The strength of each is the weakness of the other. The right of the disseisee to recover implies the liability of the disseisor, or his transferee, to lose the land. But so long as the disseisin continues, the disseisor, or his transferee, possesses all the rights incident to the ownership of an estate in fee simple. He has the *jus habendi* and the *jus disponendi*. If he is dispossessed by a stranger, he can recover possession by entry or action.<sup>5</sup> . . .

The legal effects of the disseisin of chattels are most vividly seen by looking at the remedies for a wrongful taking. The right of recaption was allowed only *flagrante delicto*. This meant in Britton's time the day of the taking. If the owner retook his goods afterwards, he forfeited them for his "usurpation."<sup>6</sup>

<sup>1</sup> 1 Rot. Cur. Reg. 451; 1 Stat. of Realm, 230, or Bract. f. 136 b; Y. B. 14 Edw. II. 409. [See another in *Isaack v. Clark*, No. 306, post.]

<sup>2</sup> Williams, *Seisin*, 7. See also *Leach v. Jay*, 9 Ch. Div. 42, 44, 45. [Two joint disseisors become joint tenants. *Putney v. Dresser*, 2 Met. 583; Litt. 278.]

<sup>3</sup> Fitz. Ab. Tresp. 153.

<sup>4</sup> For the best discussion of the doctrine of disseisin of land, see Maitland, "Mystery of Seisin," 2 L. Q. Rev. 481, to which the present writer is indebted for many valuable suggestions.

<sup>5</sup> Bract. 165 a; *Bateman v. Allen*, Cro. Eliz. 437, 438; *Asher v. Whitlock*, L. R. 1 Q. B. 1.

<sup>6</sup> 1 Nich. Britt. 57, 116. The right of self-help in general was formerly greatly

If the taking was felonious,<sup>1</sup> the despoiled owner might bring an appeal of larceny, and, by complying with certain conditions,<sup>2</sup> obtain restitution of the stolen chattel. But such was the rigor and hazard of these conditions, that from the middle of the thirteenth century the appeal was largely superseded by the new action of trespass.<sup>3</sup> If the taking was not criminal, trespass was for generations the only remedy.<sup>4</sup>

Trespass, however, was a purely personal action; it sounded only in damages. The wrongful taking of chattels was, therefore, a more effectual disseisin than the ouster from land. The dispossessed owner of land, as we have seen, could always recover possession by an action. Though deprived of the *res*, he still had a right in *rem*. The disseisor acquired only a defeasible estate. One whose chattel had been taken from him, on the other hand, having no means of recovering it by action, not only lost the *res*, but had no right in *rem*. The disseisor gained by his tort both the possession and the right of possession; in a word, the absolute property in the chattel taken. . . .

To-day, as every one knows, neither a trespasser, nor one taking or buying from him, nor the vendee of a bailee, either with or without delivery by the latter, acquires the absolute property in the chattel taken or bailed. The disseisee of goods, as well as the disseisee of land, has a right in *rem*. The process by which the right in *personam* has been transformed into a real right may be traced in the expansion of the writs of *replevin* and *detinue*, and is sufficiently curious to warrant a slight digression.

*Replevin* was originally confined to cases of wrongful distress. . . . *Replevin* was never allowed in England against a vendee or bailee of a trespasser, nor against a 'second trespasser.'<sup>5</sup> It was only by the later extension of the action

restricted. The disseisee's right of entry into land was tolled after five days. If he entered afterwards, the disseisor could recover the land from him by assize of novel disseisin. Maitland, 4 L. Q. Rev. 29, 35. So the writ of ravishment of ward would lie against one entitled to the ward if he took the infant by force from the wrongful possessor. Y. B. 21 & 22 Ed. I. 554. The lord must resort to his action to recover his serf, if not captured *infra tertium vel quartum diem*. 4 L. Q. Rev. 31. A nuisance could be abated by act of the party injured, only if he acted immediately. Bract. f. 233; 1 Nich. Br. 403.

<sup>1</sup> Originally any taking without right, like killing by accident, was felonious. In Bracton's time, if not earlier, the *animus furandi* was essential to a felony. Bract. f. 136 b.

<sup>2</sup> See cases cited *supra*, p. 543, n. 2.

<sup>3</sup> A case of the year 1199 (2 Rot. Cur. Reg. 34) seems to be the earliest reported instance of an action of trespass in the royal courts. Only a few cases are recorded during the next fifty years. But about 1250 the action came suddenly into great popularity. In the *Abbreviatio Placitorum*, twenty-five cases are given of the single year 1252-1253. We may infer that the writ, which had before been granted as a special favor, became at that time a writ of course. In Britton (f. 49), pleaders are advised to sue in trespass rather than by appeal, in order to avoid "*la perilouse aventure de batayles*." Trespass in the popular courts of the hundred and county was doubtless of far greater antiquity than the same action in the *Curia Regis*. Several cases of the reign of Henry I. are collected in Bigelow, *Placita Anglo-Normannica*, 89, 98, 102, 127.

<sup>4</sup> In early English law, as in primitive law in general, the principle of parsimony did not permit concurrent remedies. The lines were drawn between the different actions with great sharpness. The right to sue a trespasser in *replevin* and *detinue* was a later development, as will be explained further on.

<sup>5</sup> *Mennie v. Blake*, 6 E. & B. 847.

of detinue that a disseisee finally acquired a perfect right in rem. Detinue, although its object was the recovery of a specific chattel, was originally an action ex contractu. . . . In 1600 the comparatively modern action of trover, which had already nearly supplanted detinue sur trover, was allowed against a trespasser; although even then two judges dissented, because by the taking "the property and possession is divested out of the plaintiff."<sup>1</sup> As the averments of losing and finding were now fictions, trover was maintainable by the disseisee against any possessor.

The disseisee's right to maintain replevin and detinue (or trover) being thus established, . . . if this historical sketch has been accurately drawn, the disseisin of land finds its almost perfect counterpart in the conversion chattels.<sup>2</sup>

292. Lord MANSFIELD, C. J., in *Cooper v. Chitty* (1756. 1 Burr. 20, at 31). The action of trover, in *form*, is a fiction; in *substance*, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully. . . . This is an action of tort: and the whole tort consists in the wrongful conversion. Two things are necessary to be proved, to entitle the plaintiff to recover in this kind of action: 1st, Property in the plaintiff; and 2dly, a wrongful conversion by the defendant.

293. REGISTRUM BREVIUM (1595). *Breve de catallis asportatis* (fol. 95 a). Quare vi & armis quandam nauem ipsius A, precii decem librarum, apud H. inuentam cepit & abduxit, & bona & catalla sua ad valentiam viginti librarum in eadem naui inuenta cepit & asportauit &c.

294. W. S. *An Exact Collection of Choice Declarations, etc., translated into English for the benefit and help of young Clerkes.* (1653. Part 2, p. 107.) Declaration in trespass for taking and leading away a horse: I. W. complaineth of R. W. in the custody of the Marshall, etc. of that, that he in the Feast of St. Margaret the Virgin, in the 21. year of the Reign of King Henry the 8. with force and Arms, that is to say with Staves, etc. one Gelding of Colour black Gray of him the said I. of the price of 5. marks, at W. in the County aforesaid, found, took, and lead away, And other Wrongs, etc. to the Damage, etc. 10 marks, And thereupon he bringeth his Suit, etc.

295. ANON. *The Attorney's Practice in the Court of Common Pleas* (1746; 2d ed., vol. I, p. 121). Declaration in trover: Surrey, to wit. J. T. late of etc., Brewer, was attached to answer W. B. of a plea of trespass on the case;

<sup>1</sup> *Bishop v. Montague*, Cro. El. 824, Cro. Jac. 50.

<sup>2</sup> [ESSAYS AND CHAPTERS ON THE HISTORY OF ACTIONS FOR DISSEISIN OF PERSONALTY:

*James Barr Ames*, "The History of Trover." (Essays in Anglo-American Legal History, III, 417.)

*Frederic William Maitland*, "Equity and the Forms of Action at Common Law." (Lecture V, pp. 347 ff.)

*Sir Frederick Pollock and Frederic William Maitland*, "History of English Law." (vol. III, c. VIII, § 3.)

*William S. Holdsworth*, "History of English Law" (vol. II, pp. 307 ff.; vol. III, passim).]

and whereupon the said W. B. by L. R. his attorney complains, that whereas the said W. B. on the tenth day of December in the fourteenth year of his present majesty's reign, at Kingston in the county of surry, was possessed of the following goods and chattels, to wit, (here insert the goods) to the value of one hundred pounds, as of his own proper goods and chattels; and being so thereof possessed the said W. B. casually lost the said goods and chattels out of his hands and possession; which said goods and chattels afterwards, to wit, on the said tenth day of December in the fourteenth year aforesaid, at Kingston aforesaid in the county aforesaid, came by finding to the hands and possession of the said J. T. Nevertheless the said J. T. knowing the said goods and chattels to be the goods and chattels of the said W. B. and to him of right to belong and appertain, yet contriving and fraudulently intending craftily and subtilly to deceive and defraud the said W. B. of the said goods and chattels, has not delivered the said goods and chattels to the said W. B. (although often required) but afterwards, to wit, on the tenth day of January in the fourteenth year aforesaid, at Kingston aforesaid in the county aforesaid, converted the said goods and chattels to his own proper use, to the damage of the said W. B. of 200*l*. And thereupon he brings suit, etc.

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(1) *What Act amounts to a Disseisin (or Conversion)*

296. SIMMONS *v.* LILLYSTONE

EXCHEQUER. 1853

8 *Exch.* 431

THE second count was in trover for the conversion of goods and chattels, to wit, five hundred pieces of timber. Pleas (inter alia) to the whole declaration, not guilty. The plaintiff joined issue on the first plea.

At the trial, before *Pollock*, C. B., at the London sittings after last Michaelmas term, it appeared that the plaintiff carried on the business of a mast, oar, and block maker at Milton next Gravesend. The evidence in support of the second count was, that certain pieces of timber or spars used for making bowsprits, and belonging to the plaintiff, being on the defendant's land, he caused them to be removed; and upon the timber being again placed there, and having become imbedded in the soil, the defendant directed his workmen to dig a saw-pit in his land, and in so doing they cut through the timber, leaving the pieces there, and part of them was afterwards carried away by the tide of the river, which at high water flowed over the land, the other part remaining imbedded in the soil.

It was objected, on the part of the defendant, that there was no evidence of a conversion. His lordship was of opinion that there was *prima facie* evidence of a conversion. The jury found a verdict for the plaintiff; damages £60.

*Bramwell*, in last Michaelmas term, having obtained a rule *nisi*,

*Shee*, Serjt., and *Rose* showed cause in Hilary term (January 27). There was evidence of a conversion. In order to constitute a conversion, it is not necessary that there should be an acquisition of property by the defendant; it is sufficient if there be a deprivation of property to the plaintiff. *Keyworth v. Hill*, 3 B. & Ad. 685. [PARKE, B. Here the defendant never intended to take to himself any property in the timber.] If a person purposely left the gate of a field open, so that a horse escaped, that would amount to a conversion. [PARKE, B. The form of a count in trover, prescribed by the Common-law Procedure Act, 15 & 16 Vict. c. 76, Sched. (B.), is, "that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods." Suppose a person threw a stone into a room through an open window, and broke a looking-glass, would that be a conversion of it?] It is submitted that any wilful damage to a chattel, whereby the owner is deprived of the use of it in its original state, is a conversion. [PLATT, B. Taking wine from a cask and filling it up with water is a conversion of the whole liquor. *Richardson v. Atkinson*, 1 Stra. 576.] . . .

*Willes*, in support of the rule. . . .

PARKE, B. The question which relates to the count in trover is, whether there was any evidence of a conversion. Now the evidence was that the pieces of timber were cut in two by the defendant; that they were left imbedded in the soil,—not applied to the defendant's own use,—and that part of them was carried away by the tide. Without adverting to the plea of justification, we are all of opinion that there was no sufficient evidence of a conversion to entitle the plaintiff to a verdict on the plea of not guilty. In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use. In this case nothing is done but cutting the timber, and, by accident, it is washed away by the river,—not purposely thrown by the defendant to be washed away; consequently, we think that does not amount to a conversion. . . .

*Rule accordingly.*

## 297. MCPHETERS v. PAGE

SUPREME JUDICIAL COURT OF MAINE. 1891

83 Me. 234, 22 Atl. 101

ON Report. The case is stated in the opinion.

*Jasper Hutchings*, for plaintiffs.

*Barker, Vose and Barker*, for defendant. Defendant was an innocent bailee. One who receives goods in his possession and control,



knowing that they were not lawfully in the possession of the person who brought them to him, and afterwards allows them to be taken away by the same person, is not thereby guilty of a conversion. . . .

FOSTER, J. Trover to recover the value of one carcass and two saddle of deer. It is admitted that the deer were lawfully killed by the plaintiffs and that they owned the carcass and saddles for which this suit is brought. The only question involved whether there has been conversion of the property by the defendant.

The carcasses and saddles were, during open season, put on board cars to be transported to Boston for sale. Upon their arrival at Bangor, they were seized by a constable and two police officers for some supposed violation of law on the part of the plaintiffs, in attempting to transport them out of the State. They were taken and carried by these officers to the defendant's meat market in the city, and there left with him. He knew the officers' possession came by seizure. The officers had no precept and procured none, either against the property or the plaintiffs. They were not justified in seizing them, or in afterwards doing what they did with them. Nor have we any doubt that the acts of the defendant with reference to the property in question amounted to a conversion. The evidence is uncontradicted that he skinned the carcass and saddles, cut them into steaks and roasts, let one of the officers "have paper to do the pieces up to distribute them round to his friends," and sent a few of the order out with his own team. This he admits. He used none of the meat himself; neither was any of the meat sold. The defendant sets up no justification by his pleading. It would not avail him were he to do so with the facts before us.

1. It is established as elementary law by well-settled principles, and a long line of decisions, that any distinct act of dominion, or inconsistent with it, amounts to a conversion. It is not necessary to a conversion that it be shown that the wrong-doer has applied it to his own use. If he has exercised a dominion over it in exclusion, or in defiance of, or inconsistent with, the owner's right, that in law is a conversion, whether it be for his own or another person's use. Cooley on Torts, 448; Webber v. Davis, 44 Maine, 147, 152; Miller v. Baker, 1 Met. 27; Fernald v. Chase, 37 Maine, 289.

"He who interferes with my goods, and without any delivery by me, and without my consent, undertakes to dispose of them, as having the property, general or special, does it at his peril to answer me the value in trespass or trover." Gibbs v. Chase, 10 Mass. 125, 128.

In this case the defendant was more than a mere naked bailee. He exercised a dominion over the property destructive of it, and inconsistent with the plaintiff's ownership.

2. The fact that he was the servant of others who were themselves wrong-doers, and acted under their authority, cannot avail him though he may have been ignorant of their want of title to the property in question. Kimball v. Billings, supra; Coles v. Clark, 3 Cush. 399,

and cases there cited. *Hoffman v. Craow*, 22 Wend. 285; *Gilmore v. Newton*, 9 Allen, 171; *Freeman v. Underwood*, 66 Maine, 229, 233.

The stipulation of parties has settled the amount of damages to be recovered. Judgment for the plaintiffs for \$43.73, with interest thereon from the date of the writ.

PETERS, C. J., LIBBEY, EMERY, HASKELL and WHITEHOUSE, JJ., concurred.<sup>1</sup>

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## 298. FOULDES *v.* WILLOUGHBY

EXCHEQUER. 1841

8 M. & W. 540

TROVER for divers, to wit, two horses. Plea: Not guilty. The cause was tried before *Maule*, J., at the last spring assizes for Liverpool, when it appeared that the defendant was the occupier or manager of a ferry by means of steamboats over the river Mersey, from Birkenhead to Liverpool, and that on the 15th of October, 1840, the plaintiff had embarked on board the defendant's ferry-boat at Birkenhead, having with him two horses, for the carriage of which he had paid the usual fare. It was alleged that the plaintiff misconducted himself and behaved improperly after he came on board the steamboat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing-slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of a hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the steamboat, and was conveyed over the river to Liverpool. On the following day the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending

<sup>1</sup> [BRAMWELL, B., in *Burroughs v. Bayne* (1860. 5 H. & N. 296). I confess that there are some cases of a simple wrongful withholding, which may, according to the construction put upon that word, be called a conversion to a man's own use; because, what matters it, to one who may be the owner of the goods, how or why he is deprived of them? If a person detains a sheep belonging to me, what matters it to me whether he does so because he means to eat it, and does eventually eat it, or makes any other use of it? He has claimed a dominion over it inconsistent with mine. Suppose a man detains a picture for the pleasure of looking at it, and in order that it may form one of the ornaments of his dining-room, and does nothing to it but let it hang there; that is, to all intents and purposes, a conversion, according to law and good sense.]

for them and paying for their keep; and that if he did not send for them and pay for their keep, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold by auction. The defence set up at the trial was, that the plaintiff had misconducted himself and behaved improperly on board, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned judge told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steamboat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of the horses. The jury found a verdict for the plaintiff with £40 damages, the value of the horses.

In Easter term last, a rule was obtained calling upon the plaintiff to show cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages; against which rule

*W. H. Watson* and *Atherton* now showed cause. The evidence showed that which clearly amounted to a conversion, and it was not affected by the circumstance that the plaintiff had the means afterwards, if he had chosen, of obtaining the horses again. A wrongful removal of a chattel, even for a few yards, amounts in law to a conversion. [Lord ABINGER, C. B. According to that argument, every trespass is a conversion.] If a man takes and rides another person's horse without his consent, however short a distance, it is in law a conversion. [ALDERSON, B. In that case there is a user of the horse. Lord ABINGER, C. B. In this case the horses were turned out of the boat by the defendant because the owner refused to take them out, and not with any view to appropriate them to his own use, but to get rid of their owner. ALDERSON, B. If a man were to remove my carriage a few yards, and then leave it, would he be guilty of a conversion?] In the notes to *Wilbraham v. Snow*,<sup>1</sup> it is said, "Whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie; for one may qualify but not increase a tort;" citing *Bishop v. Montague*.<sup>2</sup> [Lord ABINGER, C. B. I cannot agree to that position, at least to the extent for which it is now used.] . . .

*Crompton*, in support of the rule. . . .

Lord ABINGER, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. It is a proposition familiar to all lawyers,

<sup>1</sup> 2 Saund. 470.

<sup>2</sup> Cro. Eliz. 824.

that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare asportavit is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned judge was wrong in telling the jury that the simple fact of putting these horses on shore by the defendant amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightfully or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. . . .

It has been argued that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and, in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all; but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. . . .

In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held that the single act of removal of a chattel, independent of

any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

[ALDERSON, B., GURNEY, B., and ROLFE, B., concurred with Lord ABINGER, C. B.]

## 299. ENGLAND v. COWLEY

EXCHEQUER. 1873

*L. R. 8 Exch. 126*

TROVER for household furniture. Plea: Not guilty by statute (11 Geo. II. c. 19, § 21). Issue.

The plaintiff was the holder of a bill of sale over the household furniture of Miss Morley, the tenant to the defendant of a house in River Terrace, Chelsea. The bill of sale contained the usual clauses enabling the plaintiff to take possession of and remove and sell the furniture in case of default upon Miss Morley's part in payment of the sum advanced. She having made default, the plaintiff put a man in possession early in August, 1872, and upon the 11th of August sent two of his men with vans to remove the furniture from the house. It was then after sunset. The men were met at the house by the defendant, the landlord, who alleged that half a year's rent was due and in arrear, and stated that he did not intend to allow the goods to be removed, as he meant to distrain on the day following. One of the men returned and informed the plaintiff of what had passed. The plaintiff thereupon went to the house himself, and was told by the defendant, who was in the passage, that he would not suffer any of the goods to be taken away until his rent was paid. The defendant had also engaged a policeman, whom he stationed outside, to prevent the removal of the goods. The plaintiff thereupon gave up the attempted removal and went away, leaving a man still in possession. The defendant did not himself actually take possession of or remove any of the goods upon this occasion. His object was to prevent the plaintiff's removing them, in order to distrain the next day at a legal hour.

The cause was tried before BRAMWELL, B., at the Surrey summer assizes, 1872. In summing up, the learned judge directed the jury in the following terms: "If you are of opinion that the defendant did not deprive the plaintiff of his goods, did not take possession of nor assume dominion over them, but merely prevented the plaintiff from removing them from one place to another, allowing him to remain in possession of them if he liked, then there is no cause of action." The jury answered

this question in favor of the defendant, and a verdict was entered for him accordingly, with leave to enter a verdict for the plaintiff for £40, the value of the goods, if the Court should be of opinion that the learned judge ought to have directed a verdict for the plaintiff. A rule was obtained in Michaelmas term accordingly, on the ground that the learned judge ought to have directed the jury that the conversion was proved.

*Holl* showed cause. . . . *Joyce*, in support of the rule. . . .

BRAMWELL, B. . . . I think no action is maintainable, because the defendant did not act, but only threatened that, in a certain event, he would do something. The plaintiff should either have proceeded with the removal of the goods, or at least have commenced to remove them, leaving the defendant to stop him at his peril, when there might have been a cause of action of some sort. But, further, even if the defendant had prevented the removal of the goods by physical force, I do not think trover would have been maintainable. The substance of that action is the same as before the Common-law Procedure Act, 1852, and although, in the form of declaration there given in sch. B, the words used are, "converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," the gist of the action is the conversion, as for example, by consuming the goods, or by refusing the true owner possession, the wrong-doer having himself at the time a physical control over the goods. Now here the defendant did not "convert" the goods to his own use, either by sale or in any other way. Nor did he deprive the plaintiff of them. All he did was to prevent, or threaten to prevent, the plaintiff from using them in a particular way. "You shall not remove them," he said, but the plaintiff still might do as he pleased with them in the house. Assume that there was actual prevention, still I think this action cannot be maintained. Take some analogous cases by way of illustration. A man is going to fight a duel, and goes to a drawer to get one of his pistols. I say to him, "You shall not take that pistol of yours out of the drawer," and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not. Or, again, I meet a man on horseback going in a particular direction, and say to him, "You shall not go that way, you must turn back"; and make him comply. Who could say that I had been guilty of a conversion of the horse? Or I might prevent a man from pawning his watch, but no one would call that a conversion of the watch by me. And really this case is the same with these. Illustrations of my meaning might be easily multiplied. The truth is, that, in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that something shall not be done by the plaintiff; he must say that nothing shall. Now here there was no interference with the plaintiff's rights, except the statement by the defendant that he would prevent the goods from being



removed. This is not sufficient to furnish a basis for the present action. For it must be remembered that if the defendant is liable at all, it is for the value of the goods. But how unjust that would be! The plaintiff's man was left in possession. Miss Morley could not legally take away the goods. If she did, the plaintiff could maintain an action against her for their wrongful removal. Yet he is also to be able to recover their full value against the defendant. . . .

MARTIN, B. I think this rule should be made absolute. The real question is whether the defendant "converted to his own use, or wrongfully deprived" the plaintiff of his goods. Now it appears that the plaintiff had a bill of sale over the goods of one Morley, whose landlord the defendant was. After sunset on the 11th of August, 1827, when a distress was impossible, the plaintiff, who had previously put a man in possession, went himself to the house with the view of removing the goods, there having been a default under the bill of sale. The defendant could not distrain that evening, but, in order to have the opportunity of distraining, he told the plaintiff he would prevent the goods being removed, and he took steps accordingly, placing a policeman to watch the house and to prevent the removal. I think this was a conversion. The plaintiff was not bound to resist the defendant, and to remove his goods at the peril of coming into collision with him. He was deprived, by the plaintiff's act, of the power over his goods which he was entitled to exercise. That is, in my opinion, enough to enable him to maintain this action. If the defendant had been in the room where the goods were, and had said to the plaintiff, "These goods shall not be removed," surely that would have been a "wrongful deprivation." The defendant was, in fact, not in the room but in the passage, with equal means, however, of stopping the removal. I can see no difference between the two cases. . . .

[POLLOCK, B., and KELLY, C. B., agreed with BRAMWELL, B.]

*Rule discharged.*

### 300. MORSE v. HURD

SUPREME COURT OF JUDICATURE OF NEW HAMPSHIRE. 1845

17 N. H. 246

TRESPASS, for taking and carrying away a carpet, on the 29th day of August, 1843. The writ was dated August 30, 1843. The plaintiff introduced evidence that the defendant, on the 29th day of August, having a writ against Ephraim Thayer, came into the shop kept by Thayer, and told him he had instructions to attach the carpet. Thayer informed the defendant that the carpet belonged to the plaintiff. The defendant then left, but shortly after returned and said he would attach it.

The carpet was in an inner room, and a witness testified that the defendant did not go into that room, and he did not know that the

defendant saw the carpet that day. The plaintiff also offered the return of defendant, as sheriff, on the writ against Thayer, as follows, namely: "Strafford, ss. Aug. 29, 1843. I have attached one carpet, the property of the within named Thayer, valued at ten dollars, and on the eighth day of September, 1843, I gave the within named Thayer a summons," etc. . . .

There was evidence to show that the carpet was the property of the plaintiff, and that Thayer carried on the shop, where it was at the time, as agent for him. The carpet remained at the same place until the 18th day of December following, when the defendant sold it on the execution which had issued against Thayer. . . .

*Marston*, for the defendant. There is nothing proved here that constitutes a trespass, and the action cannot be maintained. . . .

*Hale & Wiggin*, for the plaintiff. To maintain trespass de bonis asportatis, evidence of a public taking is not required. He who interferes with my goods, and, without delivery by me, and without my consent, undertakes to dispose of them as having the property general or special, does it at his peril, to answer to me the value of the goods in trespass of trover. . . . Trespass de bonis asportatis is maintained by proof that the defendant unlawfully exercised an authority over the chattels of another, against the will of the owner, though there was no manual taking or removal. . . .

WOODS, J. The defendant, having a writ which it was his duty, as a deputy sheriff, to secure by attaching the chattel in question, on the 29th of August, 1843, came into the shop of Thayer, adjoining the room in which the chattel at the time was kept, which room also appears to have been in the possession of Thayer, and gave notice to him of his instructions for attaching it. At the same time he made a return upon the writ, to the effect that he had attached the carpet, and afterwards returned the writ into court. Do these facts amount to evidence of a taking and carrying away of the chattel, as alleged in the declaration? It is apparent that the officer had access to and opportunity to attach the carpet, and he made return of the fact upon the writ.

In order that a chattel may be attached, it is only necessary that the officer have the possession and control of it. It is not necessary that he remove it, or even touch it; but if he have access to it, and manifest a purpose of exercising control over it, this is sufficient to disturb the possession of any one having had a prior custody of it, and to lay the foundation of an action in his favor, if such disturbance is not warranted by the occasion. *Odiorne v. Colley*, 2 N. H. Rep. 66; *Huntington v. Blaisdell*, id. 318. A cause of action is furnished, if the plaintiff's possession of the chattel has been disturbed, so that he could not, for the time being, had he chosen to do so, exercise that perfect control over the chattel which he might have done but for the adverse act of the party complained of; and the taking and carrying away, which the form of action requires to be alleged, is sufficiently established by the

proof of such disturbance of the owner's possession. In short, an attachment is perfected when the officer has obtained access to the goods with a purpose of attaching them. Such attachment vests the possession in the officer, so that he may maintain an action for the disturbance of it. The possession of the officer excludes the possession of all others; and the owner of chattels, whose possession is disturbed, may maintain an action of trespass de bonis asportatis against him who so disturbs it without right. *Miller v. Baker*, 1 Met. 27. . . . There must be *Judgment on the verdict.*

## 301. LORING v. MULCAHY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1862

3 All. 575

TORT for the conversion of goods which had been stolen from the plaintiff's shop, and carried to the defendant's house, with his knowledge, and left in his possession, and afterwards taken away and secreted by the same persons who carried them there. At the trial in the Superior Court, *Putnam*, J., instructed the jury that "if the defendant received these goods into his possession and control, knowing that they were stolen, or that they were not the property of the parties who brought them, and that they came unlawfully by them, it was a conversion by the defendant." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*W. P. Webster*, for the defendant.

*L. H. Wakefield*, for the plaintiff.

METCALF, J. These exceptions must be sustained. On the evidence therein stated, the defendant did not convert the goods to his own use, but was a mere depositary thereof,—a naked bailee. He did not assume to dispose of them as if they were his own, nor did he withhold them from the plaintiff on his demand. Non constat that he would not readily have restored them to the plaintiff if he had been required so to do. It does not appear that he had any intention to conceal the property from the owner, or that he made any agreement with the bailors to secrete it. In *Simmons v. Lillystone*, Baron Parke says: "In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it." See also *Polley v. Lenox Iron Works*, and cases there cited; *Fouldes v. Willoughby*. If, on the evidence in this case and the instructions given to the jury, the defendant was rightly found guilty of converting the goods to his own use, then would an inn-keeper, who should receive into his stable a horse that he knew to be stolen, and should permit the person who brought him there to take him away, be guilty of converting the horse to his own use.

*Exceptions sustained.*

302. POWELL *v.* SADLER

NISI PRIUS. 1806

*Paley, Principal and Agent* (3d edition), 80; reprinted from *Ames' & Smith's Cases on Torts*, 1st ed., vol. I, p. 297

TROVER for three horses. Plaintiff had sent the horses to defendant to be sold the next day; defendant's clerk told him the next day would not be so good a time to sell them as the following sale day; in consequence of which the plaintiff said he would send for them back again, which he did the next evening, but they had been sold. In a conversation concerning the sale, the defendant said, "it was a mistake of his clerk, for which he was not answerable."

*Garrow*, for the defendant, insisted that there was no evidence of a conversion.

LORD ELLENBOROUGH, C. J. I am of opinion that a conversion has been proved; the horses were intrusted to the defendant for a qualified purpose, which he has admitted was not conformed to. Where goods are committed to one for a qualified purpose, any deviation from it in the disposition of them is a conversion; as if a man borrow a horse to ride, and leave him at an inn, it has been held to be a conversion.

303. LAVERTY *v.* SNETHEN

COURT OF APPEALS OF NEW YORK. 1877

68 N. Y. 522

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, affirming a judgment of the General Term of the Marine Court of the city of New York, which affirmed a judgment in favor of defendant, entered upon a verdict.

This action was for the alleged conversion of a promissory note, the property of plaintiff, made by one Holly, payable to plaintiff's order.

The facts appear sufficiently in the opinion.

*James C. Carter*, for the appellant. Defendant's act in parting with the note did not amount to a conversion. . . .

*Samuel Hand and Patterson & Major*, for the respondent. Defendant was liable for a conversion. . . .

CHURCH, Ch. J. The defendant received a promissory note from the plaintiff made by a third person and indorsed by the plaintiff, and gave a receipt therefor, stating that it was received for negotiation, and the note to be returned the next day or the avails thereof. The plaintiff testified in substance that he told the defendant not to let the note go out of his reach without receiving the money. The defendant,

after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it discounted and return the money to defendant, and he [Foote] took away the note for that purpose. Foote did procure the note to be discounted, but appropriated the avails to his own use.

The Court charged that if the jury believed the evidence of the plaintiff in respect to instructing the defendant not to part with the possession of the note, the act of defendant in delivering the note, and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. . . .

Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. (Bouv. Law Dict., title Conversion.) Savage, Ch. J., in *Spencer v. Blackman* (9 Wend. 167), defines it concisely as follows:

"A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods."

In this case the plaintiff placed the note in the hands of the defendant for a special purpose not only, but with the restricted authority (as we must assume from the verdict of the jury), not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful, because contrary to the express directions of the owner. The plaintiff was entitled to the absolute dominion over this property as owner. He had the right to part with so much of that dominion as he pleased. He did part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession and beyond his reach was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property which resulted in loss, and that interference and disposition constituted, within the general principles referred to, a conversion.

And the authorities, I think, sustain this conclusion, by a decided weight of adjudication. A leading case is *Syeds v. Hay* (4 T. R. 260), where it was held that trover would lie against the master of a vessel who had landed goods of the plaintiff contrary to the plaintiff's orders, though the plaintiff might have had them by sending for them and paying the wharfage. Butler, J., said:

"If one man who is intrusted with the goods of another put them into the hands of a third person, contrary to orders, it is a conversion."

This case has been repeatedly cited by the Courts of this State as good law, and has never to my knowledge been disapproved, although it has been distinguished from another class of cases upon which the defendant relies, and which will be hereafter noticed. In *Spencer v. Blackman* (9 Wend. 167), a watch was delivered to the defendant to have its value appraised by a watchmaker. He put it into the possession of the watchmaker, when it was levied upon by virtue of an execution not against the owner, and it was held to be a conversion. Savage, Ch. J., said:

"The watch was intrusted to him for a special purpose, to ascertain its value. He had no orders or leave to deliver it to Johnson, the watchmaker, nor any other person."

So, when one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for a conversion. (*Wheelock v. Wheelwright*, 5 Mass. 103.) So, when a factor in Buffalo was directed to sell wheat at a specified price on a particular day, or ship it to New York, and did not sell or ship it that day, but sold it the next day at the price named, held that in legal effect it was a conversion. (*Scott v. Rogers*, 31 N. Y. 676; see, also, Addison on Torts, 310, and cases there cited.)

The cases most strongly relied upon by the learned counsel for the appellant are *Dufresne v. Hutchinson* (3 Taunt. 117) and *Sarjeant v. Blunt* (16 J. R. 73), holding that a broker or agent is not liable in trover for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is that in the latter the broker or agent did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only and was liable for misconduct, but not for conversion of the property, a distinction which, in a practical sense, may seem technical, but it is founded probably upon the distinction between an unauthorized interference with the property itself, and the avails or terms of sale. At all events, the distinction is fully recognized and settled by authority. In the last case *Spencer, J.*, distinguished it from *Syeds v. Hay* (supra). He said:

"In the case of *Syeds v. Hay* (4 Term R. 260), the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf."

The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he would not have been liable in this action, but he had no right to deliver the note to Foote to take away, any more than he had to pay his own debt with it. Morally, there might be a difference, but in law both acts would be a conversion, each consisting in exercising an unauthorized dominion over the plaintiff's property. *Palmer v. Jarmain* (2 M. & W. 282) is plainly distinguish-



able. There, the agent was authorized to get the note discounted, which he did, and appropriated the avails. Parke, B., said:

"The defendant did nothing *with the bill* which he was not authorized to do." . . .

The result of the authorities is that if the agent parts with the property, in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. It follows that there was no error in the charge. The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it. (31 N. Y. 490.). . . . The judgment must be affirmed.

All concur. *Judgment affirmed.*

### 304. CARNEY v. REASE

SUPREME COURT OF APPEALS OF WEST VIRGINIA. 1906

60 W. Va. 676, 55 S. E. 729

ERROR to Circuit Court, Wetzel County.

Action by J. L. Carney against A. B. Rease and others. Judgment for plaintiff, and defendants bring error. Affirmed.

*W. G. Snodgrass* and *E. L. Robinson*, for plaintiffs in error. *E. B. Snodgrass*, *M. R. Morris*, and *Pressley D. Morris*, for defendant in error.

BRANNON, J. Rease, Heasley, and Dale, partners in drilling oil wells, hired of Carney a horse, to be used in a wagon with a horse of the firm in hauling tools and supplies in the oil field. The horse was so used five days, and returned to Carney. Three days later the firm sent its driver to him to hire the horse of Carney again. The horse was wanted, along with a horse of the firm, to haul an oil well stem. Carney says it was to be hauled to Littleton, nine miles; whilst the driver, introduced by the plaintiff, says it was to be used to haul the stem to the Johnston well, four miles further than Littleton. On Friday the horse worked in the wagon in hauling the stem to Littleton. On the next day it was worked hauling the stem to the Johnston well, and in hauling another stem for repair from the Johnston well to Littleton. The team staid over Saturday night at Littleton. Sunday morning the horses started from Littleton back home to Carney's, drawing two empty wagons. These three days were very hot July days. When the team came to a point eight miles from Littleton, the Carney horse died. Carney

brought suit before a justice, which went by appeal to the Circuit Court of Wetzel County, and, upon the close of the plaintiff's evidence, the defendants, offering no evidence, demurred to the plaintiff's evidence, and the Court having given judgment for the plaintiff, the defendants brought the case here.

1. The plaintiff claims that the horse was hired only for the trip from Carney's to Littleton, and that the use of the horse for the additional distance of four miles and return, hauling a stem, was outside the contract, a misuse of the horse, and that that further use alone, without proof that the horse's death came from that additional service, renders the defendant liable. Here is a volume of conflicting cases and texts. There is much authority for the position that when an animal is hired for a fixed time, and the bailee continues to use him longer, or where he is hired to drive to a certain place by a certain route, and the bailee drives him to a different place, or by a different route, or beyond the place contemplated by the contract, such departure from the contract is a conversion of the horse, for which the owner may maintain trover. 2 Cyc. 312; 3 Am. & Eng. Ency. 12 (2d Ed.) 752. If a loss of the animal occur, so that it cannot be returned, under this rule the hirer would be responsible. Story on Bailments, 413; 1 Tucker, book 2, 359. Likely this is the rule sustained by greater authority. Under this rule, mere departure from the contract makes the party liable, no matter whether the loss came from such departure or not. But another line of cases holds that such departure from the contract does not alone of itself impose liability, but it must appear that the loss was because of such departure. Van Zile on Bailment, 127; *Farkas v. Powell* (Ga.) 13 S. E. 200, 12 L. R. A. 397. Which line does our law follow? In *Spencer v. Pilcher*, 8 Leigh (Va.) 565, a slave was hired with the understanding that he was to be employed on a farm, whereas he was taken on a voyage on a boat down the Ohio and Mississippi rivers, and was drowned on the voyage. This case cannot be quoted for the rule of absolute liability because of mere departure from the contract, for the reason that the slave perished while being used in violation of the contract. The same as to *Harvey v. Skipwith*, 16 Grat. (Va.) 393, where a slave was hired under an explicit agreement not to use him in blasting rock, but he was so used, and in such use was injured from a blast. In *Harvey v. Epes*, 12 Grat. (Va.) 153, is a full discussion of this subject. Slaves were hired to be worked on a railroad in Amelia County, but were worked on the railroad in Chesterfield County, and, while working in Chesterfield, sickened and died. The Court held that the working of the slaves in Chesterfield was not, of itself, a conversion making the hirers immediately responsible for their value, whether occasioned by such wrongful act or not; but that, to make them liable, it must be found that the death was occasioned by the act of removing and working the slaves in Chesterfield County. So, our law is that mere deviation from the contract will not alone render the hirer liable for

the loss of a hired horse. The opinion in *Harvey v. Epes*, construes, I think correctly, the case of *Spencer v. Pilcher*, as holding this rule.

Counsel for Carney rests his case largely on the rule of absolute liability; but I do not think even if there were a contract limiting the use of the horse, there could be a recovery on that ground, since it does not appear that the death of the horse occurred during, or came from, the use of the horse on the trip from Littleton to the Johnston well. There is no evidence of misuse of the horse on the extra trip. True, it is proven that the horses were heated that hot day; but that is very usual, not abuse. That does not create liability. There is no showing that the death of the horse was caused by the extra trip. That trip was in the same line of work for which the horse was hired. He did not die during that trip. Hence, under *Harvey v. Epes*, there can be no recovery because of such deviation from the contract. Likely, if the horse had died while on the extra trip, the presumption would be that the extra trip was the cause of the death, throwing the burden on the hirer to disprove that fact. The doctrine of *Harvey v. Epes* is considered as sound in a note by Freeman in 12 Am. Dec. 621. I consider the other rule extreme and hard. See *Doolittle v. Shaw* (Iowa) 60 N. W. 621, 26 L. R. A. 366, 54 Am. St. Rep. 562, citing the *Harvey Case*, and holding its principles. President Lincoln, as counsel, successfully maintained this position in *Johnson v. Weedman*, 5 Ill. 495. . . .

2. Whilst so far there is no ground of recovery, we think there is a ground for recovery. If it appears that the driver misused the horse, negligently used it, there is a liability. There is evidence that the horse was hot and tired when it got back to Littleton Saturday night. The driver, Swick, says so, and thus was apprised of the fact that the heat and labor affected the horse. Next day on the road, in great heat it is proven by Musgrave that as the team passed his house he saw that the horse was ailing, lagging back on the singletree, and asked Swick what was the matter with it, and Swick replied that the horse was sick, "given out," and they wanted to get him home, if they could, "but didn't know whether they could or not." Musgrave said the horse was just about able to walk. Postlewait states that Swick told him that, on the trip, going over to Littleton and the Johnston well, the horse got too hot, and he brought him back to Littleton, and started next morning and noticed coming up Knob Fork hill that the horse "began to fag." This was before the team reached Musgrave's. Thus, Swick knew the horse was hot Saturday, and on Sunday knew the horse was exhausted and sick from the terrible heat or other cause. We are allowed to say that he must have been very sick, as he died only a mile and a half from Musgrave's. Does it need authority to show that it was Swick's duty before he reached Musgrave's, and surely at Musgrave's, to stop using the horse, and unhitch him from the two wagons? Story on Bailments, 405, says that if a hired horse is exhausted the hirer is bound to abstain from using the horse, and if he

pursues his journey with the horse, he is liable for all the injury occasioned thereby. He says not only that, but also that the hirer must procure a farrier if to be had. The same is laid down as to a sick horse in 2 Cyc. 312, note. See *Higman v. Camody*, 57 Am. St. Rep. 33. But Swick drove the horse on that boiling day a mile and a half, the last half mile up a hill of heavy grade, until he died. The testimony of Swick betrays a consciousness that he had not used the horse right.

For this reason of negligent misuse of the horse we affirm the judgment.

305. *Eason v. Newman*. (King's Bench, 1595. Cro. El. 495.) Action on the case upon trover. A special verdict was found, that one Pepper was possessed of those goods, and the defendant found them; and Pepper made the plaintiff his executor; and that the defendant, knowing them to appertain to the plaintiff, denied to deliver them to him upon his request: and, whether there were a conversion without any act done? was the question. — And all the Justices, Popham absente, held, that it was a conversion by the sole denial. — But being afterwards moved again, POPHAM held it to be no conversion: but it was cited at the Bar, that, 23 Eliz. in this Court, it was ruled to the contrary. Et adjournatur.

306. CROKE, J., in *Isaack v. Clark*. (1614. Bulstr. 306, at 311.) A bare denial shall not make a conversion; neither shall there be any conversion so long as the privity of the bailment remains; but destroy this, and then otherwise it shall be. The baylee here is as a possessor bonae fidei. To make a conversion, there ought to be a pertinacy, and also a contumacy in the manner of the denier, "contradixit, & ad huc contradicit" We are to see and to examine when the wrong begins to the party. The wrong begins by the denier; by this denier, he is possessor malae fidei; by this denier the privity of bailment is altogether destroyed. If they are bona peritura, as sower wine, corn musty, this denier keeps the party from his possession, and this is a wrong.

Littleton in his chapter of Rents, saith, that a denier shall make a disseisin; if it be so in real things, a fortiori it shall be so in personals.

### 307. BAKER v. BEERS

SUPREME COURT OF NEW HAMPSHIRE. 1886

64 N. H. 102, 6 Atl. 35

TROVER, for twelve tons of hay; tried by the Court. The Court found for the plaintiff, and the defendant excepted.

*C. A. Dole*, for the defendant. The evidence of conversion consisted in (1) forbidding the sale by the officer at the time and place first appointed; (2) and on two or three occasions, after the execution sale, notifying the plaintiff that he must not remove the hay, and claiming that he, the defendant, bought the hay of the plaintiff with the farm.

It seems to be a complete answer to the first to say that it was no conversion, as the case shows that at a subsequent date the sale was consummated, and the plaintiff brought the hay, and until he bought it he had no interest in the hay which would enable him to maintain trover for it. . . . Merely forbidding the owner to remove his property which is in possession of a third party, and especially where the property was left by the owner in the possession of such third party, is not exercising such a dominion over the property as would enable the owner to maintain trover against the party thus forbidding him; and the fact that he stated that he bought the property of the owner at a prior date will not change the case.

*E. D. Baker*, for the plaintiff. A deed of a farm does not convey any title to hay harvested and stored in the barn on such farm. A wrongful sale of another's goods is a conversion of them; and though the custody of them remain unaltered, yet the delivery of the documentary evidence of title and the receipt of the value completes the act of conversion. 2 Greenl. Ev., s. 642. The sale of property to a third party without right constitutes conversion. *Philbrook v. Eaton*, 134 Mass. 398. Assuming to one's self the property, and the right of disposing of another man's goods, is a conversion. *Gilman v. Hill*, 36 N. H. 311, 324. The owner of personal property may maintain an action for its conversion by proof that the defendant has previously refused to deliver it to any person who had a right to demand it, although the plaintiff was not then the owner of it. *Delano v. Curtis*, 7 Allen, 470.

SMITH, J. August 17, 1878, the plaintiff conveyed by quitclaim deed the Bosworth farm to the defendant, the deed containing no special reservation of any hay, or the right to remove any. October 25, 1878, W. O. Bosworth and others conveyed the Bosworth farm to the defendant, not reserving any hay, or the right to remove any. On the same day, by an agreement in writing, with provisions by which Bosworth might be entitled to a deed of the farm, the defendant leased the farm to Bosworth, who was then in the occupation of it, and sold to him all his interest in the hay thereon. July 29, 1878, the plaintiff attached all the hay in the two barns on the Bosworth farm, as the property of Bosworth, on a writ against Bosworth and others, the officer leaving a copy of the writ and of his return with the town clerk. The plaintiff recovered judgment and took out execution October 9, 1878; and October 18 the officer advertised the hay in the south barn for sale. At the time and place advertised the defendant attended and forbade the sale by the officer. The sale was thereupon adjourned from time to time until November 15, 1878, when the old hay and one undivided half of the new hay in the south barn was sold by the officer to the plaintiff. On two or three occasions after the execution sale, the defendant notified the plaintiff that he must not remove the hay, claiming that he had bought it of the plaintiff with the farm. These conversations occurred away from the farm. The defendant was not in possession

of the farm after October 24, 1878, and did not after that date sell, move, use, or in any way meddle with hay except as above stated. Bosworth used the hay before the next spring. The plaintiff never personally demanded it of any one in possession of the farm or barns. The question on these facts is, whether there was evidence from which it was competent to find a conversion of the hay by the defendant.

1. It having been lawfully attached, the officer had constructive possession of it, equivalent in law to actual possession until the sale. *Johnson v. Farr*, 60 N. H. 426. . . . If the defendant's act in forbidding the sale was a conversion, it gave the officer a cause of action; but it was not assignable, and the plaintiff cannot rely upon a conversion which took place before he acquired a title to the property. *Tome v. Dubois*, 6 Wall. 548, 554. But the purchase of the hay by the plaintiff from the officer who had the legal custody of it gave him a good title to it, and the right to its immediate possession. Delivery of the hay by the officer was not necessary to constitute a valid sale. The legal right to the possession drew to it the possession. *Balme v. Hutton*, 9 Bing. 471, 477.

2. As the defendant is not liable to the plaintiff by reason of anything he did in regard to the hay before the sale, the question then is, whether the notification to the plaintiff after the sale not to remove it, accompanied with a claim by the defendant that he bought it with the farm, was evidence of a conversion. Any distinct act of dominion wrongfully exerted over another's property in denial of his right, or inconsistent with it, is a conversion. It is not necessary that there should be a manual taking of the property. If the wrong-doer exercises a dominion over it in exclusion or defiance of the owner's right, whether it be for his own or another's use, it is in law a conversion. *Cooley*, Torts, 448; 2 *Greenleaf*, Ev. s. 642. *Evans v. Mason*, 64 N. H. 98.

"The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods? And he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them." *Holt*, C. J., in *Baldwin v. Cole*, 6 Mod. 212.

Although the defendant did not have the possession of the hay after the sale, or the right to control the movements of Bosworth, there was evidence that both understood after the sale that Bosworth was authorized by the defendant as vendor to use the hay; and that was a conversion by the defendant. He had sold it for a price to Bosworth. His claiming that he bought it of the plaintiff, and his forbidding the plaintiff to remove it, then in the actual possession of Bosworth, was evidence from which it was competent to find that his purpose was to enable his vendee to consume the hay, and that, for the purpose of this case, its conversion by his vendee, authorized by the vendor, was the act of the vendor. In authorizing and aiding Bosworth to convert it to his own use, he became



liable to the plaintiff in trover. *Flanders v. Colby*, 28 N. H. 34. When several join in the conversion, trover will lie against either of them. *Pattee v. Gilmore*, 18 N. H. 460. There was evidence from which it was competent to find a conversion by the defendant. *Exceptions overruled.*

BLODGETT, J., did not sit; the others concurred.

### 308. DOZIER *v.* PILLOT

SUPREME COURT OF TEXAS. 1891

79 *Tex.* 224, 14 *S. W.* 1027

ERROR from District Court, Harris County.

*E. P. Turner*, for plaintiffs in error. *F. A. Schaeffer* and *E. P. Hamblen*, for defendant in error.

GAINES, J. This suit was brought by appellants as husband and wife to recover of appellee damages for the alleged conversion by him of certain personal property belonging to the wife. The facts, as disclosed by the evidence upon the trial, were that, on the 5th of February, 1886, Pauline Dozier, joined by her husband, executed a deed of trust upon the property to secure Pillot in payment of a promissory note for \$600, and interest, executed the same day, and due one year after date. The trustee was empowered to sell upon default; but the mortgage provided that, until default, the mortgagors should have the possession, use, and control of the mortgaged property. The property consisted of certain bar furniture and fixtures, and was, at the time the mortgage was executed, in a certain room belonging to Pillot, which the appellant John Dozier was holding under lease from month to month. In May, 1886, Dozier leased the mortgaged property to Wolfe & Gentry for the term of one year, and by his procurement Pillot leased them the room in which it was situated. On September 15, 1886, Wolfe & Gentry "sold out the stand" to Kendall & Jones, moved to another house, leaving the bar furniture and fixtures as they were when they took possession. Wolfe & Gentry notified Dozier that they had abandoned the property, since they could not pay the hire agreed upon; and Kendall & Jones informed him that they had bought the lease of the room, and had closed it up, in order to get rid of the competition, and that they had no use for the furniture. Such being the state of affairs, Dozier, according to his version of the transaction, demanded of Pillot the privilege of moving the property to a saloon on another street, and Pillot refused to give him permission to do so, unless he would give a bond, with sureties, conditioned to pay the note when it fell due, or else would pay the note then, he agreeing to waive the interest. This, Dozier declined to do. Pillot's version of the affair is different in some respects, but he admits that he refused to consent for Dozier to move the property. The note not having been paid at maturity, the mortgaged chattels were sold by the trustee, and brought only \$15 over the

debt, interest, and expenses of the sale. There was testimony tending to show that the property was worth largely more than the sum for which it was sold.

The appellants based their claim of a conversion of the property, and for a recovery of damages, upon appellee's refusal to consent to its removal. We are of opinion that the evidence, taken in its most favorable aspect, does not show a conversion. If Pillot had had possession of the furniture and fixtures, the case would have been different. When the property of one person is held by another, who refuses to deliver, it is to be presumed that the owner cannot regain possession without incurring the danger of a breach of the peace. He may act upon this presumption, and is not required to make the attempt; hence the refusal of the holder is evidence at least of a conversion. *Robinson v. Burleigh*, 5 N. H. 225. So, if the property be in the house of another, the owner cannot repossess himself of it against such other's will, without committing a trespass; and hence a refusal to deliver may be deemed a conversion. But in this case the room in which the property was placed was leased to Kendall & Jones, and was as absolutely under their control as if they held it by fee-simple title. Their refusal to permit Dozier to enter to retake his property, he could not have disregarded, without a violation of law. During the continuance of the lease, Pillot had no control over it, so far as the testimony discloses, and his refusal Dozier was not bound to respect.

We have examined the authorities cited by appellants' counsel, and none of them are in conflict with the principles here announced. It is necessary to consider in detail the assignments of error. The evidence, viewed in the most favorable light for the plaintiffs, did not warrant a recovery. No other verdict, except one for the defendant, could have been properly returned under the testimony, and it is immaterial whether the charge of the Court was in all respects correct or not. The judgment is affirmed.

### 309. GASKILL *v.* BARBOUR

SUPREME COURT OF NEW JERSEY. 1898

62 N. J. L. 530, 41 Atl. 700

ON demurrer to amended declaration.

Before MAGIE, Chief Justice, and Justices DIXON, LUDLOW and COLLINS.

For the demurrant, *Eugene Stevenson*. Contra, *Babbitt & Lawrence*.

The opinion of the Court was delivered by

COLLINS, J. By the declaration demurred to it is averred that on December 1, 1893, the Burlington Carpet Company mortgaged to the Camden Safe Deposit and Trust Company, as trustee, among other

goods and chattels, two hundred and thirty-seven copper rolls; that on August 7, 1894, the Camden company was lawfully possessed as of its own property as such trustee of the said rolls, and, being so possessed, casually lost the same out of its possession, and that on that day the same came to the possession of the defendants by finding; that on August 10, 1896, the Court of Chancery relieved and discharged the Camden company from all further performance of the trust under the mortgage, and substituted the plaintiff as trustee and ordered assignment to him of the mortgage, and that afterwards the same was so assigned. It is then charged that before the plaintiff succeeded to the trust the defendants converted and disposed of the rolls to their own use, to the damage of the plaintiff as trustee, etc.

If the plaintiff is to be considered as the assignee of a chose in action, he must fail, because there is no authority for his maintaining suit thereon in his own name. . . .

On the other hand, if the plaintiff, as we think is properly the case, is to be considered as succeeding to the legal title of chattels by assignment of the mortgage, he has no standing to maintain trover when he alleges a conversion prior to his right of possession. The holder of a mortgage entitled to possession may sustain trover for the mortgaged chattels, and the mere statement of a mortgage without naming its terms will imply a right of possession. But it is fundamental in trover that the plaintiff must have had his right, whatever its character, at the time of the conversion. A subsequent acquisition of title will not support the action. Chit. Pl. 148, 149 (notes 2 and 3, 11th Am. ed.); *Overton v. Williston*, 31 Pa. St. 155, 160. Titles to chattels may be transferred by an owner or mortgagee though he be out of possession, and the transferee may bring trover against the possessor, but only if the chattels are withheld from him after demand, or if in any other way the facts admit of an allegation of conversion after the plaintiff's acquisition of title, although it may be a new conversion.

The nearest approach to a precedent for the plaintiff that I have found is *Tome v. Dubois*, 6 Wall. 548, where it is held that conversion does not deprive the owner of personal property of the power of making a valid sale, as he may, if he see fit, waive the tort; and that in such a case the vendee may sue in trover, after demand and refusal. The facts proved were that logs had been sawed into lumber by the defendant before the sale to the plaintiff. The plaintiff demanded the lumber sawed and unsawed, and was refused. On these facts the Supreme Court of the United States sustained trover. All that appears in the reported case as to the allegations of the declaration is the recital that the action was "to recover damages for the conversion by defendant of certain pine saw-logs and certain planks which the plaintiffs alleged to be their property." It is plain that this decision is no authority for the maintenance of trover where the conversion alleged was admittedly prior to the plaintiff's right of possession. This is well shown by Mr.

Justice Gray in *Clark v. Wilson*, 103 Mass. 219, a decision useful on both branches of the question argued before us. The learned judge says:

"A transfer of property from a rightful owner out of possession will doubtless pass the title and enable the assignee, upon demand and refusal, to sue a wrongful holder, in trover, as for a new conversion (citing *Tome v. Dubois*, *supra*, and other cases); but it does not destroy the right of action for the previous tort, nor, if the property has meanwhile been diminished in value by the act of the wrongdoer or otherwise, lessen the measure of his liability; nor can it consistently with the rules of the common law transfer a personal right of action, for a tort, to one who at the time of its commission was not the party injured, so as to enable him to sue for the tort in his own name."

The decision supported a suit in trover in the name of the former owner who was such at time of conversion, asserting, however, the right to control it in the interest of the person really entitled to the damages.

The demurrer will be sustained, with leave to the plaintiff, on payment of costs, to amend either by a change, in the summons and declaration, of the name of the plaintiff, or by a change in the allegation of the declaration from one of conversion before to one of conversion after the accrual of the plaintiff's title, if the fact so warrants, and otherwise as he may be advised.

### 310. DIXIE *v.* HARRISON

SUPREME COURT OF ALABAMA. 1909

— *Ala.* —, 50 *So.* 284

APPEAL from Circuit Court, Marengo County; W. W. QUARLES, Special Judge.

Action by Josh Dixie against W. C. Harrison. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The special pleas are as follows: "(3) That the plaintiff voluntarily surrendered the mule, for which damage is now sought, to the defendant. . . .

(5) That defendant sold mule in controversy to one J. M. Moore, and took a mortgage on the said mule for the purchase money, and that when said mortgage became due the said Moore defaulted in the payment of the same, and that the defendant sent his agent to the said Moore, after the maturity of said mortgage, for the mule, and that the said Moore told his said agent that the plaintiff then had said mule, and for the agent to return the following day and he could get the mule; that the said agent did return the day following; that Moore then informed him that the plaintiff had said mule, and to go and get him; that said agent went to the plaintiff, and told plaintiff that he had come for the mule, whereupon plaintiff gave the said agent of the defendant

the said mule of his own accord and voluntarily. (6) That the defendant surrendered possession of the said mule to the plaintiff voluntarily, and that prior to any demand for the return of said mule and to the bringing of this suit, and before the defendant knew the plaintiff claimed said mule, the defendant sold said mule, and does not now know where said mule is; that plaintiff surrendered said mule in the first part of the year 1906, and did not make a demand upon defendant for the same until more than six months thereafter."

Motion was made to strike these pleas, and after it was overruled the following demurrers were filed: "(1) The pleas are no defense to this suit. . . . (4) Because plea 5 does not allege that plaintiff had knowledge of the mortgage taken by the defendant to secure the purchase price of said mule, and does not allege that same was recorded before plaintiff purchased said mule. . . ."

*George Pegram*, for appellant. *Elmore & Harrison*, for appellee.

MAYFIELD, J. The complaint in this cause, as last amended, consisted of six counts, designated as 1, 2, 3, 4, A, and B. Counts 1, 2, and 3 were in trespass, for the wrongful taking of one bay mare mule. Count 4 was in trover, for the conversion of the same mule. Counts A and B were also in trespass, count A setting up the facts constituting the trespass. To this complaint defendant filed six pleas. . . . The plaintiff moved to strike the special pleas 3, 4, 5, and 6 upon the grounds set up in the motion. The Court overruled the motion, and the plaintiff excepted. The plaintiff then demurred to pleas 4, 5, and 6, which demurrers, being duly considered, were overruled by the Court. The pleas and demurrers were refiled after the complaint was amended, with the same action, as to the amended complaint and the pleas and demurrers thereto. The trial was had upon the general issue and these special pleas, and resulted in a verdict and judgment for the defendant, from which plaintiff appeals. . . .

Upon the undisputed evidence in this case the plaintiff was clearly entitled to the general affirmative charge upon the count in trover; the special pleas being eliminated, as they should have been, upon the motion or demurrer of the plaintiff thereto. The evidence is undisputed that the plaintiff purchased the mule in question from one Moore; that Moore had purchased the mule from the defendant prior to the time he sold it to the plaintiff; that Moore executed to the defendant a mortgage upon the mule to secure the purchase price; and that this mortgage was not recorded until after the mortgagor, Moore, had sold the mule to the plaintiff, and there is no evidence that the plaintiff had any actual knowledge or notice of the existence of this mortgage at the time he purchased the mule. Section 1009 of the Code of 1896 provided, among other things, that conveyances of personal property to secure debts or to provide indemnity were inoperative against creditors or purchasers without notice until recorded, etc. He was clearly a bona fide purchaser for value without notice of the mortgage, and the facts are un-

disputed that the defendant sent an agent and took the mule from the possession of the plaintiff after his title was perfect thereto, and that defendant afterwards converted the mule by selling it or otherwise disposing of it. . . .

There is no phase of the evidence which tends to show that the plaintiff in any way estopped himself from maintaining this action. The testimony of the defendant's son upon this subject is as follows: That he went to the plaintiff and asked for the bay mare mule which Mr. Moore told him to get from Josh, and that Josh, the plaintiff, delivered the mule into his possession of his own accord and voluntarily; that witness then took the mule and delivered same to defendant. The testimony of the plaintiff upon this subject is as follows:

"Mr. Neal Harrison (son of defendant) rode up to where the mule was, and caught hold of the bridle, and commenced unhitching her, and took her out of the plow. I went up there where he was, and asked him what he was doing. He said his papa sent him after the mule. I told him that the mule was mine, and that I had paid Mr. Moore, and he said he was going to take the mule, and I helped him unhitch her then because I did not want to be bothering any white folks."

This was all the evidence as to the taking. The defendant, among other things, testified that after his son delivered the mule to him he kept the same five or six weeks, and then sold her for \$100, and that he received a letter from Josh Dixie, the plaintiff, asking him to pay for the mule or to return it. . . .

The trial Court, at the request of the defendant in writing, charged the jury, first, that unless a demand was made on defendant before the commencement of the suit the plaintiff could not recover for conversion; and, second, that, if the mule was freely and voluntarily delivered to Neal Harrison by plaintiff, then he could not recover in trespass. Both of these instructions were erroneous.

1. Under the undisputed facts in this case, no demand was necessary to support trover. Even if it had been a case in which a demand was necessary the undisputed evidence showed that there was a sufficient demand (see defendant's own testimony, where he says that he received a letter from Josh Dixie asking him to pay for the mule or return it). But a demand in an action of trover is only necessary where the taking was rightful, and where a demand and refusal are necessary to constitute a conversion. This was clearly not a case in which any demand was necessary, nor does it constitute a waiver of the right of action to demand payment for property converted. *Baker v. Hutchinson*, 147 Ala. 637, 41 South. 809; *Williams v. McKissack*, 117 Ala. 441, 22 South. 489. In actions of trover, where there has been a wrongful assumption of property by the defendant which is of itself a conversion, no demand is necessary before suit brought. *Brown v. Beason*, 24 Ala. 466; *Rhodes v. Lowery*, 54 Ala. 4.

2. The Court was also clearly in error in charging the jury that, if



the plaintiff freely and voluntarily delivered the mule to the agent of the defendant, then he could not recover in trespass. The mere fact that the plaintiff did not resist or object to the taking could not make the taking rightful which was otherwise a trespass. If the plaintiff had induced the defendant to take the property, then it would be a defense to trespass; but there is no evidence tending to show that he induced the taking. The strongest phase of it is that he did not resist or object. *Smith v. Kaufman*, 94 Ala. 364, 10 South. 229. For this reason special pleas Nos. 3, 4, and 6 were wholly insufficient. Plea No. 5 was also insufficient for the reason that it did not deny the plaintiff's title to the mule, the subject-matter of the suit, nor did it show that the mortgage under which the defendant claimed title was recorded prior to the acquisition of the plaintiff's title, nor did it show that plaintiff had any actual notice of the mortgage. As stated above, it would not have been error to strike pleas 3, 4, and 6 from the record upon the motion of the plaintiff; and, while it might not have been reversible error for the Court to refuse the motion to strike and thus put the plaintiff to a demurrer, it was clearly reversible error to refuse the motion to strike and to overrule the demurrers thereto, and allow the cause to be tried upon wholly immaterial issues such as these pleas raise.

It is not necessary to consider the other assignments of error, which will probably not be raised upon another trial.

For the errors mentioned, the judgment is reversed, and the cause is remanded.

*Reversed and remanded.*

DOWDELL, C. J. I concur in the conclusion to a reversal of the judgment, but do not concur in all that is said in the opinion of Justice MAYFIELD. I place my concurrence upon the ground that on the undisputed evidence in the case the plaintiff was entitled to the general charge as requested under the count of the complaint in trover. . . .

SIMPSON and McCLELLAN, JJ., concur in these views.

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### 311. GREEN v. DUNN

NISI PRIUS. 1811

3 Camp. 215

TROVER for timber which defendant found on his premises, and which had been deposited there by permission of the servant of the former occupier. The plaintiff, to whom the timber belonged, having demanded it of the defendant, the latter said, "If you will bring any one to prove it is your property, I will give it you, and not else."

LORD ELLENBOROUGH, C. J. This is a qualified refusal, and no evidence of conversion.

*Plaintiff nonsuited.*<sup>1</sup>

<sup>1</sup> [BRAMWELL, B., in *Burroughs v. Bayne* (1860. 5 H. & N. 296). In such case, it would be monstrous to hold that a man had not a right to make reason-

312. ATCHISON, TOPEKA & SANTA FE RAILWAY  
COMPANY *v.* JORDON STOCK FOOD COMPANY

SUPREME COURT OF KANSAS. 1903

67 *Kan.* 86, 72 *Pac.* 533

IN BANC. Error from District Court, Shawnee County; Z. T. Hazen, Judge. Action by the Jordon Stock Food Company against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

BURCH, J. Certain goods were in the possession of a commission merchant for sale on the owner's account. A person without title or authority procured them to be consigned to him at Topeka, via the railroad of the plaintiff in error, at which place they were unloaded and placed in the railroad company's warehouse. The interloping consignee then directed the goods to be shipped to a point beyond the State, paid the freight, and was given a bill of lading. Before the goods were reshipped, an authorized agent and attorney of the owner discovered the goods, claimed them for his principal, and demanded possession of them from the carrier. The demand not having been complied with, the owner brought an action of replevin for his property, but obtained no order for its delivery to him. Three days later the carrier forwarded the goods in accordance with the shipping directions it had received, and its bill of lading previously issued. The carrier was ignorant of who the true owner was, except as advised by the demanding agent, and was ignorant of that person's authority, except as disclosed by his own representations. What was the right of the owner, and the duty of the carrier, under these circumstances?

The position of the railroad company was one of great hazard and embarrassment. It was liable to be mulcted in damages if it wrongfully refused to carry and deliver the goods under its contract with the shipper, and it was without any adequate means or opportunity of knowing definitely who the true owner might be. The law, however, must always aid the true owner in the recovery of his property, and he cannot be deprived of it by means of any contract relation between a wrongdoer and the carrier. When, therefore, the owner did appear and demanded his goods, he was entitled to their immediate delivery, and it was the duty of the possessor to make it. The solving principle to be applied to such a state of facts is expressed in the following texts, where the English and American cases are collated. . . .

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able inquiries. It cannot be, that if I pick up a watch in the street, and another person says, "That is mine," I am bound at once to deliver it up. I may say, "It may be [yours], but I will not give it to you before you tell me the name of the maker;" and, if he thereupon walked away, it cannot be that he would have a right of action against me simply because I exercised a sound discretion. If such were the law, I should be sorry for it; but I do not believe it is.]

"It is no conversion by a common carrier or other bailee, who has received property from one not rightfully entitled to possession to deliver it in pursuance of the bailment, if this is done before notice of the right of the real owner. After such notice he acts at his peril. A delivery to the party entitled to the possession will be a protection to him, and he may defend in the right of such party before delivery." Cooley on Torts, 456.

The plaintiff in error cites, in opposition to this rule, the case of *Kohn v. Railroad Company*, 37 S. C. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. Rep. 726, the syllabus of which reads:

"Where goods were received by a common carrier for transportation, and their possession then demanded by the agent of the shipper's mortgagee, after condition broken, but the carrier declined to surrender the possession, and after retaining them until next day then shipped the goods to their destination, the carrier is not liable to the mortgagee for a conversion of the goods."

In a monographic note to the report of this case, in 34 Am. St. Rep., it is incidentally correctly appraised in the following statement of the law:

"There is no doubt, *except in South Carolina*, that the true owner of personal property may enforce his right to it as against the consignor or consignee, or the carrier, or other bailor or bailee, whenever he sees fit to do so, before its delivery to the consignee, as directed by the bailor. Hence, when the true owner demands the property of the carrier, and the latter has notice or knowledge of the title of the former, it is the duty of the carrier to deliver the property at once to the owner, and his refusal to do so renders him guilty of a tort, and at once liable to such owner in an action for conversion."

The District Court properly took this view of the case upon the merits. . . . The judgment of the District Court is affirmed. All the Justices concurring.

### 313. SUTTON v. GREAT NORTHERN RAILWAY COMPANY

SUPREME COURT OF MINNESOTA. 1906

99 Minn. 376, 109 N. W. 815

[Printed post as No. 318; point 1 of the opinion.]<sup>1</sup>

#### <sup>1</sup> PROBLEMS:

[The plaintiff's gun was wrongfully in the possession of one J. P. The defendants were creditors of J. P., and he delivered them the gun as security. Later he came and got it back from them, giving them other security, and he sold the gun to a fourth person. Has the plaintiff an action for conversion? (1841, *Leonard v. Tidd*, 3 Metc. 6.)

The agents of an insurance company saved some of the plaintiff's goods from a fire and placed them in a warehouse under the defendant's charge. The plaintiff came to get them, but the defendant said that he could not deliver them

*(2) Sundry legal rules dependent on Disseisin*314. LACON *v.* BARNARD

COMMON BENCH. 1627

*Cro. Car.* 35

TROVER and conversion of one hundred sheep, showing that the plaintiff upon the twenty-fifth day of March, 19 Jac. 1., was possessed of those goods and lost them, and that upon the last day of April they

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without an order from the insurance company. Was this a conversion? (1821, *Alexander v. Southey*, 5 B. & Ald. 247.)

The plaintiff left his plough for a while, for safe keeping, on the land of C., with C.'s consent. C. transferred his land to H. The defendant borrowed the plough from H., supposing it to belong to H.; used it for three or four days; then returned it. Later the plaintiff informed the defendant that it was the plaintiff's plough, and demanded that he return it and pay for its hire, or else pay its value. The defendant did neither. Is he liable for a conversion? (1883, *Frome v. Dennis*, 45 N. J. L. 515.)

The defendant employed the defendant, a carrier, to take his goods to a storage-place and there hold them subject to the plaintiff's orders. The goods, while there, were attached by a third person on garnishee process. When the plaintiff came for them, the defendant informed him of the attachment and declined to surrender the goods. Was this a conversion? (1906, *Cornell v. Mahoney*, 190 Mass. 265, 76 N. E. 664).

G. shipped goods to the plaintiff, M., by the B. & O. R. Co. The R. Co. transhipped to the defendant carrier as agent to forward, but by mistake the waybill was filed out so as to direct delivery to G.'s order. The defendant delivered to G. Has the plaintiff an action for conversion? (1905, *Merchants' & M. T. Co. v. Moore*, 124 Ga. 482, 52 S. E. 802.)

The defendant, a warehouseman, received goods on storage from a party who had no right to dispose of them, and gave a receipt. The bailor assigned the receipt and the holder of it came and got the goods from the defendant. Has the plaintiff, the true owner, an action for conversion? (1887, *Hudmon v. Dubose*, 85 Ala. 446, 5 So. 162.)

The plaintiff and the defendant occupied a farm together. Each took half the hay crop. The plaintiff departed, leaving his hay in storage. The defendant instructed his employee to feed his cattle from the plaintiff's hay, which was done. Was this a conversion? (1892, *Brown v. Ela*, 67 N. H. 110, 30 Atl. 411.)

The mortgagor of wheat placed it in the defendant's elevator. Some months later, the plaintiff, the mortgagee, who was entitled to possession on demand, wrote demanding it and asking when it would be delivered. No reply coming, a second letter was sent. The defendant replied that he had referred the matter for investigation to the superintendent in another town and requested the plaintiff to write to the latter. He did so, but received no reply. After five months, he wrote to the defendant by registered mail. The receipt was returned, but no reply. Has the plaintiff an action for conversion? (1902, *First National Bank v. Minneapolis & N. E. Co.*, 11 N. D. 280, 91 N. W. 436.)

The defendant sheriff entered the store where goods were to be attached. Two or three of the debtor-firm were there. Should the Court instruct the jury that when the sheriff said "he had a warrant for collecting the rent and had come to levy on everything in the house," the sheriff's possession was complete so as to

came to the defendant's hands, who the same day sold and converted them to his proper use.

The defendant for eleven of them pleaded not guilty. And as to the eighty-nine, the residue, he pleaded, that the plaintiff at another time, viz. on the eighteenth day of September, 19 Jac. 1., prosecuted an original writ out of the Chancery, returnable in this Court, against the defendant and one Brian Smith, quare ceperunt et abduxerunt 100 oves, and thereto they appeared, and the plaintiff counted against them of their taking of a hundred sheep upon the fourteenth day of April, 19 Jac. 1., and thereto they pleaded not guilty for the eleven sheep, and for the eighty-nine residue they pleaded a recovery in debt by the defendant against Edward Hatchliff of a debt of sixty pounds; and that the said Edward Hatchliff was then possessed of the said eighty-nine sheep and that by virtue of a fieri facias those goods were sold to him, whereupon he took them into his custody; the plaintiff thereto [in the former action] replied, and took issue, and [a verdict was] found for him, and damages assessed to twopence, and thereupon the plaintiff had judgment of the said twopence damages, and had six pounds for costs. And [so the defendant now] avers, that the said taking and driving, for which the recovery in trespass was had, and the conversion of the said eighty-nine sheep in this action be all one, and that the said judgment is yet in force.

To this plea the plaintiff replies, that true it is he brought such an action, and recovered the twopence for the taking and driving of the said eighty-nine sheep, and six pounds for costs; but he farther saith, that the said twopence damages was not assessed for the value of the said sheep and the conversion of them, and that the said defendant, at the day and year in the bill, sold the said eighty-nine sheep and converted them to his own use: the which conversion is the same conversion whereof he now complaineth. . . .

Upon this replication the defendant demurred generally: and it was now argued at the Bar by Serjeant *Crew*, for the defendant, and by Serjeant *Henden*, for the plaintiff; and after the said arguments at the Bar, it was resolved

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support an action for trespass d. b. a.? (1896, *Jones v. Howard*, 99 Ga. 451, 27 S. E. 765.)

ESSAYS:

*George Luther Clark*, "The Test of Conversion," (H. L. R., XXI, 408.)

NOTES:

"Possession: nature and essential elements." (H. L. R., VI, 443.)

"Bailee violating terms of bailment." (H. L. R., VIII, 280.)

"Pledgee violating terms of pledge." (H. L. R., IX, 289, 540; X, 65; XI, 201; XIII, 55.)

"Demand and refusal: when necessary: innocent purchaser from converter." (H. L. R., XI, 66; XV, 590.)

"What constitutes conversion: refusal to deliver damaged goods without payment of freight." (H. L. R., XX, 227, 236.)]

By HUTTON, HARVEY, and myself [CROKE] that this replication is good, and that the plaintiff ought to recover; for the damages of twopence given for the eighty-nine sheep being so small, is in itself an implication (and the Court shall so intend it) that it was given only for the taking and driving of them, and that the plaintiff had them again, and not in lieu of the value of them; for if it should be given for the value of them, then the plaintiff should thereby lose the property in them, and have nothing for his sheep but twopence, and the defendant should have the sheep. But the law will rather intend (and so it may be averred) that those [former] damages were given only for the taking and driving [the sheep], and that the plaintiff had them again, and afterwards lost them, and that the defendant found and after converted them, &c. And this demurrer is a confession that he converted them *after* the said taking and driving; for the action of trespass is supposed to be upon the 14th April, 19 Jac. 1. which well stands with the former action; for the defendant may take and chase them one day, and the plaintiff recover damages for the chasing, and after lose them, &c. And this first action is brought for the first taking and chasing, and the second for the conversion, so both may stand together, which is now confessed by the demurrer, and that the damages were given for the first taking and driving and not for the conversion; therefore they conceived the plaintiff should recover.

But YELVERTON held, because the action of trespass is *cepit et abduxit*, therefore it includes that the defendant had them, and ousted the plaintiff of the possession; and although the damages be small, it shall be intended to be given for the sheep; and if so, then he cannot have an action for converting them afterward. — But judgment was given for the plaintiff.

### 315. NORRIS *v.* BECKLEY

CONSTITUTIONAL COURT OF SOUTH CAROLINA. 1812

*2 Mills Const. 228*

THE plaintiffs, in this case, had brought an action of trover against the defendant for certain negroes, and obtained a verdict for 300 dollars, to be released upon the payment of 30 dollars and delivering him the negroes. The defendant appealed from that verdict to this Court, where a decision was also given against him. He then filed a bill of injunction in the Court of Equity which, after the usual delay, was also dismissed. After this long and ineffectual struggle, he tendered the negroes to the plaintiffs, who voluntarily accepted of them. This action was brought for the work and labor of the negroes, during the time the proceedings were delayed by the appeal to this Court, and the injunction.

The case was tried before Mr. Justice *Smith*, at Abbeville, who was



of opinion the plaintiffs were entitled to recover, and the jury found a verdict accordingly. An appeal was then made to the Constitutional Court to set aside that verdict, as being contrary to law and evidence.

The opinion of the Court was delivered by Mr. Justice NOTT.

The action of trover is a remedy by which a person recovers damages for the conversion of personal property, but not the property itself. It is a well known legal maxim, that a verdict in trover vests the property in the defendant; "transit in rem judicatam." From the time of this verdict, therefore, the property belonged to the defendant, and it would be very extraordinary that a person should be required to pay for the use of his own property. The [fact of the trover] verdict being in the alternative makes no difference; for the jury cannot find such a verdict without the consent of the plaintiff; and then it is optional with the defendant which alternative to choose. It does not weaken his right to the property. It is only a mode of payment offered by the plaintiff, which the defendant may accept or refuse as he may think proper. It is contended [by the plaintiff] that by delivering up the negroes, he [the defendant] recognized the right of the plaintiff from the time of the verdict; but I cannot conceive it in that light: he recognized no right in the plaintiff, except what the law gave him; that was a right to 300 dollars. He [the plaintiff] had no right to demand the specific property. I should rather conclude that the acceptance of it afterwards was a satisfaction of the judgment.

But it is said justice requires that, after keeping the plaintiff out of his property, by various groundless and vexatious suits, he [the defendant] should pay him for the use of it. But let it be repeated that he did not keep him out of his property. He kept him out of his money, that is, the amount of the judgment; but the property belonged to defendant. . . . Suppose the defendant had paid up the judgment in money; could the plaintiff have sued for the labor of the negroes? Certainly not; and delivering up the negroes, instead of paying the money, was only paying the same amount in a different way. The verdict, therefore, must be set aside, and a nonsuit granted.

GRIMKE, BAY, and COLCOCK, J., concurred.

JOHNSON, and GANTT, J., dissented.

### 316. HARTLEY STATE BANK v. McCORKELL

SUPREME COURT OF IOWA. 1894

91 Ia. 660, 60 N. W. 197

APPEAL from District Court, Woodbury county; *A. Van Wagenen*, Judge.

June 21, 1890, plaintiff commenced this action to recover possession, as absolute owner thereof, of a certain stallion known as "Chere" purchased by defendant October 21, 1887, from L. M. Hartley, of the

alleged value of \$500. Plaintiff alleges that its ownership and right to the possession of the horse was acquired by the purchase of a mortgage on said horse, given by defendant to L. M. Hartley, together with the notes secured thereby. Defendant answered, admitting the execution of the notes and mortgage, and alleging that about August 6, 1888, before plaintiff became the owner thereof, said L. M. Hartley, through his authorized agent, for a valuable consideration, executed and delivered to defendant a complete release and discharge of said mortgage, and that subsequently said L. M. Hartley ratified said acts of C. E. Hartley. Defendant further alleges that, prior to the time plaintiff took possession of said horse under replevin, the notes secured by said mortgage had been fully paid, and that the horse was of the value of \$1,800 when taken from defendant. Defendant asks judgment for the return of the horse, or for his value if not found, and for costs. . . . Upon these issues the case was tried to a jury, and a verdict returned finding that the defendant was entitled to the possession of the horse at the time he was taken under the writ herein; that he was then of the value of \$1,125; and that defendant is entitled to \$800 for the wrongful detention of the horse. Plaintiff's motion for a new trial being overruled, and defendant electing to take the value of the horse as found, judgment was entered against the plaintiff for \$1,925. Plaintiff appeals. Affirmed.

*Sawyer & Taft*, for appellant.

*Lewis & Holmes*, for appellee.

GIVEN, J. 1. In the fall of 1887, L. M. Hartley, through C. E. Hartley, sold the horse Chere to defendant, and, in payment, took his three notes for \$600 each, dated October 21, 1887, payable June 1, 1889, 1890 and 1891, respectively, secured by a mortgage on said horse. . . . The defence of payment was withdrawn from the jury, as will be seen hereafter, thereby leaving only the questions whether the chattel mortgage had been canceled, the value of the horse, and the amount of damages. . . .

5. The Court admitted evidence, over plaintiff's objections, tending to show the value of the use of the horse, and after instructing the jury that, if it found that the defendant was entitled to possession of the property, it should determine the reasonable market value thereof, instructed as follows: "You also will assess and determine the damage which defendant has sustained, if any, by the horse being wrongfully taken under the writ of replevin, and this damage is to be estimated by ascertaining from the evidence the net profits to plaintiff if he had been allowed to have possession of the horse from the time he was taken under the writ until the present time." Plaintiff concedes that, if defendant was compelled to or had elected to take a return of the property, he would be entitled to recover for its use, but contends that, as defendant elected to take judgment for the value of the horse, he is not entitled to damages for the use thereof, but simply for its value, with interest. Plaintiff says in argument: "The defendant elects that it is

a good sale of the horse, and says he prefers that amount of money to the horse. Now, shall he be allowed to extort from the plaintiff \$800 additional, ostensibly for the detention of the horse, which, by his act of election, he sold two years ago for \$1,125, but which in reality is only for the use of the money, instead of the horse." The fault in this argument is in assuming that there are any of the elements of contract or sale in the transaction, and that, by the election, the horse became the plaintiff's from the time he took it under the writ. The relief accorded to the defendant is for a tort, and not upon contract, and the purpose of the law is to fully compensate him for all that he lost by the wrongful act. By the verdict it is determined that he was entitled to the possession and use of the horse from the time he was taken, and that the value of that use during the time the horse was wrongfully detained was \$800. Clearly, the defendant lost that use by the wrongful taking and detention of the horse. The value of the use being in excess of legal interest on the value of the horse, the latter value, with interest, would not afford full compensation.

Cases are cited wherein it is held that the value of the property, with interest [only], was the measure of recovery. Such a rule would afford full compensation in instances where the use, of which the party was deprived, had no value, or its value did not exceed the interest allowed. In many cases, and especially where work animals were the subject of the controversy, a different rule has been applied. *Allen v. Fox*, 51 N. Y. 562; *Williams v. Phelps*, 16 Wis. 85; *Johnson v. Bailey* (Colo. Sup.) 28 Pac. 85; *Farrar v. Eash*, (Ind. App.) 31 N. E. 1125. *Cook v. Hamilton*, 67 Iowa, 394, 25 N. W. 676, fully answers this contention. In that case it is said:

"The theory upon which the provisions of the statute authorizes the recovery of damages for the detention of property is based is that, as the property is owned by the plaintiff, he is entitled to its possession and use, and ought to recover the full value of such use in damages for its detention. The right of the plaintiff to the possession continued until he abandoned it by exercising the option given him by statute to accept the money or money judgment in place of the property. As he owns the property, and was entitled to its use up to that time, he ought to recover the full value thereof in a judgment for damages."

See, also, *McIntire v. Eastman*, 76 Iowa, 455, 41 N. W. 162. As defendant's right to the possession and use of the horse continued up to the time he elected to take a money judgment, he certainly lost that use by the wrongful detention, and is entitled to be compensated therefor. . . .

Our conclusion upon the whole record is that the judgment of the District Court should be affirmed.

317. CERNAHAN *v.* CHRISLER

SUPREME COURT OF WISCONSIN. 1900

107 Wis. 645, 83 N. W. 778

APPEAL from Circuit Court, Chippewa County; *E. W. Helms*, Judge.

Action by William A. Cernahan against Austin Chrisler. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought in justice court to recover for the conversion by defendant of a horse, buggy, and harness. The trial resulted in a judgment for plaintiff for six cents damages and costs. The case was appealed to the Circuit Court, and was tried and disposed of upon the justice's return of testimony. The judgment of the Court below was affirmed.

The following facts are shown by the record: Plaintiff purchased the property of Mrs. Lowe, a widow, who at his direction left it at a livery stable in the city of Eau Claire. Mrs. Lowe eloped, leaving several children. William Lowe, a brother of her deceased husband, took charge of the children. He came to Eau Claire to look up any property she may have left, and at his request the defendant, who was undersheriff, assisted him. The defendant found the property at the livery stable, and directed the persons in charge not to let any one have it. He returned soon afterwards with Mr. Lowe, and directed the livery stable keeper to deliver the property to him, and it was taken away. He acted on the supposition that it belonged to Mrs. Lowe. The following day he was informed by plaintiff that he owned the property. He replied that he had acted a little too quick in the matter, and that he would have the horse brought in the next day. After the suit had been commenced, and before trial, Lowe brought the property back to the stable, and made claim for keeping of the horse. Plaintiff declined to pay, and took the property and sent it to his farm. There are other minor circumstances shown by the record tending to support the alleged conversion, but it is deemed unnecessary to state them in detail. Defendant brings this appeal.

*Wickham & Farr*, for appellant.

*Frawley, Bundy & Wilcox*, for respondent.

BARDEEN, J. (after stating the facts). Two questions are suggested by the record: (1) Does the evidence show that defendant was guilty of a conversion of the property sued for? (2) Was the taking of the property by plaintiff pending the suit a waiver of his cause of action for conversion?

1. We will first inquire what acts of a party constitute a conversion. Perhaps as terse a definition as can be found in the books is given in Cooley; Torts (2d Ed.) 524. The learned author says:

"Any distinct act of dominion wrongfully exercised over one's property in denial of his right, or inconsistent with it, is a conversion."

It is not necessary that there should be a manual taking, or that it should be shown that he applied it to his own use. The test is, does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights? If he does, that, in law, is conversion, be it for his own or another person's use. Neither is it any defence to say that he acted as agent.

"But one who assists in a wrongful taking of goods is liable, though he acted as agent merely, for agency cannot be recognized as a protection in wrongs." *Id.* 529.

Neither is the motive which controlled the party available as a defence, except, in cases where exemplary damages are claimed, it may be shown in mitigation. *Railroad Co. v. O'Donnell* (Ohio Sup.) 32 N. E. 476, 21 L. R. A. 117; *Tobin v. Deal*, 60 Wis. 87, 18 N. W. 634. In view of these rules, it seems entirely unnecessary to discuss the evidence. The defendant clearly exercised dominion over the plaintiff's property in defiance of his rights. It does not serve to excuse him that he was ignorant of plaintiff's title, or supposed title was in Mrs. Lowe, or that he was acting in the interest of Mr. Lowe. We say, therefore, that there is evidence to support the plaintiff's cause of action.

2. After this suit was commenced the plaintiff took possession of the property, and it is now claimed by defendant that he waived his right to further prosecute his action. We are referred to *Collins v. Lowry*, 78 Wis. 329, 47 N. W. 612, as an authority sustaining that proposition. This was an action for the conversion of certain shares of stock. Pending the action the defendant brought such shares into Court and tendered them to plaintiff. At the trial plaintiff announced his readiness to accept the stock and thereupon introduced the stock certificate in evidence. He claimed also the right to recover damages for his time, trouble, and expense in attempting to secure a return of the stock. The Court directed a verdict for nominal damages. The recovery being less than \$50, judgment for costs was entered for defendant. In this Court the plaintiff insisted that he was entitled to recover for his expenses, etc. In denying a recovery under the circumstances, the following language was used:

"The theory of the case is that the defendant is only answerable for the value of the property, and that he or his vendee or transferee is to be regarded as the owner. Such being the nature of the action, a verdict for the value of the property converted necessarily covers and includes the damages for such conversion, and the acceptance by the plaintiff of the thing converted necessarily covers and includes its value, and hence such acceptance extinguishes the alleged cause of action for such value. In other words, the plaintiff, pending such action, cannot waive the alleged tortious conversion by taking back the property, and at the same time continue the action and recover the full or partial value of the thing converted, not even to recover costs."

It will be observed that no cases are cited to sustain this proposition. It is true that in actions for conversion of property the measure of

damages is generally the value of the property at the time and place of the conversion, with interest; but, when the circumstances show special damage over and above the value of the property, the almost universal current of authority is that such damage may be recovered in such action. This rule was recognized in *Churchill v. Welsh*, 47 Wis. 39, 1 N. W. 398, is incidentally referred to in *Ingram v. Rankin*, 47 Wis. 406, 2 N. W. 755, and is expressly stated in *Parroski v. Goldberg*, 80 Wis. 339, 50 N. W. 191. In *Churchill v. Welsh*, 47 Wis. 39, 1. N. W. 398, and again in *Warder v. Baldwin*, 51 Wis. 450, 8 N. W. 257, this Court discussed the circumstances under which there may be a return of the property converted, in mitigation of damages, pending the suit. The conclusion arrived at was that in case of such return, and in the absence of evidence showing special damage, the recovery should be limited to nominal damages. . . . Many other cases might be cited, but to do so would incumber the record. The rule is universal, and rests upon the ground that the return of the property does not extinguish the cause of action, but simply goes in mitigation of the damages.

It being established in this State that special damages may be recovered in actions of this kind, the infirmity of the rule stated in *Collins v. Lowry* becomes apparent. The theory of the case is not that "the defendant is only answerable for the value of the property." He is answerable, not only for the value of the property, but for any special damage the plaintiff has sustained. Hence a return or retaking of the property goes only to mitigate the damages, and not in bar of the action.

In the case at bar, however, no special damages are shown. In *Hiort v. Railway Co.*, 4 Exch. Div. 188, 195, Bromwell, L. J., said:

"A conversion cannot be purged, and if a defendant is guilty of conversion he must pay some damages. A return of the goods undoubtedly might be shown, to reduce the damages, in the case of conversion, not only when the owner voluntarily received back the goods, but when he took them back against his will. In an action of trover and conversion, the practice was for a defendant to apply to the Court for a stay of proceedings on a delivery up of the goods, and on payment of nominal damages and costs; but if the plaintiff refused to accept delivery, and insisted on proceeding with his action for substantial damages, he did so at his peril, and if he failed to get substantial damages he was made to pay the costs of the action. It is clear, therefore, that on a return of the goods the plaintiff would recover, not their value, but the damages he had sustained by the wrongful act, which was called the conversion."

The rule above suggested, when a return of the property had been had, of applying to the Court to stay or dismiss the action upon tender or payment of nominal damages and costs, was referred to and approved in *Bigelow Co. v. Heintze*, *supra*, and is one that furnishes ample protection to the defendant. It is certainly against the policy of the law to permit parties to carry on litigation when only the question of costs is involved. . . . The defendant might easily have protected himself



by setting up the facts in his answer, and tendering payment of nominal damages and costs, as hereinbefore suggested. The judgment of the Circuit Court is affirmed.

### 318. SUTTON *v.* GREAT NORTHERN RAILWAY COMPANY

SUPREME COURT OF MINNESOTA. 1906

99 *Minn.* 376, 109 *N. W.* 815

APPEAL from District Court, Marshall County; *Andrew Grindeland*, Judge.

Action by John J. Sutton against the Great Northern Railway Company. Verdict for plaintiff. From an order denying judgment notwithstanding the verdict or a new trial, defendant appeals. Affirmed.

*J. W. Mason* and *Robert A. Hastings*, for appellant.

*John J. Sutton*, for respondent.

JAGGARD, J. The plaintiff and respondent shipped certain property, including horses and mules, as emigrant movables and stock from a point in Wisconsin, over the Chicago, St. Paul, Minneapolis & Omaha Railway Company, through the Minnesota Transfer, destined for Argyle, Minn., at an agreed rate which plaintiff paid. The property arrived at the Minnesota Transfer and was thence reshipped to its destination, over the Great Northern Railway Company, the defendant and appellant. Before it was so finally transported, the defendant wired its agent at Argyle to "locate" the plaintiff and advise him that it would forward his car containing five horses, four mules, etc., at emigrant rates. The plaintiff asked that the shipment be made at once. On August 19th, the defendant telegraphed: ". . . Shipment will be forwarded to-day." When the goods and stock reached Argyle they were not delivered to plaintiff on demand. He was informed by the local agent that, because of error in the original shipment as emigrant movables, there were \$77.15 additional charges under proper classification, which would have to be paid before the property would be delivered. Plaintiff declined to pay these charges. There was testimony that at this time the agent told the plaintiff that, if he would show a receipt for prepaid freight on the property, the agent would deliver it to him free. Other testimony contradicted this. The live stock was thereupon placed in a livery stable at Argyle. This was on August 21st. On August 23d, plaintiff was notified that his stock was at a livery stable in Argyle, and at his expense, and that the railroad company had nothing further to do in the matter. Plaintiff brought this action in conversion. The jury returned a verdict for \$1,435.10. From an order denying defendant's motion in the alternative for judgment notwithstanding the verdict or a new trial, defendant took this appeal.

1. The first point made upon appeal is that the testimony upon trial

did not show, as a matter of law, any conversion by defendant, as the trial Court in its charge erroneously assumed; that testimony tended to show that, upon demand by plaintiff, the refusal of the defendant to deliver was not absolute. The rule of law is well settled that, while a demand in an action of trover must be unconditional, the refusal to abide by the conditions of special property does not operate as a conversion where a reasonable qualification is annexed to that refusal. *Solomon v. Dawes*, 1 Esp. 83; *Green v. Dunn*, 3 Camp. 215, note; *Gunton v. Nurse*, 2 Brod. & B. 447; *Alexander v. Southey*, 5 Barn. & Ald. 247; *Mount v. Derick*, 5 Hill. 455; *Blankenship v. Berry*, 28 Tex. 448; *Bolling v. Kirby*, 90 Ala. 215, 7 South. 914, 24 Am. St. Rep. 789. It is ordinarily, however, for the jury, under proper instructions from the Court, to pass upon the existence of the qualification and its reasonableness. *McCormick v. Pennsylvania Cent. R. Co.* 49 N. Y. 303 (et vide 80 N. Y. 353); *Alexander v. Southey*, 5 Barn. & Ald. 247; *Ingalls v. Bulkley*, 15 Ill. 224; *Burroughs v. Bayne*, 5 Hurl. & N. 296; *Connah v. Hale*, 23 Wend. 462. The most favorable construction of facts in this case, under these rules of law, is that the defendant was entitled to have had submitted to the jury the facts as to the qualification. No request to that end was made. On the contrary the case was tried on the theory of an unconditional tender. The failure of the Court to submit the issues was not raised with sufficient definiteness either in the defendant's motion after verdict or by assignment of error in this Court. In view of this state of the record and of a number of other considerations, upon which it is unnecessary to here enlarge, we conclude that there was no reversible error in the assumption of the trial Court that there had been a conversion so far as this point is concerned.

2. The second point made by the appeal was that, if there were a conversion at all, it was merely a technical one with no intent on the part of the appellant to make any claim to the property, except to assert a supposed lien; that shortly afterwards it unconditionally, tendered to the respondent the property, unchanged and undamaged, and that, in view of these facts, the Court erred in treating the value of the property as the measure of damages. This view of the law accords with both reason and authority. There are cases of willful or substantial conversion, as distinguished from cases of merely technical conversion. Whenever there is an unauthorized act which deprives the owner of his property permanently or for an indefinite time, there is a conversion. The law must afford a remedy to the person entitled to the immediate possession of the property. Trover is an appropriate and historical remedy. The unauthorized act, however, may be of such a character that the action of trover amounts to little more than a vindication of the right of possession. In ordinary cases, the measure of damages is the familiar one — the value of the property at the time of the unauthorized act with interest. In cases of merely technical conversion, where the

property was returned in the same condition as before the unauthorized act, not only when the owner voluntarily received back the goods, but also when he took them back against his will, the plaintiff will be entitled to only nominal damages and costs. To award more would be to exceed compensation under circumstances not justifying any other measure of damages; to award less would be to justify a wrong. "A conversion cannot be purged." Lord Bramwell in *Hiort v. Railway Co.*, 4 Exch. Div. 188, 195; Lord Thesiger, p. 197; and see *Warder v. Baldwin*, 51 Wis. 450, 459, 8 N. W. 257; *Churchill v. Welsh*, 47 Wis. 39, 1. N. W. 398; *Farr v. Bank*, 87 Wis. 223, 58 N. W. 377, 41 Am. St. Rep. 40; *Bigelow Company v. Heintze*, 53 N. J. Law, 69, 21 Atl. 109; *Delano v. Curtis*, 89 Mass. 470, 475; *Pollock on Torts*, \*p. 296 and \*p. 298. And it may be conceded in this case that, if the owner of a special property immediately or within a reasonable time after a refusal to deliver, due to a bona fide mistake, unconditionally tenders, to the person entitled to immediate possession, the goods uninjured, unchanged, and without deterioration, the damages may be mitigated or reduced to a nominal sum.

Defendant's difficulty is to be found, not in the law upon which he relies, but in the facts to which he seeks to apply it. The tender in this case was not absolute. It imposed upon plaintiff the search of at least two livery stables, shown to have been in the town of Argyle; he was not required by law to make that search. It involved the payment of expense there contracted; he was not required by law to defray that charge occasioned by defendant's misconduct. The tender was not immediate; the stock was withheld from its rightful owner and possessor from the 21st to the 23d day of August. The trial Court might have held that this retention of stock for that length of time at that period of the year under the circumstances set forth in this record was unreasonable as a matter of law. No request was made to submit to the jury any issue concerning the reasonableness of that time, nor is any failure of the Court in this respect properly made the object of assignments of error. The tender upon which defendant relies did not, therefore, constitute the complete reparation of defendant's wrong, which is essential to such a plea in mitigation of damages. Moreover, in view of the actual course of trial and especially of the remarks of counsel for defendant after the testimony was closed, and before the charge to the jury, the defendant is in no position to complain of the actual charge of the Court, either as to tender or as to the measure of damages adopted by the Court.

Finally, defendant contends that there was no conversion, because the contract claimed by plaintiff was void as involving an unlawful discrimination by a public carrier, in this: that not all the property was properly classified as emigrant movables. See *Texas & Pac. Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; Rev. Laws 2905, § 2015. That defence was not specifically asserted by

way of answer. The issue was not litigated upon trial, nor were the merits of such a controversy fairly presented below nor raised by the assignments of error here. *Order affirmed.*

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### 319. MILLER v. HYDE

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

161 *Mass.* 472, 37 *N. E.* 760

APPEAL from Superior Court, Middlesex county.

Replevin by Louisa A. Miller, administratrix of the estate of Herbert W. Miller, deceased, against E. A. Hyde for the possession of a horse. From a judgment for defendant, plaintiff appeals. Judgment set aside, and judgment for plaintiff ordered.

This is an action of replevin to recover possession of a horse known as the "Bull." The plaintiff is the widow and administratrix of the estate of Herbert W. Miller, late of Boston, Mass. The said Herbert W. Miller was by business a stable keeper, and was also interested in the trotting of horses. On or about July 12, 1890, the said Miller in his lifetime intrusted to one George Bryden, of Hartford, Conn., a blank check to be used in the purchase of the said horse known as the "Bull," and a few days thereafter the said Bryden, as the agent and for the benefit of said Miller, purchased said horse, and paid for it with money obtained on said check. Said horse was kept, in company with other horses also belonging to said Miller, in a barn rented for that purpose by said Miller in Hartford, Conn., and there remained until demanded by the plaintiff herein. The said Miller died in Boston, September 14, 1890, and in the following November the plaintiff herein was duly qualified as the administratrix of his estate in Massachusetts, and shortly thereafter, on or about the 13th day of November, 1890, she went to Hartford, and made a demand on said Bryden for said horse, but Bryden refused to deliver the horse, and claimed to own a half interest therein. The affairs of the said Miller were found to be in great confusion, and the plaintiff was without means of her own, and was harassed by lawsuits in Boston, but in due course of time she was appointed administratrix of the estate of said Miller in Hartford County, Conn., by the Probate Court of said county, and, shortly after, his estate was declared insolvent by said Probate Court. Meantime, on or about March 31, 1891, the said Bryden sold said horse, the "Bull," as his own property, to Joseph C. Davenport, of Hartford, Conn., and Ada L. Hyde, of Brookline, Conn., for the sum<sup>1</sup> of \$1,500, and gave a bill of sale of said horse to the said Davenport and Hyde, and the said Davenport gave to the said Bryden his check for \$1,285, which check was duly paid. In November, 1891, after her appointment as administratrix in said Hartford county, the plaintiff, being a

stranger in Connecticut, and being unable to furnish a bond in Connecticut sufficient to enable her to replevin said horse, brought an action for the conversion of said horse against the said Bryden and Joseph C. Davenport, E. A. Hyde, and John Shillinglaw, the horse being then in the possession of said three last-named defendants, and said horse was attached in said suit. Said action was brought to trial in the Court of Common Pleas of Hartford county at the March term of 1892, and the Court found for plaintiff as against the defendant Bryden in the sum of \$1,000, fixing the date of conversion at the time of the demand on Bryden in November, 1890, and in favor of the defendants Hyde, Davenport, and Shillinglaw on the ground that said three last-named defendants did not appear to have anything to do with said horse until some months after said conversion by said Bryden. The defendant Bryden was worthless and without property. Execution against him was taken out on said judgment by the said plaintiff, and placed in the hands of James R. Graham, a deputy sheriff for said Hartford county. After demand on said execution on said Bryden by said sheriff, which demand was not complied with, the said sheriff levied said execution by direction of the plaintiff's attorney on the said horse, the "Bull," and proceeded to advertise said horse for sale at public auction. The said sheriff was in the act of selling said horse on said execution, but before it was sold it was taken from him by John M. Foote, Jr., a deputy sheriff of said county, under a writ of replevin in favor of the said Joseph C. Davenport, which suit of replevin at the time of the bringing of this suit was still pending in said Hartford county, Conn. The said Davenport gave bond in said replevin suit, and took possession of the said horse, the "Bull," and later, in August, 1892, intrusted him to the said E. A. Hyde, who brought the horse to Massachusetts, and entered it in his own name for the races at Mystic Park, in Medford, Mass., and, while said horse was at said Mystic Park, he was replevied by the plaintiff herein under a replevin writ directed to the said Hyde. The judgment entered against said Bryden in favor of the plaintiff as aforesaid has not been satisfied.

*Elder, Wait & Whitman*, for plaintiff. *J. H. Morrison*, for defendant.

BARKER, J. The plaintiff may maintain replevin if she is the owner of the horse, and if she is not estopped from asserting her ownership against the defendant. As administratrix of her husband's estate, she was the owner when she brought trover in Connecticut against Bryden, the bailee who had wrongfully usurped dominion and sold and delivered the horse to Davenport. As the horse was in Connecticut and the action of trover was in the Courts of that State, the effect of the suit upon her title would be determined by the law of the forum. But as the law of Connecticut is not stated as an agreed fact, we must apply our own.

Whether a plaintiff's title to the chattel is transferred upon the entry in his favor of judgment in trover has not been decided by this Court. Assuming that, in early times, title to the chattel was transferred to

the defendant upon the entry of judgment for the plaintiff in trover, at present a different doctrine is generally applied, and it is now commonly held that title is not transferred by the entry of judgment, but remains in the plaintiff until he has received actual satisfaction. See *Atwater v. Tupper*, 45 Conn. 144; *Turner v. Brock*, 6 Heisk. 50; *Lovejoy v. Murray*, 3 Wall. 1; *Ex parte Drake*, 5 Ch. Div 866; *Brinsmead v. Harrison*, L. R. 7 C. P. 547; 1 Greenl. Ev. § 533, and note. And the law has been commonly so administered by our own trial Courts. We think this doctrine better calculated to do justice, and see no reason why we should not hold it to be law. Whenever the title passes, as there has been no sale or gift and no title by prescription or by possession taken upon abandonment by the true owner, the transfer is made by his inferred election to recognize as an absolute ownership the qualified dominion wrongfully assumed by the defendant. The true owner makes no release in terms and no election in terms to relinquish his title; but the election is inferred by the law, to prevent injustice. Formerly this election was inferred when judgment for the plaintiff was entered, because his damages, measured by the value of the chattel and interest, were then authoritatively assessed, and the judgment brought to his aid the power of the Court to enforce its collection out of the wrongdoer's estate or by taking his person; and this was deemed enough to insure actual satisfaction. If so, it was just to infer that when he accepted these rights he elected to relinquish to the wrongdoer the full ownership of the chattel. An election was not inferred when the suit was commenced, although the plaintiff then alleged that the defendant had converted the chattel, and although the writ might contain a *capias*; because, owing to the uncertainties attendant upon the pursuit of remedies by action, it was not just to infer such an election while ultimate satisfaction for the wrong was but problematical. Forms of action are a means of administering justice rather than an end in themselves. When it is seen that the practical result of a form of action is a failure of justice, the Courts will make such changes as are necessary to do justice. If the entry of judgment in trover usually gave the judgment creditor but an empty right, it was not just to infer that upon acquiring such a right he relinquished the ownership of the chattel, and the rule that required the inference to be then drawn was properly changed. The ground for inferring such an election was that upon the entry of judgment he acquired an effectual right in lieu of his property, and the doctrine that, without some actual satisfaction, the inference of an election would not be drawn has been shown by experience to be necessary to the administration of justice, and has been generally acted upon, and the modern rule adopted that the plaintiff's title is not transferred by the entry of judgment, but is transferred by actual satisfaction. Trover is but a tentative attempt to obtain justice for a wrong, and, until pursued so far that it has given actual satisfaction, ought not to bar the plaintiff from asserting his title. The



present doctrine is consistent with the general principle stated by Lord Ellenborough in *Drake v. Mitchell*, 3 East, 251, and quoted in *Vanuxem v. Burr*, 151 Mass. 386, 389, 24 N. E. 773, as approved in *Lord v. Bigelow*, 124 Mass. 185, that

“a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party.”

But the present plaintiff has done more than to take judgment in trover. In her action of trover she caused the horse to be attached as property of Bryden, and, since obtaining judgment, she has caused the horse to be seized in execution on the judgment as his property, and to be kept and offered for sale on the execution until, as it was about to be so sold, it was replevied by Davenport from the officer in a suit between them which is still pending in Connecticut. That suit is not a bar to this action, because it is not between the same parties. *White v. Dolliver*, 113 Mass. 400; *Newell v. Newton*, 10 Pick. 470. But we must still inquire whether, assuming that the plaintiff's property in the horse was not transferred by her judgment in trover, it was transferred by that judgment taken in connection with the facts of the attachment and levy. . . . The case of *Ex parte Drake*, above cited, is an authority to the point that a plaintiff who has brought an action of detinue, and taken judgment both for detention and the value of the chattel, and has also proved his judgment in bankruptcy after having had the chattel seized on execution as the defendant's property, may nevertheless assert his ownership and have process to restore to him the chattel in specie. In such cases Courts look to substance rather than form, and do not by inferring an election or a waiver deprive of his property a plaintiff who has unfortunately resorted to some futile method of procuring redress. In the present case, Davenport had bought the horse of Bryden before the attachment was made, and therefore the attachment was a denial of his ownership as well as an assertion of her own title by the plaintiff. The natural construction to be put upon her conduct in attaching and beginning a levy upon her own horse as the property of Bryden in a suit asserting her ownership is that, while she contended that in fact the horse was her own, she consented that, if litigation with Davenport as to the true state of title could be avoided by so selling the horse that the proceeds of the sale should be applied upon her claim for damages, she would in that event no longer assert her paramount title. Her implied offer not having been accepted, and Davenport having rendered impossible the accomplishment of her plan to avoid further litigation, she could thereupon say that all which had gone before was provisional upon the completion of the levy, and could enforce her right of property by any proper action against Davenport, or any one who might thereafter take wrongful possession of her horse, unless barred by the rules of estoppel. . . . She is not estopped by it from maintaining the present action.

In the opinion of a majority of the Court, the result must be: Judgment set aside, and judgment for plaintiff ordered.

KNOWLTON, J. (dissenting). I am of opinion that the judgment in this case should be for the defendant. . . . When a plaintiff has elected to take judgment for the full value of property converted, and has then levied the execution upon property of the defendant which is subject to be taken on execution, — especially if it is the property converted, — he is thereby precluded from reversing his election, and taking the converted property under his original title.

The CHIEF JUSTICE concurs in this opinion.

HOLMES, J. (dissenting). As the judges are not unanimous, it becomes necessary for me to state my views, which otherwise I should not do, as they have not persuaded my brethren.

I am of opinion that the plaintiff ought to be barred in this action by her recovery of judgment in trover for the same horse. I am aware that the doctrine that title passes by judgment without satisfaction is not in fashion, but I never have been able to understand any other. It always has seemed to me that one whose property has been converted has an election between two courses, — that he may have the thing back, or he may have its value in damages, but that he cannot have both; that when he chooses one he necessarily gives up the other; and that by taking a judgment for the value he does choose one conclusively. He cannot have a right to the value of the thing, effectual or ineffectual, and a right to the thing, at the same time. The defendant is estopped by the judgment to deny the plaintiff's right to the value of the thing. Usually, estoppels by judgment are mutual. It would seem to follow that the plaintiff also is estopped to deny his right to the value of the thing, and therefore is estopped to set up an inconsistent claim. In general, an election is determined by judgment. *Butler v. Hildreth*, 5 Metc. (Mass.) 49; *Bailey v. Hervey*, 135 Mass. 172, 174; *Vulcanite Co. v. Caduc*, 144 Mass. 85, 86, 10 N. E. 483; *Raphael v. Reinstein*, 154 Mass. 178, 179, 28 N. E. 141. I know of no reason why a judgment should be less conclusive in this case than in any other. Of course, I am speaking of a judgment for the value of the chattel, not of one giving nominal damages for the taking. The argument from election is adapted in *White v. Philbrick*, 5 Greenl. 147, 150, which, so far as I know, is still the law of Maine, notwithstanding the remark in *Murray v. Lovejoy*, 2 Clif. 191, 198, Fed. Cas. No. 9,963. See, also, *Shaw, C. J.*, in *Butler v. Hildreth*, 5 Metc. (Mass.) 49, 53.

The most conspicuous cases which have taken a different view speak of the hardship of a man's losing his property without being paid for it, and sometimes cite the dictum in Jenk. (4th Cent.) Case 88, "*Solutio pretii emptionis loco habetur*," which is dogma, not reasoning, or, if reasoning, is based on the false analogy of a sale. But they leave the argument which I have stated unanswered, not, as I think, because the judges deemed it unworthy of answer, or met by paramount con-

siderations of policy, but because they did not have either that, or a clue to the early cases, before their mind. *Lovejoy v. Murray*, 3 Wall. 1, 17; *Brinsmead v. Harrison*, L. R. 6 C. P. 584, 587, L. R. 7 C. P. 547, 554. It is not the practice of the English judges to overrule the common law because they disapprove it, and to do so without discussion. In *Brinsmead v. Harrison*, Mr. Justice Willes thought he was proving that the common law always had been in accord with his position. So far as the question of policy goes, it does not seem to me that the possibility — it is only the possibility — of an election turning out to have been unwise is a sufficient reason for breaking in upon a principle which must be admitted to be sound on the whole, and for overthrowing the doctrine of the common law by a judicial fiat. I am not informed of any statistics which establish that judgments for money usually give the judgment creditor only an empty right.

That the view which I hold is the view of the common law, I think, may be proved by considering what was the theory on which the remedies of trespass and replevin were given. In Y. B. 19 Hen. VI. 65, pl. 5, Newton says:

“If you had taken my chattels, it is at my choice to sue replevin, which shows that the property is in me, or to sue a writ of trespass, which shows that the property is in the taker; and so it is at my will to waive the property or not.”

In 6 Hen. VII. 8, pl. 4, Vavisor uses similar language, and adds:

“And so it is of goods taken. One may divest the property out of himself, if he will, by proceedings in trespass, or demand property by replevin or writ of detinue,” if he prefers.

There is no doubt that the old law was that replevin affirms property in the plaintiff, and trespass disaffirms it, and that the plaintiff has election. Bro. “Trespass,” pl. 134; 18 Vin. Abr. 69e; *Anderson and Warberton, JJ., in Bishop v. Montague*, Cro. Eliz. 824. The proposition is made clearer when it is remembered that a tortious possession — at least, if not felonious — carried with it a title by wrong, in the case of chattels, as well as in the case of a disseisin of land, as appears from the page of Viner just cited, and as has been shown more fully by the learned researches of Prof. Ames and Prof. Maitland. 3 Harv. Law Rev. 23; see *Id.* 326; 1 Law Quarterly Rev. 324. I do not regard that as a necessary doctrine, or as the law of Massachusetts; but it was the common law, and it fixed the relations of trespass and replevin to each other. Trespass, and, on the same principle, trover, proceed on the footing of affirming property in the defendant, and of ratifying the act of the defendant which already has affirmed it. I do not see on what other ground a judgment for the value can be justified. If the title still is in doubt, or remains in the plaintiff, the defendant ought not to be charged for anything but the tortious taking. Again, cannot the plaintiff take the converted chattel on execution? And on what principle can he do so, if it does not yet belong to the defendant?

I say but a word as to the practical difficulties of the prevailing rule. No doubt they can be met in one way or another. Suppose the plaintiff, after judgment, were to retake the chattel by his own act. It would strike me as odd to say that this satisfied the judgment, and as impossible to say that it satisfied the whole judgment, which was for the tort, as well as for the value of the property. Yet, on the view which I oppose, I presume that the judgment could not be collected. See *Coombe v. Sansom*, 1 Dowl. & R. 201.

It seems to me that the opinion which I hold was the prevailing one in England until *Brinsmead v. Harrison*, supra. *Bishop v. Montague* Cro. Eliz. 824; *Fenner, J.*, in *Brown v. Wootton*, Cro. Jac. 73, 74, Yel. 67, Moore, 762; *Adams v. Broughton*, 2 Strange, 1078, Andrews, 18, 19; *Buckland v. Johnson*, 15 C. B. 145, 157, 162, 163; Serjeant James Manning's note to *Barnett v. Branado*, 6 Man. & G. 640. See *Lamine v. Dorrell*, 2 Ld. Raym. 1216, 1217. And I should add that I see a relic of the ancient and true doctrine in the otherwise unexplained notion that when execution is satisfied the title of the defendant relates back to the date of the conversion. *Hepburn v. Sewell*, 5 Har. & J. 211; *Smith v. Smith*, 51 N. H. 571, 50 N. H. 212. Compare *Atwater v. Tupper*, 45 Conn. 144, 148.

The only authorities binding upon us are the ancient evidences of the common law, as it was before the Revolution, and our own decisions. I have shown what I think was the common law. Our own decisions leave the question open to be decided in accordance with it. *Campbell v. Phelps*, 1 Pick. 62, 65, 70; *Bennett v. Hood*, 1 Allen, 47. Many cases in other states are collected in *Freem. Judgm.* (4th Ed.) § 237.

If I am right in my general views, they apply to this case. The plaintiff recovered her judgment in Connecticut, to be sure, as ancillary administrator there; but the horse was there, and she was entitled to it there, so that her judgment recovered there passed the title. Like any other transfer of a chattel, valid in the place where it was made, and where the chattel was situated, it will be respected elsewhere. The Connecticut law was not put in evidence, and therefore we must presume that a judgment there has whatever effect we attribute to it on the principles of the common law.

320. JAMES BARR AMES. "*The Disseisin of Chattels.*" (1890. Harvard Law Review, III, 23. Select Essays in Anglo-American Legal History, No. 67, III, 541.) One who has been wrongfully dispossessed of a chattel has the option of suing the wrong-doer in Replevin, Detinue, Trover, or Trespass. A judgment in Replevin enables him to keep the chattels already replevied and delivered to him by the sheriff, and a judgment in Detinue establishes his right to recover the chattel in specie, or, that being impracticable, its value. A judgment in Trespass or Trover, on the other hand, is for the recovery of the value only, as damages. Inasmuch as a defendant ought not to be twice vexed for a single wrong, a judgment in any one of these forms of action is not only a merger of the right to resort to that one, but is also a bar against the others. Accordingly, a judgment in Trespass or Trover against a sole wrong-

doer who, at the time of judgment recovered, is still in possession of the chattel operates like the statute of limitations, and annihilates the dispossessed owner's right to recover the chattel. The converter's possession being thus set free from adverse claims, changes into ownership.

If the change of possession is before judgment, there is a difference. Let us suppose, for instance, that B. converts the chattel of A., and, before judgment recovered against him in Trespass or Trover, sells it to C., or is in turn dispossessed by C. C., the new possessor, will hold the chattel, as B. held it, subject to A.'s right to recover it. The change of possession simply enlarges the scope of A.'s remedies; for his new rights against C. do not destroy his old right to sue B. in Trespass or Trover. Nor will an unsatisfied judgment against B. in either of these actions affect his right to recover the chattel from C. Or the proceeds of its sale in an action of assumpsit. It is no longer a question of double vexation to one defendant for a single wrong. Not until the judgment against B. is satisfied can C. use it as a bar to an action against himself. A different principle then comes into play, namely, that no one should receive double compensation for a single injury.

Another case can be put where the dispossessed owner has concurrent rights against two or more persons. B. and C. may have jointly dispossessed A., instead of being successive holders of the converted chattel. Under these circumstances A. may proceed against B. and C. jointly or severally. If he obtain a joint judgment in Trespass or Trover, all his rights against both are merged therein, and his title to the chattel is extinguished. But if he obtain a separate judgment against one, he may still bring Replevin or Detinue against the other to recover the chattel, or Trespass or Trover for its value; for the latter cannot invoke the maxim, "*nemo bis vexari debet pro eadem causa.*" Not until the judgment against the one is satisfied can it be used as a bar in an action against the other. The controversy whether the title to a converted chattel vests in a defendant by a single judgment, or only after the satisfaction of the judgment, is, therefore, but another battle of the knights over the gold and silver shield. Under some circumstances the title changes by the judgment alone; in other cases satisfaction is necessary to produce that result.<sup>1</sup>

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### 321. CHAPIN v. FREELAND

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886

142 Mass. 383, 8 N. E. 128

THIS was an action of replevin in which the plaintiffs alleged the taking and detention by the defendant of two counters as the property of the plaintiffs. The answer was a general denial, and averment of property in the defendant. Trial before *Blodgett*, J., without a jury, where there was evidence tending to show, and the Court found, that in 1867 one Daniel Warner built a building upon his land in Oxford, and fitted up the same with shelving and counters, and designed the same for use

<sup>1</sup> [NOTES:

"Judgment in trover as bar to replevin for goods converted." (H. L. R., XVI, 131.)]

as a store for the sale of general merchandise; that the counters in controversy were put into the store by him; that the same were nailed to the floor, and used in said building; that January 2, 1871, said Warner conveyed the premises in mortgage to Alexander De Witt; that said De Witt died in 1879, and Charles A. Angell and William Newton were duly appointed executors of his will; that in April, 1879, said executors foreclosed said mortgage by sale under the power contained in said mortgage, and became the purchasers of the said premises; that soon after such sale said Warner removed said counters from the building, and the executors regained possession of them, and put them back in place upon the premises, but did not nail or fasten them to the premises; that afterwards the executors sold said premises to the plaintiffs, but did not make mention of said counters in their deed, nor speak of them in the sale; that the defendant took the counters from the premises occupied by the plaintiffs in 1881. The defendant offered evidence tending to show, and the Court found, that she purchased these counters in 1861; that they were built in Worcester, and sent to her complete at Oxford, and placed in her store; that they were heavy counters supported by standards standing upon the floor, to which they were not fastened, but kept in position by their own weight, and were used there until some time in 1866, when they were set one side as not being adapted for the business then carried on in the store, and finally, with the knowledge and consent of De Witt, were moved out of the building onto the street, and placed one upon the other; that said Warner took the counters from their place in the street, and put them in his store as aforesaid; that there were two mortgages on defendant's store premises given some time previous to November 26, 1866, which were assigned to said De Witt, November 26, 1866; that from that date, by agreement with the defendant, said De Witt, who was the defendant's brother, had charge of said estate and of said counters for the defendant; that she never authorized him, or any other person, to dispose of the counters which were removed from her store; she missed them, and made inquiries for them, but failed to find them; and that, when she learned they were upon the plaintiff's premises, she took them away. There was no other evidence than above stated as to the means of the defendant of obtaining information as to where the counters were after they were taken from her store, or as to any concealment of the taking of the counters by Warner. It was in evidence, however, that defendant, after 1861, resided some of the time in Oxford and some in Sutton. There was no evidence, except as before stated, tending to show what interest, if any, Warner claimed to have in the counters at the time they came into his possession, or at any time thereafter; and there was no other material evidence in the case applying to the ruling made as asked at the trial. . . .

The plaintiff claimed, and asked the Court to rule, that upon this evidence. . . the defendant had lost the right to take the counters if said Warner had no right or title to them when he so took and attached them to the store building, — such taking being a tort, and, as a cause



of action, barred by the statute of limitations long before the defendant removed them in 1881. . . . and that the facts in the case would not warrant a finding for the defendant. The Court declined to rule as requested, and found for the defendant, and the plaintiff alleged exceptions.

*A. J. Bartholomew*, for plaintiffs. *John Hopkins*, for defendant.

HOLMES, J. This is an action of replevin for two counters. There was evidence that they belonged to the defendant in 1867, when one Warner built a shop, put the counters in, nailed them to the floor, and afterwards, on January 2, 1871, mortgaged the premises to one De Witt. In April, 1879, De Witt's executors foreclosed and sold the premises to the plaintiff. The defendant took the counters from the plaintiff's possession in 1881. The Court found for the defendant. . . . We understand the Court to have ruled or assumed that although the statute would have run in favor of Warner or De Witt before the transfer to the plaintiff, that circumstances would not prevent the defendant from taking possession if she could, or entitle the plaintiff to sue her for doing so if she was the original owner. A majority of the Court are of opinion that this is not the law, and that there must be a new trial. We do not forget all that has been said and decided as to the statute of limitations going only to the remedy, especially in cases of contract. . . . What we do decide is that, when the statute would be a bar to a direct proceeding by the original owner, it cannot be defeated by indirection within the jurisdiction where it is law. If he cannot replevy, he cannot take with his own hand. A title which will not sustain a declaration will not sustain a plea.

It is true that the statute in terms only limits the bringing of an action. But, whatever importance may be attached to that ancient form of words, the principle we lay down seems to us a necessary consequence of the enactment. Notwithstanding the disfavor with which the statute of limitations was formerly regarded, all the decisions or dicta which we know of, directly bearing upon the point, favor or go beyond that principle. *Cockfield v. Hudson*, 1 Brev. 311; *Howell v. Hair*, 15 Ala. 194; *Jones v. Jones*, 18 Ala. 248-253; *Clark v. Slaughter*, 34 Miss. 65; *Winburn v. Cochran*, 9 Tex. 123; *Preston v. Briggs*, 16 Vt. 124, 130; *Baker v. Chase*, 55 N. H. 61, 63; *Campbell v. Holt*, 115 U. S. 620, 623; s. c. 6 Sup. Ct. Rep. 209. And a similar doctrine has been applied to the statute of frauds. *Carrington v. Roots*, 2 Mees. & W. 248. See *King v. Welcome*, 5 Gray, 41.

As we understand the statutory period to have run before the plaintiff acquired the counters, . . . we regard a purchaser from one against whom the remedy is already barred as entitled to stand in as good a position as his vendor. Whether a second wrongful taker would stand differently, because not privy in title, we need not discuss. See *Leonard v. Leonard*, 7 Allen, 277; *Sawyer v. Kendall*, 10 Cush. 241; *Norcross v. James*, 140 Mass. 188, 189; s. c. 2 N. E. Rep. 946; Co. Litt. 1146, 1216.

*Exceptions sustained.*

FIELD, J. (dissenting). I am unable to assent to the opinion of the Court. . . .

The second request, as applicable to the case, is in effect that if Warner took the counters tortiously, and kept them attached to his building more than six years, the defendant lost her right of property in the counters. . . . The effect of the statute of limitations of real actions upon the acquisition of title to real property is carefully discussed in Langdell, Eq. Pl. §119 et seq. Our statute of limitations of real actions (Pub. St. c. 196, § 1) provides that

“no person shall commence an action for the recovery of land, nor make any entry thereon, unless within twenty years after the right to bring such action, or to make such entry, first accrued, or within twenty years after he, or those by or under whom he claims, have been seized or possessed of the premises, except as hereinafter provided.”

Gen. St. c. 154, § 1; Rev. St. c. 119, § 1; St. 1786, c. 13; St. 1807, c. 75; Commissioner's Notes to Rev. St. c. 119. . . . The effect of the statute has been to extinguish the right, as well as to bar the remedy, and this is the construction given to the English statute of 3 & 4 Wm. IV. c. 27. Our statute of limitations of personal actions was taken from St. 21 Jac. I. c. 16; and this statute has been held not to extinguish the right, but only to bar the remedy. *Owen v. De Beauvoir*, 16 Mees. & W. 547; s. c. 5 Exch. 166; *Dawkins v. Lord Penrhyn*, 6 Ch. Div. 318; s. c. 4 App. Cas. 51; *Trustees of Dundee Harbor v. Dougall*, 1 Macq. 317, 321; *In re Alison*, 11 Ch. Div. 284. Pub. St. c. 197, § 1, is that

“the following actions shall be commenced within six years after the cause of action accrues, and not afterwards: . . . Actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels.”

There is no statute and no law prohibiting the owner of personal chattels from peaceably taking possession of them wherever he may find them. It is established in this Commonwealth that a debt barred by the statute of limitations of the place of the contract is not extinguished. The statute only bars the remedy by action within the jurisdiction where the defendant has resided during the statutory period. *Bulger v. Roche*, 11 Pick. 36. . . .

There is nothing in the statute which suggests any distinction between actions to recover chattels and actions to recover debts, and it does not purport to be a statute relating to the acquisition of title to property, but a statute prescribing the time within which certain actions shall be brought. There is not a trace to be found in our reports of the doctrine that possession of chattels for the statutory period of limitations for personal actions creates a title, and I can find no such doctrine in the English reports, or in the reports of a majority of the Courts of the States of the United States. . . . These cases show that the statute of limitations of personal actions is construed with reference to the particular action brought, and indicate that there is no change of title in property, although

the time for bringing an action of trover has expired. I think that the subject of the acquisition of title to personal chattels by adverse possession can best be dealt with by the Legislature if it thought necessary to establish such a rule of law, and that it was not the intention of the statute of limitations of personal actions to extinguish rights or titles.

There is much force in the suggestion that, if the defendant could not have recovered the counters by action, she ought not to be permitted to take them from the possession of the plaintiff by force or fraud; but it is not found in the case that she took them by force or fraud, and the request does not assume this, and I think that the defendant could have recovered these counters of the plaintiff by action, as the statute of limitations did not begin to run in favor of the plaintiff until 1881, when he took possession, and it is not found that the plaintiff's vendors had any title which they could convey to him. I think the second and third requests ought not to have been given.

322. JAMES BARR AMES. "*The Disseisin of Chattels*" (1890. Harvard Law Review, III, 23. Select Essays in Anglo-American Legal History, No. 67, III, 541.) Title by prescription was an important chapter in the Roman law. Continuous possession, in good faith, although without right, gave the possessor, after a given time, a perfect title. The civilians, as is shown by the requisite of bona fides, looked at the matter chiefly from the side of the adverse possessor. In England the point of view is different. English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide, in terms, not that the adverse possessor shall acquire title, but that one who neglects for a given time to assert his right shall not thereafter enforce it. Nevertheless, the question of bona fides apart, there is no essential difference between the two systems on the point under discussion. In the English law, no less than in the Roman law, title is gained by prescriptive acquisition.<sup>1</sup> As a matter of legal reasoning this seems clear. For, as already pointed out, the only imperfection in the disseisor's title is the disseisee's right to recover possession. When the period of limitation has run, the statute, by forbidding the exercise of the right, virtually annihilates it, and the imperfect title must become perfect.

This conclusion is abundantly supported by authority from Bracton's time down: "Longa enim possessio. . . . parit jus possidendi et tollit actionem vero domino petenti, quandoque unam, quandoque aliam, quandoque omnem, . . . Sic enim . . . acquiritur possessio et liberum tenementum sine titulo et traditione, per patientiam et negligentiam veri domini."<sup>2</sup>

Blackstone is even more explicit: "Such actual possession is prima facie evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right by degrees, ripen into a perfect and indefeasible title."<sup>3</sup> Lord Mansfield may also be cited: "Twenty years' ad-

<sup>1</sup> The writer regrets to find himself in disaccord upon this point with the opinion expressed incidentally by Professor Langdell, in his *Summary of Equity Pleading* (2 ed.), § 122.

<sup>2</sup> Bract. 52 a.

<sup>3</sup> 2 Bl. Com. 196; see also 3 Bl. Com. 196; 1 Hayes, *Conveyancing* (5 ed.), 270; *Stokes v. Berry*, 2 Salk. 421, per Lord Holt.

verse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession."<sup>1</sup> . . .

The conclusions reached in regard to land apply with equal force to chattels. The vice in the converter's title is the dispossessed owner's right to recover the chattel by recaption or action. The bar of the statute operating as a perpetual injunction against the enforcement of the right of action virtually destroys that right; and the policy of the law will not permit the dispossessed owner's right to recover by his own act to survive the extinguishment of his right to recover by legal process. The vice being thus removed, the converter's title is unimpeachable; and it is as true of chattels as of land that a prescriptive title is as effective for all purposes as a title by grant. . . . If sued by the original owner, he may plead in denial of the plaintiff's title.<sup>2</sup>

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<sup>1</sup> *Taylor v. Horde*, 1 Burr. 60, 119. See *Leffingwell v. Warren*, 2 Black, 599, 605, per Swayne, J.; *Davis v. Mills*, 194 U. S. 451, 456-7 per Holmes, J.; *Moore v. Luce*, 29 Pa. 260, 262, per Lewis, C. J.

<sup>2</sup> *Campbell v. Holt*, 115 U. S. 623 (semble); *Smart v. Baugh*, 3 J. J. Marsh. 363; *Smart v. Johnson*, 3 J. J. Marsh. 373; *Duckett v. Crider*, 11 B. Mon. 188; *Elam v. Bass*, 4 Munf. 301; *Lay v. Lawson*, 23 Ala. 377; *Traun v. Keiffer*, 31 Ala. 136.

**TITLE D: MIXED HARMS****SUB-TITLE (I): NUISANCE**

323. **REGISTRUM BREVIUM** (1595). *Assisa de nocumento*. (fol. 197.) Rex vicecomiti salutem. Questus est nobis A., quod B. iniuste &c. exaltauit quoddam stagnum in C. in comitatu tuo, ad nocumentum liberi tenementi sui in L. in comitatu H, post primam &c. vsque ibi, legales homines de visinetu illo videre stagnum illud, & nomina eorum imbreuiari. Et summoneas &c. quos sibi associas ad certos diem & locum in confinio comitatum prædictorum quos iidem &c. parati inde &c.

324. **JOSEPH CHITTY**. *Treatise on Pleading*. (1831. 5th. ed. vol. II, p. 774.) Declaration on the case for Nuisance. And whereas also the said plaintiff, before and at the time of the committing of the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage and premises, situate in the county aforesaid, (or at, &c.) and which said last-mentioned messuage and premises, the said plaintiff and his family, at the said several times hereinafter next mentioned, occupied, and inhabited, and dwelt in, and still do occupy, inhabit, and dwell in, to wit, in the county (or at, &c.) aforesaid; yet the said defendant, well knowing the premises, but contriving and intending to injure, prejudice, and aggrieve the said plaintiff, and to incommode and annoy him and his family in the possession, occupation, and enjoyment of his said last-mentioned messuage and premises, heretofore, to wit, on the day and year aforesaid, and on the several days and times aforesaid, wrongfully and injuriously caused and procured divers noxious, offensive, and unwholesome vapors, fumes, smokes, smells, and stench, to arise and ascend near to, in, and about the said last-mentioned messuage and premises of the said plaintiff, and the same have thereby been rendered and are become uncomfortable, unhealthy, and unwholesome, and unfit for habitation; and the said plaintiff hath thereby been and still is greatly annoyed and incommoded in the possession, use, occupation, and enjoyment of the said last-mentioned messuage and premises, and hath been, and is, by means of the premises, otherwise greatly injured and damnified, to wit, in the county (or at, &c.) aforesaid.

**325. JONES v. POWELL**

COMMON PLEAS. 1628

*Hutton*, 135

**JOHN JONES**, Plaintiff, against **James Powell**, Defendant, in an action upon the Case for a Nuisance, counts, That the Plaintiff, 10 August, I Caroli, was and is, and for forty years last past hath been, possessed for divers years yet during, of a Messuage, in which he and his family did by the time aforesaid dwell: And by all that time hath been Register to the Bishop of Gloc. and kept his Office there, that the said Defendant the tenth day of August, and ever since hath held in possession another house over against the Plaintiff's; And they being so possessed

the Defendant the said 10. of Aug. erected a Brewhouse, and a Privy in the said house, and burned Sea-coles in the said Brewhouse, so that by the smoke, stench, and unwholesome vapours coming from the said Coles and Privy, the Plaintiff and his family cannot dwell in the said house without danger of their health. Not guilty pleaded. Verdict for the Plaintiff.

The Plaintiff prayeth Judgment, and both offer for Authorities for this Case: 4 Ass. 3. 4. E. 3. 37. 5 E. 3. 47. New Book of Entries, fol. 19. in 5 Jac. between Smith and Mopham, an action upon the case for erecting a Tan-fat, with averment of corrupting the Air and Water, to the annoyance of the Plaintiff, and adjudged for the Plaintiff after Derby. Coke lib. 4. Aldred's Case, pleaded in new Book of Entries, fol. 106; an action of the case for erecting a Hogsip, *Ad nocumentum aeris* adjudged. Old Book of Entries, fol. 4.6. in the Edition 1596, action upon the Case brought for annoying a Piscary with a Gutter that came from a Dye-House; and there an action brought against a Dyer, *Quia sumos foeditates & alia sordida juxta parietes querentis posuit, per quod parietes putridae devenerunt, & ob metum infectionis per horridum vaporem, &c. ibid. morari non audebat.* 13 H. 7. 26, An action lieth against a Glover, because he with a Lime-pit so corrupted the water, that the Tenants departed. F. N. B. 185. b, A Writ lyeth to the Mayor of a City to cleanse the Streets from filth, whereby infection might grow. By which case it appeareth, that although Sea-cole be a necessary fuell to be used, and that Brew-houses are necessary, yet the Rule in Law is, *Sic utere tuo, ut alienum non laedas.* And Chimneys, Dye-houses, and Tan-fats are also necessary, but so to be used that they be not prejudicial to their Neighbors. And in this Case the Jury found that this new Brew-house and Privy was maliciously erected to deprive the Plaintiff of the benefit of his Habitation and Office, and that the Plaintiff was hereby damnified, as in the Declaration is alledged.

And upon Conference and Consideration of the Case, all the Judges did concur that Judgment should be given for the Plaintiff. Vide I Croke 510, *que un tallow furnace est Nuisance.*

### 326. REX *v.* WHITE AND WARD

KING'S BENCH. 1757

1 Burr. 333

THE defendants had been convicted of a nuisance in erecting and continuing their works at Twickenham, for making acid spirit of sulphur, oil of vitriol, and oil of aqua fortis. The indictment run thus, viz. That

“ at the Parish of Twickenham, &c. near the king's common highway there, and near the dwelling-houses of several of the inhabitants, the defendants erected 20 buildings for making noisome, stinking, and offensive liquors; and



then and there made fires of sea-coal and other things, which sent forth abundance of noisome, offensive, and stinking smoke; and made, &c. great quantities of noisome, offensive, stinking liquors, called, &c. whereby and by reason of which noisome, offensive, and stinking, &c. the air was impregnated with noisome and offensive, stinks and smells: to the common nuisance of all the king's liege subjects inhabiting, &c. and travelling and passing the said king's common highway; and against the peace, &c."

Sir *Richard Lloyd* — for the defendants — (on Monday 15th November 1756,) . . . said that this indictment was laid for making a liquor from whence the air was impregnated with noxious, hurtful, unwholesome, and stinking qualities: and the English word "noxious" answers to the Latin "nocivus." But it appeared, he said, upon the evidence, that the fumes, however offensive and disagreeable to many persons, were by no means in reality noxious, hurtful, or unwholesome; but the contrary. . . . On Tuesday, the 23d of the same month, Mr. Justice DENNISON reported the evidence; which was of great length, he said, there being about 75 witnesses on each side: however he collected the substance of it together in his report. It appeared to be very strong on the part of the prosecution: and he declared himself satisfied with the verdict. And it appeared upon his report, that the smell was not only intolerably offensive, but also noxious and hurtful, and made many persons sick, and gave them head-aches. . . .

On Saturday following, Sir *Richard Lloyd*, Mr. *Norton*, Mr. Serjeant *Hewitt*, and Mr. *Nares*, moved in arrest of judgment: . . . Here no offence is precisely laid. It charges "that by reason of the noisome, offensive, and stinking smoke, the air was impregnated with noisome offensive stinks and smells:" which are vague uncertain terms. . . . Tremaine's Pl. Cor. 195. *Rex v. Brookes* (for keeping a glasshouse) uses the words "unwholesome and dangerous." Ibid. 198. *Rex v. Cole*, (for a nuisance in keeping a soap-boiler's furnace), "unwholesome turpibus, periculofissimis, contagious, and infectious." Here, 't is only said to be "noisome and offensive." . . .

Sergeant *Davy*, Mr. *Morton*, Mr. *Afton*, Mr. *DeGrey*, Mr. *Stow*, and Mr. *Thurlow*, contra, for the prosecution, answered, that "noisome" conveys indeed a complex idea; but still includes "hurtfulness." It stands in the place of the Latin word "nocivus," and certainly imports a nuisance. . . . Nay, an offensive stench is of itself a nuisance; even though it should not be strictly hurtful. An indictment merely for a stench would have been good; even without any epithets. It depends upon rendering the property of other persons incommodious and uncomfortable to them: and this point is to be tried by a jury, "Whether the thing be really such a prejudice or incommodiousness to the neighborhood, as amounts to a nuisance." And here the jury have found it so. . . .

Sir *Richard Lloyd*, in reply — asserted that the epithet "offensive," alone, would not be sufficient. . . .

LORD MANSFIELD, C. J., thought there was nothing in the objections, which, he said, are reducible to 3 heads; viz.

1st. That there is no sufficient charge of the hurtfulness; . . . First — The jury have found “that it is to the common nuisance of the king’s subjects, dwelling, &c., and travelling, &c.” And the word “noxious,” not only means “hurtful and offensive to the smell;” but it is also the translation of the very technical term “nocivus;” and has been always used for it, ever since the Act for the proceedings being in English.

But it is not necessary that the smell should be unwholesome: it is enough, if it renders the enjoyment of life and property uncomfortable. . . . So that the Court were unanimous in denying the motion.<sup>1</sup>

<sup>1</sup> [The following are among the principal definitions, given in subsequent English judgments, of the kind and degree of sensory annoyance which constitutes a nuisance:

BRUCE, V. C., in *Walter v. Selfe* (1851, 4 De G. & Lm. 322): [The question is,] Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy and fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions of English people?

LORD ROMILLY, M. R., in *Crump v. Lambert*, (1867, L. & R. 3 Eq. 413): There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapor, or water, or any other gas or fluid. The owner of one tenement cannot cause or permit to pass over or flow into his neighbor’s tenement any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighboring tenement, or so as to injure his property.

JAMES, L. J., in *Salvin v. Coal Co.* (1874, L. R. 9 Ch. 75): The Master of the Rolls [said] that . . . the plaintiff must show substantial, or as the Master of the Rolls expressed it, “visible” damage. The term “visible” was very much quarrelled with. . . . It was stated that the word used in the judgment of the Lord Chancellor was “sensible.” I do not think that there is much difference between the two expressions. . . . The damage must be such as can be shown by a plain witness to a plain common jurymen. MELLISH, L. J.: That [the damage must be “visible”], as a strict proposition of law is not correct; for it is by evidence made out that there is a substantial damage, it does not matter how the fact of the damage was made out, whether by the eye or by the nose, or whether it is made out by the eye of a scientific person, or by the eye of anybody else. But . . . in cases of a nuisance of this particular description, those propositions are to my mind perfectly accurate.

LORD SELBORNE, in *Fleming v. Hislop* (1866). L. R. 11 App. Cas. 690: All the cases which have followed [*Walter v. Selfe*] have laid down this proposition . . . that that which causes material discomfort and annoyance for the ordinary purposes of life, to a man’s house or to his property, is to be restrained, subject of course to any questions which the circumstances of the particular case may raise; and that [too] although the evidence does not go to the length of proving that health is in danger. . . . It excludes any sentimental, speculative, trivial discomfort or personal annoyance of that kind, a thing which the law may be said to take no notice of and to have no care for. LORD HALSBURY: What makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction.]

327. BARNES *v.* HATHORN

SUPREME JUDICIAL COURT OF MAINE. 1866

54 Me. 124

ON exceptions, from Nisi Prius, *Dickerson*, J., presiding.

*Tallman & Larrabee*, for the defendant.

*Gilbert*, for the plaintiff.

KENT, J. The facts, which the plaintiff proved or offered to prove, on which the presiding judge ordered a nonsuit, are substantially as follows: That the husband of the defendant, Mary Hathorn, in 1846, built a tomb on the premises now owned by her, and within 44 feet from the west side of the plaintiff's house and the windows of his parlor, sitting room, and dining-room, all of which rooms were on that side of his house; That dead bodies were from time to time deposited in said tomb, until about the year 1856, when nine such bodies were in the tomb; That such an effluvia was emitted from them that the plaintiff's house became unwholesome, and, after an examination of the premises by physicians, the defendant caused them to be removed from the tomb; That the tomb remained unoccupied for six years, and until October, 1865, when the defendant caused the tomb to be opened and another dead body to be deposited for burial therein; That there was a wooden frame building over the tomb, which was whitewashed; that the tomb was of brick, with ventilators at each end; That the plaintiff had resided for twenty-five years, and still resides, in a house owned by himself and on his lot of about three acres; That the defendant's land adjoins his, and the dividing-line is 14 feet from his dwelling-house, and her lot contains about 130 acres; That the erection and occupation of the tomb, as alleged in the writ, diminished the market value of the plaintiff's house and lot from \$1000 to \$1500; and That his life in the occupancy of his premises is made uncomfortable by the apprehension of danger arising from the use of said tomb as a burial place.

The plaintiff introduced two physicians, who testified that the effect of burying dead bodies in the tomb might be unwholesome and injurious to the occupants of the house; if much miasma, long continued and concentrated from them, it might be fatal; and that any emission from such bodies might be injurious to the physical and mental system; and, without any effluvia, it might injuriously affect the inmates of the house by exciting the imagination.

The action is for injury to the plaintiff by reason of a nuisance continued by the defendant.

The question before us is whether, upon the case as above stated, a nonsuit was properly ordered.

What is a nuisance? In considering this question, when the complaint is based upon the use of another of his own property, we are first met by the general doctrine of the right of every man to regulate, im-

prove, and control his own property; to make such erections as his own judgment, taste, or interest may suggest; to be master of his own, without dictation or interference by his neighbors. On the other hand, we meet that equally well established and exceedingly comprehensive rule of the common law — “*sic utere tuo, ut alienum non laedas*”— which is the legal application of the gospel rule of doing unto others as we would that they should do unto us.

The difficulty is in drawing the line in particular cases, so as to recognize and enforce both rules, within reasonable limitations. It is quite clear that the law does not recognize any legal right in any one to compel his neighbor to follow his tastes, wishes or preferences, or to consult his mere convenience. He cannot dictate the style of architecture or, generally, the location of the buildings, or maintain that an unsightly or ill-proportioned edifice is a nuisance because it offends his eye or his too cultivated taste. Nor can he interfere because he has idle and unfounded fears of ill effects from the use of the adjoining lot. There may be many acts which, to the eyes of others, appear to be unneighborly and even unkind, and entirely unnecessary to the full enjoyment of the property, — vexatious and irritating, and the source of constant mental annoyance, and yet they may be but the legal exercise of the right of dominion, and therefore cannot be deemed nuisances. . . .

There is one class of cases, arising from the exercise of trades or business, which are in their nature offensive, or which renders the occupation of buildings near them, unhealthy, or decidedly uncomfortable. Many of these cases may be found collected in a very recent case in this State: *Norcross v. Thoms*, 51 Maine, 503, and more fully in the case of *Brown v. Perkins*, 12 Gray, 97. It is unnecessary for us to repeat them here. From the general tenor of the reported cases, we find that certain doctrines are recognized and acted upon. One is, that some trades, occupations, or acts are regarded as in themselves and inherently noxious or offensive and prejudicial, without extraneous proof. In other cases they are not necessarily nuisances, but may become so from location or some extraneous fact. Another well-established doctrine is, that it is not necessary to prove that the air is poisoned or rendered positively unhealthy; it is enough if the matter alleged to be a nuisance is offensive to the senses, or in any way renders the enjoyment of life and property uncomfortable. *State v. Haines*, 30 Maine, 65; *Rex v. White*, 1 Burr. 337; *Fish v. Dodge*, 4 Denio, 311; *State v. Pierse*, 4 McCord, 472; *Catlin v. Valentine*, 9 Paige, 575; *Rex v. Neil*, 2 Carr. & Payne, 485. . . .

The case finds that the erection and continuance of a private tomb is the nuisance complained of. A man may have a legal right to build such a tomb on his own land, as a general proposition. It is not in itself and inherently a nuisance to his neighbors. If a nuisance at all, it becomes so from its locality or other extraneous facts. However unwise or inexpedient it may be, in the judgment of reflecting men, to deposit

the remains of deceased relations or friends in private burying places on private lands, considering the constant change in the title of real estate in our country, and the almost certainty that in one or two generations no one will be left to care for or protect the graves, yet we know of no law which prohibits such erections or interments. But such tombs may be or may become nuisances. On the facts stated, this particular tomb was, at one time, beyond dispute, a very serious nuisance, when it "was occupied by nine dead bodies which emitted such an effluvia as to render the plaintiff's house unwholesome"; and as, after an examination of the premises by several physicians, all the bodies were removed, it could hardly be questioned that it was then a nuisance. But the defendant says that, after these bodies were removed, it ceased to be of such a character. Whilst the tomb remained for six years unoccupied, the only ground on which it could be then called a nuisance, probably, was its unpleasant proximity to the house of the plaintiff. It was only some fifteen paces from the windows of his dining and sitting room. It was certainly not a very cheering or exhilarating prospect which met the plaintiff's vision, whenever he looked abroad. How far, to a man of ordinarily nervous temperament, or to one of a sensitive nature, who shrunk from the constant view of this fixed memorial of death and decay, this erection might prove injurious to health, it is impossible to say. But, that it must have affected his comfort and happiness in the occupation of his dwelling may be less questionable. There seems to have been no necessity for this close proximity, as the defendant's farm consisted of at least one hundred and thirty acres. On what ground this spot, almost under the droppings from the plaintiff's house, was chosen, instead of some retired place, in this large farm, does not appear, and is not, perhaps, material in our examination of the case.

But, it seems, after six years from the time of removal, the defendant again opens the tomb and commences the deposit of deceased friends anew. One such body had been thus placed in the tomb, before this action was brought. This act would seem to indicate an intention to again use it for the place of interment of her family. Now, considering the result stated as having been produced by the former occupation, might not a man of ordinary firmness and judgment be reasonably apprehensive of danger? In addition to this, we have the testimony of the physicians called on the trial, that any emission from dead bodies in that tomb might be injurious to health, bodily and mentally. It had proved so before, and might again. A single body might not be so liable to create deadly or noxious effluvia as a larger number. But it would be of the same general character, and might of itself prove uncomfortable, if not positively unhealthy. The defendant made no disavowal of an intention to place other bodies there. On the whole, we are of opinion, that the case should have been submitted to the jury on the evidence, with proper instructions, and that the nonsuit was not properly ordered.

Exceptions sustained.

Nonsuit set aside and new trial granted.

CUTTING, WALTON, BARROWS, DANFORTH, and TAPLEY, JJ., concurred.

DICKERSON, J., dissenting. This is an action of review, and comes before us on exceptions to the ruling of the presiding judge in ordering a nonsuit. Several questions arise under the bill of exceptions.

1. Whether allowing an unoccupied tomb, built of brick with ventilators at each end, covered with a wooden frame building, whitewashed, and situated forty-four feet from the dwelling-house of the adjacent proprietor, to remain on one's premises is a nuisance per se. The injurious act imputed to the defendant in review is claimed to be a private nuisance which renders the dwelling-house of the plaintiff in review uncomfortable, unhealthy, and valueless, as a residence.

The law of nuisance is designed to enforce the observance of that fundamental moral maxim: "*sic utere tuo, ut alienum non laedas*" — so use your own as not to injure another. This rule, however, must have a reasonable construction, or it would become oppressive in many instances, and defeat the benevolent purpose it was designed to subserve. In populous villages and cities, a tree cannot be planted or a building erected without in some degree diminishing the quantity of light enjoyed by the adjacent proprietor. The smoke emitted from every additional chimney increases the quantity of unconsumed materials in the atmosphere, impairs its purity, and is oftentimes a source of annoyance and discomfort to others; so is the sound of the factory bell, the steam engine, and railroad car. . . .

The better interpretation of this rule of human conduct is that which harmonizes with that other maxim of the law, of equal authority, *de minimis non curat lex*, — the law takes no notice of trifles. Persons cannot insist upon their extreme rights, and bring suits for every trifling inconvenience, annoyance, or discomfort they may experience on account of the use others may make of thier own property. . . .

It is not the kind of erection, or the thing kept, but the use made of it, and the time, place, and manner of keeping, that determine the legal status in this respect. The structure may be faulty in its architectural proportions, and ill adapted for the purpose intended, or it may be even grotesque in its appearance, yet, if not used so as to cause substantial discomfort to the adjacent proprietors, these circumstances will not render it a nuisance. So, the article kept or used, or the business carried on, though dangerous in its character, may be so managed in respect to time, place, and manner, as to be harmless in the eye of the law.

The tomb erected by the devisor of the plaintiff in review, and by her allowed to remain on the devised premises, was a lawful erection; for, whatever may be thought of the policy of private burial, the right is unquestionable. In an unoccupied state, it could not have caused



the defendant in review such substantial discomfort as the law imputes to a nuisance. It may have been offensive to his tastes, but the law does not enter the domain of the fine arts, and establish styles of architecture; and the apprehension of injury from future deposits therein that might never be made, and noxious smells that might never arise therefrom, is altogether too remote, not to say fanciful, to base an action at law upon. . . . The nonsuit was properly ordered, and there should be judgment for the original plaintiff.

### 328. WESTCOTT *v.* MIDDLETON

COURT OF CHANCERY OF NEW JERSEY. 1887

43 *N. J. Eq.* 478, 11 *Atl.* 490

BIRD, V. C. The parties to this controversy own adjoining lots in the city of Camden. The complainant occupies his as a dwelling-house and for offices. The defendant occupies the basement and first floor of his dwelling to carry on the business of an undertaker, using the front room as an office, the second room as a place to keep supplies, and the second and third stories with his family. On the lot of the defendant, back of the first and second rooms, is a kitchen or extension, between which and the lot of the defendant is an open space going back to the rear of the lot, which is one hundred and eighty feet deep. In this open space is a hydrant. The cellar of the defendant is used for storing lumber, which, as occasion requires, he takes out in the rear, through this open space, to a shop which is at the extreme rear end of his lot, there to be used in making boxes. The complaint is, that the defendant is guilty of maintaining a nuisance in the maintenance of this business of undertaking, and that the complainant is entitled to the aid of this Court in being relieved therefrom. There is a charge that the defendant disturbs the complainant in the manufacture of boxes. This point is practically abandoned. But the complainant insists, in the first place, that this business is carried on in an unlawful manner; and, in the second place, that the defendant has no right to carry on this business where he does. The proof shows that the defendant buries from one hundred to one hundred and fifty persons a year, and the vehicles which he uses for that purpose are driving to and from his place of residence about four times in every case, so that, from five to six hundred times during the year, the complainant has the opportunity, if he attends thereto, to be reminded that death has taken place, that some one is a corpse, and that preparations are being made for the funeral, or that some one has just been buried. In every such case the defendant uses a large box, in which the corpse is preserved, as far as possible, from decomposition, by the use of ice in another box, made of tin, which is placed directly over the corpse. Formerly the tin box opened underneath, by a tube running down through the box contain-

ing the body, to carry off the water as the ice melted. This is now dispensed with, so that there is no connection whatsoever between the ice and the corpse. These boxes, which are so used to preserve the body, are taken, after the burial, to the residence of the defendant, through his office and store to the rear thereof, and, in this narrow space, by the side of the hydrant, are often washed; and, if not washed there, are washed further back in the yard. They have been allowed to remain there for an hour, and sometimes longer — occasionally all night. The complainant insists that he has several times noticed offensive odors from those boxes, which have greatly distressed him and given him alarm. Indeed, it may be said that there is no doubt but that the complainant has been frequently exercised in his mind on account of the presence of these boxes, which have been receptacles of the dead. Nor is there any doubt but that he has observed offensive odors, but whether from these boxes or not, is not so clear to my mind. There were odors arising from that locality, but the defendant insists that they came from a drain which he found to be choked up on two occasions; and that, after the drain had been opened and cleansed, there were no longer any odors. The complainant insists that these odors were of the character that he says they were, because flies were attracted there in great numbers, among which was what is known as the blow fly, which is supposed, according to the testimony, more likely to be attracted to places where there is animal decomposition than the ordinary fly. . . .

It is quite clear to my mind that this, like many other occupations, may be conducted as to be a nuisance. For example, a grocer might allow his vegetables to decay in such quantities and in such localities upon his premises as to do infinite harm to his neighbors, and subject him to the penalties of the law, or to the restraint of a court of equity. The same may be said of the vendor of meats; so negligent might he be as to scatter disease and death to multitudes. But because these things are possible, or may occasionally happen, it is not pretended for a moment that it is unlawful to carry on the grocery business; or to vend meats in the populous parts of our cities. It seems to me that the same reasoning may be applied, with great certainty, to the business of undertaking. It may be carried on so negligently, with such indifferent regard to the rights and feelings of others, as to be not only an offence to the tender sensibilities of the intelligent and refined, but to be a direct menace to the health, and open violation of the civil rights of all residing in the neighborhood. . . .

But it has not been shown that disease of any kind has ever been communicated by any act or omission of the defendant. It is not in evidence that the fatal spore has ever been allowed to remain in any of the boxes which the defendant and his employees have handled as children do their toys. Nor does it anywhere appear that any special risk has been presented in the management of this business. Therefore, as to the first question, I must conclude that the complainant cannot prevail.

In the second place, it is urged that the business of an undertaker is a nuisance per se. Is this proposition maintainable? Must the undertaker retire from the inhabited parts of our villages, towns, and cities? Is an occupation which is absolutely essential to the welfare of society to be condemned by the courts, to be classified with nuisances, and to be expelled from localities where all other innocent and innoxious trades may be carried on? In other words, is this business so detestable in itself as unreasonably to interfere with the civil rights or property rights of those who dwell within ordinary limits, and who can and do, without effort, see and hear what is being done? The inquiry is not whether it is obnoxious to this or that individual or not; but whether or not it is of such a character as to be obnoxious to mankind generally, similarly situated. There are certain obscene or offensive sights, certain poisonous or destructive gases or odors, certain disturbing sounds or noises, which affect most persons alike. Can the business of an undertaker be classed with any of these? Is the business of an undertaker of this class? Before the Court can condemn a trade or calling, it must appear that it cannot be carried on without working injury or hurt to another; and, as I have said, that injury or hurt must be such as would affect all reasonable persons alike, similarly situated. The law does not contemplate rules for the protection of every individual wish, or desire, or taste. It is not within the judicial scheme to make things pleasant or agreeable for all the citizens of the State.

But to proceed with the case before me. Let us ascertain from what standpoint, or under what circumstances, the complainant regards this employment a nuisance per se. Mr. Westcott is one of the most highly respected citizens. He is about seventy-two years old. As to the subject matter in hand, and everything akin to it, he is most sensitive or tender. It is conceded that he has an extraordinary horror or repugnance to contemplating anything pertaining to death or to the dead. Such emotions or feelings so control him that he has not attended a half dozen funerals during his long life. As he advances in years, this sentiment becomes more and more intolerable. It is urged, and with great reason, that these facts being so, Mr. Westcott's judgment is not only overcome by his imagination, but that innumerable evils are created thereby for his soul to feed upon, which he charges in this case to the defendant. Plainly, the circumstances are special, and most unsafe to found any general rule of law upon. . . .

My attention has been called to the case of *Penna. R. R. Co. v. Angel*, 14 Stew. Eq. 316. The principle there laid down is of great value in every such case. The defendant was engaged in a lawful business, but so used its tracks in making up its trains and distributing the cars in front of the complainant's dwelling that, by reason of stenches, noises, smoke, steam, and the dirt thereby occasioned, the comfort of the complainant's home was seriously impaired. The Court below allowed an injunction against such use of the road. But the Court did not pretend

to hold that the company must abandon the use of its tracks altogether. It was only decided that the company had no right to allow its engines or its cars to remain in the presence of, or near by, the house of the complainants, making hideous noises, emitting smoke and steam and unwholesome odors, to the great discomfort of the complainant in his home. The judgment of the Court simply looked to the proper exercise of the lawful rights of the defendant, and in the lawful exercise of those rights, what inconvenience or annoyance the complainants might suffer, they must submit to. Engines in passing might whistle or emit smoke, steam, and dirt, cattle might bellow, sheep bleat and hogs squeal; but to that extent the complainants must yield to the general demand. To this extent the Court was sustained on appeal. I can find nothing in that case to lead me to say that the business of an undertaker is a nuisance per se.

My attention has also been directed to *Cleveland v. Citizens' Gas Light Co.*, 5 C. E. Gr. 201, in support of complainant's views. In that case the court held:

"Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained. . . . To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress. The only question is what amounts to that discomfort from which the law will protect."

The learned Chancellor then made this important observation:

"The discomfort must be physical, not such as depends on taste or imagination. But whatever is offensive, physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort."

For a strikingly similar definition, see *Walter v. Selfe*, 15 Jur. 416, 4 Eng. L. & Eq. 15. In this case, then, we have the broad, yet perfectly perceptible or tangible ground or principle announced, that the injury must be physical, as distinguished from one purely imaginative; it must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or a refined fancy. This is very comprehensive; indeed, I cannot conceive of a more liberal or broad statement of the law; yet I apprehend it is a true delineation of the law.

How, therefore, shall I apply this rule? I must find that physical discomfort has been produced, or will be; but, in so doing, I must not forget the influence of the imagination or of a morbid or abnormal taste on the mind and body. What has been disclosed by the proofs? These facts: Mr. Westcott and the defendant have lived side by side, in these same houses, for about eleven years. During all this time, the

latter had carried on this business of burying the dead in about the same open and unpretentious manner that he now does. There is no evidence that Mr. Westcott or any other person has ever been afflicted by reason of the defendant's occupation. Indeed, nothing has been attempted in that direction. Yet it is admitted that this trade has been and is carried on by the defendant in the midst of the most populous part of the city of Camden. And what, to my mind, is of very great consequence, in considering whether this trade affects the body of Mr. Westcott through what is known as the bodily senses, or through his imagination or taste, is the fact that not another person has been produced who has been affected as he has been. . . . And although the business of undertaking, caring for, and burying the dead has been conducted in about the same manner from the earliest times (that is, in an open and public manner, in the town and city, as well as in the country), and so continues to be, where the most refined and cultivated abide, as well as where the unpretentious do, yet from no class has any one been brought to testify to any bodily or mental injury or suffering, because an undertaker was carrying on his vocation in his neighborhood.

Hence, in my judgment, before a trade or business can be declared to be a nuisance per se, it must be made to appear that it necessarily works injury, discomfort, or annoyance to the property of persons of citizens generally, who may be so circumstanced as to come within its influence. It is not enough that only one person, and that one the complainant, alleges discomfort; and certainly his case is greatly weakened when he admits that so sensitive is he on the subject that in seventy-two years he has not attended a half-dozen funerals. . . .

The result of my inquiries are, that, while the defendant has no right to conduct his business so as to endanger or threaten the health of the complainant, or to make his home uncomfortable, either by filling the air with noxious vapors, or the germs or seeds of disease, the evidence does not show that he has done either, and that the business of an undertaker is not a nuisance per se.

The bill should be dismissed, with costs.

### 329. McMILLAN v. KUEHNLE

COURT OF CHANCERY OF NEW JERSEY. 1909

76 N. J. Eq. 256, 73 Atl. 1054

BILL for an injunction by John McMillan and others against Louis Kuehnle and another. Preliminary injunction granted.

*Charles E. Sheppard* and *Edwin G. O. Bleakly*, for complainants.  
*George A. Bourgeois*, for defendants.

WALKER, V. C. The bill is filed by John McMillan and John H. Goldsmith on behalf of themselves and other residents of Atlantic City; among them being those whose affidavits are annexed to the bill. Those

making affidavits besides the two complainants are Mrs. Ellen Goldsmith, wife of one of the complainants, Robert Ingram and Harriet A. Ingram, his wife, Mrs. Frances Young, and Mrs. Mary Reynolds. The object sought by the bill is to restrain the defendants from holding forth baseball games at Inlet Park, Atlantic City, on Sundays, because of an alleged nuisance attendant thereon by way of noise and disorderly conduct which disturbs the peace and quiet of the Sabbath and interferes with the rest to which the complainants are of right entitled to enjoy on that day. The case stands or falls on the question of nuisance or no nuisance, as the Court of Chancery has no power to enforce, by injunction, the Sunday laws, so called. That jurisdiction belongs to another tribunal.

The complainant Mr. McMillan, who is a clergyman, swears that baseball games had been carried on at Inlet Baseball Park, Atlantic City, for some five or six Sundays before the making of his affidavit which was on August 25th ult. (1909); that his residence is about two squares from the park, and that large crowds attend the games; and that in going to and returning therefrom make loud noises, and sounds which are an annoyance to himself and the neighborhood, and a disturbance of the peace and quiet of the neighborhood, but he says nothing about sounds emanating from the grounds. He also says that quite a large number of the boys in his Sunday school absent themselves, and attend the games on Sabbath afternoons. With this last feature of his complaint the Court has nothing to do.

The complainant Goldsmith swears that he lives about a block and a half, or 600 feet, from the park, and that on Sunday afternoons crowds of people in carriages, in automobiles, and on foot pass by, to, and from the games, making loud noises, and that during the progress of the games there is frequently heard very loud cheering and shouting, yelling, and screaming and stamping of feet on the stands, all of which is very plainly heard at his residence and is greatly annoying and interferes with the comfort of his house for himself and his family, and destroys the peace and quiet of the neighborhood during the time. . . .

[Five other affidavits, to the same effect, were made.]

The proofs on the part of the defendants, who admittedly control and operate the Inlet Baseball Park, show that lands near or adjoining the park are used as a terminal of the trolley line (which extends from Longport to the Inlet) where its terminal building and waiting-room and also a hotel and restaurant, around which is a two-story pavilion and another hotel are situate; also, nearby, is a pier from which approximately 100 sailing yachts of various sizes make daily or hourly excursions or trips down Absecon Inlet and out upon the Atlantic Ocean, which yachts daily carry great numbers of people, extending into the thousands, on sailing trips, great numbers of people taking those trips on Sunday afternoons; that great numbers of people visit the hotels, or one of them, especially on Sundays, and enjoy the refreshments that



may be purchased; that there are automobile lines running from various parts of the city to the Inlet, and that large numbers of busses carry people to and fro, and that the majority of the people who go to the Inlet from the Board Walk along the Atlantic Ocean reach it by automobiles and busses, the trolley line not touching the Board Walk except at two points. The affidavits of over 40 people living near to the park were produced many of them living much nearer than those whose affidavits are annexed to the complainants' bill, who swore that none or very little noise or applause was heard coming from the baseball park while games were held forth there, and that what was heard was no annoyance whatever to people living in its vicinity nor was the conduct on the part of the crowds going to or returning from the Inlet on Sundays of the character mentioned by the complainants' witnesses; in fact, that it was not annoying.

If the issue were as to a certain well-defined physical fact presumably within the knowledge of all of the affiants, such as did a certain sound occur at midday or midnight, the defendants would prevail upon the clear weight and preponderance of the evidence; but the issue is as to facts not so clearly defined, but is as to facts which different people see and hear differently, according to their different natures. The criterion for determining whether or not a particular use of property is a nuisance is its effect upon persons of ordinary health and sensibility, and ordinary modes of living, and not upon those who, on the one hand, are morbid or fastidious or peculiarly susceptible to the thing complained of, or, on the other hand, are unusually insensible thereto. 21 Am. & Eng. Ency. of L. (2d ed.) p. 689. There is no evidence before the Court on this hearing to the effect that the complainants and affiants are morbidly sensitive as to the sounds that form the gravamen of the complaint; except that it may be inferred that such is the fact because of the overwhelming proof of those residing in the same neighborhood that the noises spoken of by the complainants are quite inappreciable, and not at all disturbing. This feature of the case may perhaps be gone into on final hearing. . . .

The law governing the matter under consideration is to be found in the three cases in this Court of *Cronin v. Bloemecke*, 58 N. J. Eq. 313, 43 Atl. 605, decided by Vice-Chancellor Emery in 1899; *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. 27, 53 Atl. 289, decided by Vice-Chancellor Pitney in 1902; and *Seastream v. New Jersey Exhibition Co.*, 67 N. J. Eq. 178, 58 Atl. 532, decided by Vice-Chancellor Pitney in 1904. . . .

A parallel to be found in the *Seastream* case is that the defense was there made that the ball ground was not the only place to which people resorted who went by the premises of the complainants and annoyed them. It was shown that Newark Bay was only a slight distance from the ball grounds and that people were attracted to its shores for amusements on Sundays, consisting of boating, crabbing, fishing, and pic-

nicking, and that, independent of the baseball playing, a large crowd on Sundays habitually resorted to the neighborhood by means of the trolley, alighting at the very same part of the avenue and creating precisely the same nuisance as was complained of on account of the baseball crowds. 67 N. J. Eq. 185, 58 Atl. 532. Vice-Chancellor Pitney did not think that that state of affairs estopped the complainants from asserting their rights against the defendants. . . .

Another phase of the case under consideration was dealt with by Vice-Chancellor Pitney in the Gilbough case. He said that noises which would not be declared to be nuisances on a week day are held to be nuisances if made on a Sunday, because they have the effect of disturbing that quiet and rest which the citizen, wearied with six days of labor, is entitled to have for his recuperation; and that the fact that such noise is forbidden by the laws of the land (the Sunday laws) takes away from the producer any excuse therefor (64 N. J. Eq. 29, 30, 53 Atl. 289); that is, as I understand it, takes away his defence, so far as that defence may be any justification for the making of disturbing noises at the given time, even though they be but slight. . . .

In the Cronin case the restraint went against the use of the park for the purpose of baseball games so that a nuisance might be occasioned to the annoyance and injury of the complainant and his family at his residence; the games not being prohibited entirely (58 N. J. Eq. 316, 317, 43 Atl. 605); and in the Gilbough case the injunction went restraining the defendant from permitting any noise or noises to be made upon its premises on Sunday which should disturb the complainants or their families, there being no prohibition of the games themselves (64 N. J. Eq. 36, 53 Atl. 289); but in the Seastream case, the law having previously been so well settled, the injunction went restraining the playing of baseball on Sundays altogether (67 N. J. Eq. 187, 58 N. J. Eq. 532).

Now, applying the law, as I understand it, to the facts of this case, as I understand them, I am constrained, following the last and culminating decision, to advise the issuance of an injunction against the playing of baseball games on Sundays at the Inlet Park, Atlantic City, until the final hearing of this cause, and until the further order of the Court to the contrary.

It may not be amiss to state again that an injunction does not issue in a cause like this upon any theory of enforcing observance of the Sunday laws. It goes only to protect the citizen against a nuisance which appreciably affects him. If the question before me had not already been passed upon by this Court, I should feel inclined to do no more than advise an injunction restraining the defendants from holding forth baseball games in such way or manner as to disturb and annoy the complainants at their residence; but, as already remarked, I feel bound to follow the Seastream case, which appears to be a good deal like this one, and to grant an injunction restraining the games altogether. If

this decision be erroneous, there is a Court above me to which the defendants may resort for correction of the error.

The order to show cause will be made absolute, with costs to abide the event of the suit.

### 330. TOWALIGA FALLS POWER COMPANY *v.* SIMS

SUPREME COURT OF GEORGIA. 1909.

—*Ga.* —, 65 *S. E.* 844

ERROR from City Court of Forsyth; *W. M. Clark*, Judge.

Action by George Sims against the Towaliga Falls Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*Cleveland & Goodrich* and *Persons & Persons*, for plaintiff in error.

*H. M. Fletcher*, for defendant in error.

POWELL, J. Sims sued the Towaliga Falls Power Company, alleging that during the year 1906 he was a tenant residing on certain lands in Monroe County; that the defendant built a high dam across the Towaliga River some distance below his residence, and backed a large body of water on and over a great area of land near his home; that the land so submerged was covered with trees and other vegetation; that the ponding of this water and the submerging of the vegetation caused malaria, and contaminated and affected the air with poisonous and deleterious gases; that the pond was a nuisance; that it made him and his family sick, and caused them to lose a large amount of time and to incur expenses of medical treatment and nursing; and that he was deprived of the use of his premises. By amendment he set up that he himself, his wife, and two minor children had been made sick of malarial fever; and the details of the sickness, lost time, and expenses incurred are set out definitely. By a further amendment he alleged that the submerging of the vegetation had produced noxious, disagreeable, and poisonous odors, vapors, gases, etc., causing malaria and marsh gas to permeate, impregnate, and contaminate the atmosphere upon his premises, and that the pond had incubated, produced, and raised a great many mosquitoes, which infected his land and premises, from which he and his family suffered great annoyance; that his home was rendered uncomfortable, undesirable, and at times almost uninhabitable; that his premises were rendered unhealthy and undesirable as a place to live; that great injury was caused to the land and to the enjoyment thereof and to the use of his home; that mosquitoes which were bred in the pond and which had not previously infested it became a medium for the transmission of malaria and did transmit it to himself and his family, causing them to have malarial fever, which they otherwise would not have had. He prayed for damages on account of the injury to the use of his premises on account of his own sickness, pain, and suffering, on account of the loss of the services of his wife and minor children,

and on account of expenses incurred in connection therewith. On the trial the plaintiff introduced evidence tending to establish the allegations of his petition. The testimony of the defendant was to the effect that the pond was not stagnant; that there was less stagnant water, etc., in the neighborhood of the plaintiff's premises after the erection of the dam than there was before; that the pond did not cause his sickness; that, if he was sick, he did not have malarial fever; that the mosquitoes about the pond were not of the anopheles (the malaria-bearing kind) — indeed, there was enough expert testimony as to miasma, malaria, mosquitoes, bacteria, bacilli, microbes, germs, and other things in Greek, Latin, Italian, and sesquipedalian terminology to hopelessly confuse any jury — and as all this is copied without material abridgment into the brief of evidence we ourselves are not without some justification if we decide this case without grasping all the points. The trial resulted in a verdict in favor of the plaintiff for \$200; and the defendant, having filed a motion for a new trial, which was overruled, brings error. The record contains a large number of exceptions. We will not take them up seriatim, but will state certain general principles, applicable to the facts, and controlling upon the points presented.

1. The plaintiff's testimony showed that he was probably a tenant at will — that he was in possession by virtue of a parol contract for more than one year. A tenancy at will is an interest in land, and is capable of being damaged. See *Hayes v. Atlanta*, 1 Ga. App. 26, 57 S. E. 1087.

2. At common law a nuisance was regarded only as an injury to some interest in land. Blackstone's definition of a private nuisance is

"anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another."

The definition adopted in our Code is broader:

"A nuisance is anything that worketh hurt, inconvenience, or damage to another."

Civ. Code 1895, § 3861. An examination of the authorities will show that the modern tendency of the American Courts is to break away from so much of the common-law rule as confined redress on account of nuisances to the damage done to some interest in real property, and as gave remedy only to persons having interests in lands. An interesting case on the subject is that of *Ft. Worth & Rio Grande Ry. Co. v. Glenn*, 97 Tex. 586, 80 S. W. 992, 65 L. R. A. 818, 104 Am. St. Rep. 894. It is hardly consistent with the modern idea of legal rights, wrongs, and remedies that a husband living in a house, the title to which is in his wife, should not have a cause of action against one who erects nearby a nuisance which sickens him, and causes him other great losses — and yet some Courts go to this extent. Under our Code we think the rule is not so rigid; but that one who has been specially endamaged by a nuisance can recover from the wrongdoer, though his damage consists

in an injury to his purse or person, irrespective of whether he has had an interest in real estate damaged or not.

3. The loss which occurs to a property owner from the erection or operation of public or quasi public utilities, such as roads, sewers, railroads, etc., upon his property or in such range of it that damages ensue, is in many features so akin to the loss which occurs from the maintenance of a nuisance near him that there has been a tendency in the minds of the Courts and text-book writers to confuse the two and to apply measures of damage appropriate only in the one case to the other. Prior to the Constitution of 1877, corporations exercising the right of eminent domain were liable only for the value of the property physically taken by them, and not also for the consequential damage resulting to property not taken. *City of Atlanta v. Green*, 67 Ga. 386. Under the Constitution of 1877 (art. 1, § 3, par. 1),

“private property shall not be taken *or damaged* for public purposes without just and adequate compensation being first paid.”

Civ. Code 1895, § 5729. The adoption of this provision enlarged the liability of those exercising the right of eminent domain, and gave property owners a right to claim consequential damages, even though none of their property was physically taken. *Smith v. Floyd County*, 85 Ga. 420, 11 S. E. 850. But the Constitution makes provision for compensation only for the taking and damaging of *property*, and there is no provision as to the compensation for damages to anything else resulting from a proper exercise of the right of eminent domain. In such cases, if business, purse, or person suffers, it is *damnum absque injuria*, unless the loss reflects itself in the diminution of the value of the tangible property. *Howard v. County of Bibb*, 127 Ga. 291, 56 S. E. 418. The result is that the measure of damage in cases when the injury ensues from the proper exercise of the right of eminent domain is very similar to that enforced in cases of injury from a nuisance in those jurisdictions where the common-law definition and notion of a nuisance is given full effect — “anything done to the hurt or annoyance of lands, tenements, or hereditaments of another.” As stated above, our Code recognizes a broader liability in nuisance cases. Hence in this State the measures of damage in the two cases are not necessarily the same. . . .

11. Recurring now to the measure of damage: . . . The gist of the action is the maintenance of a thing menacing to health, and, as we have said above, the public nature of the defendant's calling would not shield it from liability on account of the maintenance of a nuisance in fact, seriously endangering the health of those living nearby. The defendant, if liable at all, was therefore liable for all actual damages, whether done to property or not. The basis for limiting its responsibility to damages to property only was not present under the theory of the plaintiff's case. Now, where the effect of a nuisance is to make the

residence of a person unhealthful, the market value of the property or of some interest therein suffers. If the property is in the possession of a tenant and the nuisance is of such a temporary nature as not to be likely to affect the premises after the expiration of the lease, the whole loss is to the tenant's leasehold interest, and not also to the landlord's reversion. The evidence in this case did not disclose more than a temporary nuisance. Where a temporary nuisance makes premises undesirable by reason of the likelihood of those living there to be made sick, the property suffers a natural diminution in rental value for the time being, and, if the premises be held by a tenant, the value of the leasehold interest is the thing affected; and, by examining the matter critically, it may be seen that this damage results not so much because of the actual occurrence of the illness, but because of its liability to occur. The damage to the market value of the lease is just as great where the tenant has to move out on account of a reasonable fear of illness, as it is where he remains and he or his family actually become sick. The ensuing illness, where it does occur, the seriousness of it, the generality with which it is suffered by the family or other occupants of the premises is evidentiary of damage to the real estate, but is not part of that damage. In those cases, where from the nature of the subject-matter or the state of the pleadings only damages to property are recoverable, proof of illness suffered by the occupants of the premises may be heard for the purpose of showing how much the particular interest in the realty has been damaged, but, except in so far as it reflects itself in diminution of the value of the property, the damage directly resulting from the illness itself cannot enter into the recovery. But, where the plaintiff is entitled to recover all the direct damages resulting to him from the nuisance, the rule is different. In the latter class of cases the person injured may sue for and recover not only any loss occasioned to his interest in the realty by reason of the premises being rendered undesirable through their unhealthful condition, but, if he has suffered illness, he may recover separate and additional damages for that. As to illness suffered by himself personally, the plaintiff may claim damages for pain and suffering, physicians', druggists', and nurses' bills, and for loss of time from his usual labor. As to illness suffered by those members of his family for whose support and maintenance he is legally liable and to whose services he is entitled, he may recover in like manner, except as to the element of pain and suffering. The present plaintiff was the owner of a crop. He sought to recover damages, not only for the time he lost from the crop through illness, but also for the amount he paid to hands hired by him to take his place in the crop. This would have been a reduplication of the damage, and therefore not permissible. He also claimed to have lost a portion of his crop because he could not harvest it on account of the time he lost from sickness. He could not recover both of these. If he could have hired hands and have saved the crop, he should have done



this and the measure of damage would have been the sums expended in paying the hired men.

A close reading of the case of *Swift v. Broyles*, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390, and especially of the summary of the pleadings given prefatory to the opinion, will show that what we have said above is in harmony with the decision in that case. In many States following the common law the measure is narrower, but in this State, as the Supreme Court said in the case of *Langley v. Augusta*, 118 Ga. 599, 45 S. E. 490 (98 Am. St. Rep. 133):

"The plaintiff is, however, entitled to recover for all legitimate damages of every kind he has sustained. He can recover for the increased expense to which he has been put in the building of bridges, etc., by reason of the construction and maintenance of the ditch. He can recover whatever actual damages he has sustained by reason of sickness, or by reason of injury to his property growing out of the maintenance of the ditch in such a way as to make the same a nuisance. In a word, the plaintiff can recover all the actual damages he has sustained by reason of the wrong complained of on the theory that the ditch as maintained is a nuisance."

In *Savannah Ry. Co. v. Parish*, 117 Ga. 893, 45 S. E. 280, the plaintiff sued for \$1,000 damages to the market value of his property, and for \$1,000 additional damages on account of his having been made ill as a result of the nuisance. The verdict was for the full amount of \$2,000, and this was sustained by the Supreme Court. In *G., F. & A. Ry. Co. v. Jernigan*, 128 Ga. 501, 57 S. E. 791, though only \$200 damages to property was alleged, a verdict of \$400 was sustained, there having been an allegation that the plaintiff was further damaged by the sickness of himself and family. See, also, *Jones v. Royster Guano Co.*, 6 Ga. App. —, 65 S. E. 361.

12. Since the damages incurred by the plaintiff under his pleadings and testimony consisted of an injury to the value of a tenancy at will to his person through sickness, and to his purse through loss of services of his wife and minor children, it was not necessary that he should submit figures in dollars and cents, so as to show his loss with arithmetical accuracy. As to such matters the enlightened conscience of the jury is the guide. The Court properly instructed the jury, in substance, that the plaintiff was entitled to recover the actual damages inflicted by the injury, and that they should estimate the amount by their enlightened consciences from the facts submitted. *Hayes v. Atlanta*, 1 Ga. App. 26 (4), 30, 57 S. E. 1087; *Jones v. Royster Guano Co.*, 6 Ga. App. —, 65 S. E. 361; *Baltimore & Potomac R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 746.

13. We have given the record much careful consideration. The result of our study is that, while we gravely doubt that the jury reached the right result, we find no reversible error in the record; and the jurors, and not we, of course, are the sole judges of the facts. The

charge of the Court was eminently fair and followed in general outline the opinion given above. It is our duty, therefore, to affirm the judgment refusing a new trial. *Judgment affirmed.*<sup>1</sup>

## SUB-TITLE (II): VEXATION BY LITIGATION

### 331. SAVILE *v.* ROBERTS

KING'S BENCH. 1697

1 *Ld. Raym.* 374

THE single question of this case was, if A procures B falsely and maliciously to be indicted of a riot, upon which indictment B is acquitted; whether B have an action against A for so falsely and maliciously procuring him to be indicted? And after verdict for the plaintiff, this was moved in arrest of judgment by Serjeant *Lutwyche* for the defendant. And it was argued by Serjeant *Wright* for the plaintiff in Michaelmas term, 8 Will. 3, C. B. And after having been argued

#### <sup>1</sup> [ILLUSTRATIONS:

Instance of annoyance to sense of *smell* alleged to be a nuisance; pig-stye (1611, *Aldred's Case*, 9 Co. 57).

Instances of annoyance to sense of *feeling* alleged to be a nuisance; cookstove (1871, *Grady v. Wolsner*, 46 Ala. 381); Chinese laundry (1874, *Warwick v. Wah Lee*, 10 Phila. 160).

Instances of annoyance to sense of *hearing* alleged to be a nuisance: circus (1869, *Inchbald v. Barrington*, L. R. 4 Ch. App. 396); dog's barking (1840, *Brill v. Flagler*, 23 Wend. 354); railroad trains disturbing a church service (1867, *Sparhawk v. U. P. R. Co.*, 54 Pa. 401); pestle and mortar (1878, *Sturges v. Bridgman*, L. R. 11 Ch. D. 852); church-bells (1851, *Soltan v. DeHeld*, 2 Sim. N. S. 132); disturbing a church-service by loud talking, singing, and reading (1841, *Owen v. Henman*, 1 W. & S. 548); dog's barking (1906, *Herring v. Wilton*, 106 Va. 171, 55 S. E. 547).

Instance of annoyance to sense of *taste* alleged to be a nuisance (1872, *Savill v. Kelner*, 26 Law Times, N. S. 277).

Instances of annoyance to *sight* alleged to be a nuisance (1611, *Aldred's Case*, 9 Co. 57; 1866, *Barnes v. Hathorn*, 54 Me. 124; 1881, *Hawkins v. Sanders*, 45 Mich. 491).

Instances of *mixed annoyances* alleged to be a nuisance: cemetery (1899, *Lowe v. Prospect Hill Cem. Ass'n*, 58 Nebr. 94, 78 N. W. 488); pesthouse (1899, *Paducah v. Allen*, — Ky. —, 49 S. W. 343); stable (1902, *Albany Christ Church v. Wilborn*, 112 Ky. 507, 66 S. W. 285); hospital (1904, *Deaconess Hospital v. Bontjes*, 207 Ill. 553, 69 N. E. 748); house of ill-fame (1899, *Blagen v. Smith*, 34 Or. 394, 56 Pac. 292); concert-saloon (1895, *Koehl v. Schoenhausen*, 47 La. An. 1316, 17 So. 809).

#### NOTES:

"Stove tending to heat wine-cellar as nuisance." (H. L. R., IV, 185.)

"Stable as nuisance per se." (H. L. R., XIV, 391.)

"Recovery by lessee of premises affected." (H. L. R., XIV, 547; XVI, 145.)

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. XIII, § 434, p. 431.]

two or three times at the bar of the Court of Common Pleas, the judges in Hilary term, 8 Will. 3, pronounced their opinions in solemn arguments. And NEVILL and POWELL, Justices, held, that the action would well lie. But TREBY, Chief Justice, was of opinion against the action. Whereupon judgment was entered for the plaintiff. Upon which error was brought for the defendant in B. R. And it was argued by Sir *Bartholomew Shower* for the plaintiff in error, and by myself [*Raymond*] for the defendant, Hil. 9 Will. 3, B. R., and by Mr. *Hall* for the plaintiff, and Mr. *Northey* for the defendant, Pasch. 10 Will. 3, B. R.

And now in this term HOLT, Chief Justice, pronounced the resolution of the Court, that the action would well lie; and therefore all the Court was of opinion, that the judgment ought to be affirmed. And HOLT, Chief Justice, said, that this point is not *primae impressionis*, but that it has been much unsettled in Westminster Hall, and therefore to set it at rest is at this time very necessary.

And first, he said, that there are three sorts of damages, any of which would be of sufficient ground to support this action. 1. The damage to a man's *fame*, as if the matter whereof he is accused be scandalous. And this was the ground of the case between Sir Andrew Henley and Dr. Burstall, Raym. 180. But there is no scandal in the crime for which the plaintiff in the original action was indicted. 2. The second sort of damages, which would support such an action, are such as are done to the *person*; as where a man is put in danger to lose his life, or limb, or liberty, which has always been allowed a good foundation of such an action. . . . 3. The third sort of damages, which will support such an action, is damage to a man's *property*, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses is without doubt, which is an injury to his property; and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself. And though this doctrine has been questioned lately, it was always received in ancient times. 3 Ed. 3, 19; 3 Assi. pl. 13; 7 Hen. 4, 31 a; 11 Hen. 7, 25, 26; F. N. B. 116; Stile, 379; *Atwood v. Monger*. But it was objected at the bar against these old cases, that they were grounded upon a conspiracy, which is of an odious nature, and therefore sufficient ground for an action by itself. But to this objection he answered, that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie. . . .

Objection: Such actions will discourage prosecutions and there is no more reason that an action should be maintainable in this case, than where a civil action is sued without cause, for which no action will lie; if a man slanders another by suing of an action in a proper

court, no action will lie for it. 2 R. 3, 9, 10; Keilw. 26. Answer: 1. There is a great difference between the suing of an action maliciously, and the indicting of a man maliciously. When a man sues an action, he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a right, he may sue an action. . . .

2. The common law has made provision, to hinder malicious and frivolous and vexatious suits, that every plaintiff should find pledges, who were amerced, if the claim was false; which judgment the Court heretofore always gave, and then a writ issued to the coroners, and they affeered them according to the proportion of the vexation. See 8 Co. 39 b; F. N. B. 76 a. But that method became disused, and then to supply it, the statutes gave costs to the defendants.

### 332. SMITH *v.* MICHIGAN BUGGY COMPANY

SUPREME COURT OF ILLINOIS. 1898

175 *Ill.* 619, 51 *N. E.* 569

**ERROR** to Appellate Court, First District.

Trespass on the case by Alfred A. Smith against the Michigan Buggy Company. From a judgment of the Appellate Court (66 *Ill. App.* 516) affirming a judgment for defendant, plaintiff brings error. Affirmed.

This is an action of trespass on the case, begun by the plaintiff in error against the defendant in error in the Circuit Court of Cook County on March 3, 1893. The action is brought for the purpose of recovering damages for the alleged malicious prosecution of an ordinary civil action without probable cause by the defendant in error against the plaintiff in error. The defendant below (the defendant in error here) filed a general demurrer to the declaration. This demurrer was overruled, and a plea of not guilty was filed to the plaintiff's declaration. A trial was had before the Court and a jury. After the introduction by the plaintiff in error (who was the plaintiff below) of all his testimony, the defendant in error moved the Court to take the case from the jury, without introducing any evidence whatever on its behalf. This motion was based upon two grounds: First, that such cases as the present are not maintainable in the State of Illinois; second, upon the ground that the evidence did not show a want of probable cause, or, in other words, did show that there was probable cause. After hearing the arguments of counsel, the Court instructed the jury that the evidence did not establish a case on which the plaintiff was entitled to recover, and that their verdict should be in favor of the defendant. The action of the Court in giving this instruction was duly excepted to by the plaintiff. Thereupon the jury returned a verdict of not guilty, and, after overruling a motion for new trial made by the plaintiff, judgment was rendered in favor of the defendant and against the plaintiff for costs. The plaintiff

below (the present plaintiff in error) took an appeal to the Appellate Court. The Appellate Court has affirmed the judgment of the Circuit Court, and the present appeal is prosecuted from such judgment of affirmance.

The original action, for the alleged prosecution of which without probable cause the present action is brought, was begun by the defendant in error against the plaintiff in error on February 1, 1892, in the County of Kalamazoo, in the State of Michigan. The Michigan suit so begun by defendant in error against plaintiff in error was an action of trespass on the case, in which a declaration was filed by the Michigan Buggy Company, and a plea of not guilty by Smith. That action was tried in Michigan before the Court and a jury, and the jury returned a verdict in favor of the defendant therein (the plaintiff in error here). The Michigan Buggy Company, the present defendant in error, was a corporation organized under the laws of Michigan, having its place of business and principal office at Kalamazoo, in that State. From July, 1891, up to February 1, 1892, the plaintiff in error, Smith, had been in the service of the defendant in error, the Michigan Buggy Company, as a travelling salesman. By his contract of employment, the territory over which he was required to travel in order to sell the buggies and carriages manufactured by the defendant in error was the State of Illinois. The suit brought against the plaintiff in error by the defendant in error in Michigan was for the purpose of recovering damages for fraudulent representations alleged to have been made by the plaintiff in error to the defendant in error in order to obtain employment with it. The declaration in the Michigan action charged that the plaintiff in error had represented that during two years prior to his employment by defendant in error he had sold, while employed by another company engaged in manufacturing carriages, by the name of the Abbott Buggy Company, from \$60,000 to \$65,000 worth of buggies and carriages per year in each of said two years among his friends and acquaintances in Illinois. The declaration in that suit also alleged that the plaintiff in error had represented to the defendant in error that the persons among whom he had made such sales were his friends and acquaintances, and that he could control their trade, and turn it over to the defendant in error, if the defendant in error would employ him as requested, and that he furthermore represented that he was a first-class salesman in the line of the business in which the defendant in error was engaged, and that he could sell for the defendant in error as many buggies and carriages per year as he had sold for the Abbott Buggy Company during the two years in which he had been engaged in making sales for the last-named company. The declaration then charged that these statements and representations were false, that the plaintiff in error had not sold as many goods within the time stated as he represented, that he was not able to control such a trade as he represented that he could control, and that he was not such a first-class salesman as he represented

himself to be. It was also alleged in such declaration that through these representations the defendant in error had been induced to make a contract with the plaintiff in error, and to pay him large sums of money, and that the defendant in error had thereby suffered and sustained a great amount of loss, etc.

*Smith, Shedd, Underwood, and Hall*, for plaintiff in error. . . . An action on the case will lie for the malicious prosecution, without probable cause, of a civil action, irrespective of whether or not there has been any interference with the person or property of the defendant. In such an action actual damages are recoverable, and punitive damages in the discretion of the jury. . . .

*Meek, Meek, and Cochrane*, for defendant in error. An action for damages will not lie where there has been no arrest of the person or seizure of the property. *Gorton v. Brown*, 27 Ill. 488. A mere suit, however malicious or unfounded, cannot be made the ground of an action for damages if the defendant or his goods be not seized. *Kramer v. Stock*, 10 Watts, 117; *Meyer v. Walter*, 64 Pa. 289. . . . It is not enough for the plaintiff to declare, generally, that the defendant brought an action against him *ex malitia et sine causa per quod*, and put him to a great charge, etc., but he must allege and show the grievance specially.

MAGRUDER, J. (after stating the facts). The suit which was begun by the defendant in error against the plaintiff in error in Michigan was an ordinary civil suit, and resulted in favor of plaintiff in error. It is alleged in the declaration in the case at bar that the suit in Michigan was a malicious prosecution, and without probable cause. But it is not alleged or claimed that in that suit the plaintiff in error was arrested, or that any of his property was seized; nor does it appear that the plaintiff in error therein suffered any special damage, over and above the ordinary expenses and trouble which are attendant upon the defence of an ordinary civil suit. The question, therefore, which is presented in this case, and the only question which we deem it necessary to consider, is whether damages can be recovered for the malicious prosecution without probable cause of an ordinary civil suit, begun by personal service of process, and unaccompanied either by an arrest of the person or by seizure of property.

It is well settled that malicious prosecution is a proper action for the recovery of damages for the institution of a civil suit with malice and without probable cause, where the defendant is deprived of his personal liberty, or where there is an attachment or seizure of his property. But whether malicious prosecution will lie in such case in the absence of any interference with personal liberty, and in the absence of any seizure of property is a question upon which the authorities are very much divided.

The question above indicated has never been squarely decided in any case that has come before this Court. In *Gorton v. Brown*, 27 Ill. 489, it was held that an action could not be maintained for maliciously suing



out a writ of injunction. The conclusion reached in that case, however, was based mainly upon the ground that the party had a sufficient remedy upon the injunction bond given when the injunction was obtained, and that such bond was designed by the statute to cover the damages suffered by the party enjoined. But the drift of the opinion in that case was against the maintenance of an action for malicious prosecution without probable cause of an ordinary civil suit, unaccompanied by arrest or seizure of property. In *Gorton v. Brown*, *supra*, we said (page 493):

“We are well aware that elementary writers and respectable courts have held that an action on the case will lie for an abuse of the process of the courts, where special damages are alleged, and against a party for prosecuting a causeless action, prompted by malice, by which the defendant has sustained some injury, for which he has no other recourse or remedy. Such actions, however, for the most part, are actions wherein arrests have been made, and bail demanded, or the party put to some other expense and inconvenience, which cannot be compensated in any other mode than by an action. Such actions, except where a malicious arrest is charged, are not favored by the courts, and ought not to be; for, in a litigious community, every successful defendant would bring his action for a malicious prosecution, and the dockets of the courts would be crowded with such suits.”

The question here under consideration has been much discussed of late years in legal periodicals and in text-books, as well as in judicial decisions rendered by the Courts in many of the States. We have examined the discussions upon this subject with great care, and are inclined to hold in accordance with the intimation made in *Gorton v. Brown*, *supra*, that such actions ought not to be maintained.

An able discussion of this subject, and an extensive review of the authorities in relation thereto down to the year 1878, may be found in 21 *Amer. Law Reg.* pp. 281, 353. The articles there published were written by Mr. John D. Lawson. After his review of the cases, Mr. Lawson announces it as his own opinion “that, while the weight of authority denies the action, the weight of reason allows it.” The conclusion announced by the author of these articles has been followed by Courts of last resort in several of the western and newly-created States. But, as the weight of authority denies the action, we, as a Court, feel it our duty to be governed by the weight of authority, rather than by the conclusion of any law writer, however able and ingenious his reasoning may be. The author of these articles, after giving the substance of the English and American decisions upon this subject, fairly and frankly states the following conclusion therefrom, before he announces his own judgment in opposition to such conclusion, to wit:

“We have now reviewed all the American cases pro and con, and the weight of authority appears to be against the right of action for the unfounded and malicious prosecution of an ordinary civil action. With the majority are all but one of the text writers we have cited, — Swift, Townsend, Addison, and the editors of the *American Leading Cases*, who follow the English adjudications; Mr.

Weeks, who limits the right to 'extremely vexatious suits, where special damage has been actually suffered'; and Judge Cooley, who discourages the remedy, without positively denying the right. On the other side is Mr. Hilliard, who evidently favors the action, but unfortunately relies upon cases which do not sustain it at all."

Another review of the authorities may be found in 41 Cent. Law J. p. 449. The learned author of the article on "Malicious Prosecution" in 14 Am. & Eng. Enc. Law, beginning on page 32, also refers to and states the substance of the cases on both sides of the question. It is there said:

"At common law the defendant in an action maliciously brought without probable cause has a right of action against the plaintiff in such action after its termination in favor of such defendant, and this regardless of whether the plaintiff had interfered with either the person or property of the defendant. But, after the enactment of the statute of Marlbridge, in the fifty-second year of Henry III, giving costs to successful defendants by way of damage against the plaintiff *pro falso clamore*, it came to be held that an action for malicious prosecution would not lie in civil actions, unless in cases where there had been arrest of the person, or seizure of property, or other special injury, which would not necessarily result in all suits prosecuted to recover for like causes of action. And this is the rule adopted by some of the courts of this country. The contrary rule, adopted by courts equal in number and respectability, is that an action can be maintained, where neither the person nor the property was seized, for damages accruing in suits brought maliciously and without probable cause."

We prefer to adopt, as the sounder rule, the rule first stated in the passage last above quoted. We are of the opinion, and so hold, that an action for the malicious prosecution of a civil suit without probable cause will not lie where the process in the suit so prosecuted is by summons only, and is not accompanied by arrest of the person, or seizure of the property, or other special injury not necessarily resulting in all suits prosecuted to recover for like causes of action. This conclusion is sustained by the following authorities, to wit: *Poots v. Imlay*, 4 N. J. Law, 330; *Bitz v. Meyer*, 40 N. J. Law 252; *Muldoon v. Rickey*, 103 Pa. St. 110; *Kramer v. Stock*, 10 Watts, 115; *Eberly v. Rupp*, 90 Pa. St. 259; *Mayer v. Walter*, 64 Pa. St. 283; *Wetmore v. Mellinger*, 64 Iowa, 741, 18 N. W. 870; *Smith v. Hintrager*, 67 Iowa, 109, 24 N. W. 744; *McNamee v. Minke*, 49 Md. 122; *Supreme Lodge v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Terry v. Davis*, 114 N. C. 31, 18 S. E. 943; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Mitchell v. Railroad Co.*, 75 Ga. 398; *Newell, Mal. Pros.* § 32.

Those who favor the doctrine that the Courts ought to permit suits of this character to be brought and prosecuted urge in support of it the common-law maxim that for every wrong the law furnishes a remedy. It is said that, when a civil suit is maliciously prosecuted without probable cause, the defendant undergoes expenses, and suffers injury from loss of time, and often from loss of credit, and that these wrongs he

must endure without a remedy, if he cannot bring suit for damages for the prosecution of such malicious action. On the other hand, it must be remembered that the Courts are open to every citizen; and every man has a right to come into a court of justice, and claim what he deems to be his right, without fear of being prosecuted for heavy damages. If such actions are allowed, it might oftentimes happen that an honest suitor would be deterred from ascertaining his legal rights, through fear of being obliged to defend a subsequent suit charging him with malicious prosecution.

It is urged that the costs which are awarded to the successful defendant in a civil suit, malicious in its character, and brought against him without probable cause, are inadequate compensation for the injury which he suffers. But the question of the amount of costs which are to be allowed the successful party is a question to be determined by the Legislature, and not by the Courts. As was said by Chief Justice Kirkpatrick in *Potts v. Imlay*, *supra*:

“The courts of law are open to every citizen, and he may sue *toties quoties* upon the penalty of lawful costs only. These are considered as a sufficient compensation for the mere expenses of the defendant in his defence. They are given to him for this purpose, and he cannot rise up in a court of justice, and say the Legislature has not given him enough. If we were legislators, indeed, perhaps we should be inclined to say that the costs, in all cases where costs are given, should completely indemnify the party for all his necessary expenses, both of time and money; but those to whom this high trust is committed in this State have thought, and, we will presume, have wisely thought, otherwise.”

Such ordinary trouble and expense as arise from the ordinary forms of legal controversy should be endured by the law-abiding citizen as one of the inevitable burdens which men must sustain under civil government. *Muldoon v. Rickey*, *supra*. In the case at bar there was introduced in evidence a transcript of the record of the action which was tried in Michigan. This transcript shows that a considerably larger bill of costs is allowed against the defeated party in a civil action in the State of Michigan than is allowed in the State of Illinois and in many of the other States. It appears from the defendant's bill of costs in the Michigan suit that the present plaintiff in error was allowed attorney's fees for services before notice of trial, after notice of trial, and during the trial, and upon continuance of the cause, and that he was furthermore allowed a reporter's fee and witness' fees on trial, including days and miles travelled by the plaintiff in error, and a witness who went to Michigan from Illinois to testify. The total taxation of costs in behalf of plaintiff in error in the Michigan suit was \$74.70.

Those who favor this species of action also claim that, if the Courts refuse to allow such actions to be maintained, litigation will be encouraged, and causeless and unfounded civil suits will be apt to be brought. On the contrary, the danger is that litigation will be promoted and encouraged by permitting such suits as the present action to

be brought. This is so, because the conclusion of one suit would be but the beginning of another. A defendant who had secured a favorable result in the suit against him would be tempted to bring another suit for the purpose of showing that there had been malice and want of probable cause in the prosecution of the first suit which he had won. Litigation would thus become interminable. Every unsuccessful action would be apt to be followed by another alleging malice in the prosecution of the former action. There would thus be substantially a trial of every lawsuit twice instead of once, because, in order to show that the first suit was malicious and without probable cause, it would be necessary to go over again the material facts that had been developed by the proof in such suit. Again, if every successful defendant should be encouraged to bring an action against the defeated plaintiff for the malicious prosecution without probable cause of an ordinary civil suit, such defendant would be careless and extravagant in the matter of the cost of the defence made by him. It would be a matter of little importance to the successful defendant whether his contract with his attorney for the latter's professional services provided for extravagant or reasonable fees, if he could turn around at once and recover from the defeated plaintiff whatever he had expended. His expenses and trouble and loss of time and credit would assume larger proportions, and would be regarded as heavier burdens, if he knew that he was to be reimbursed for such outlay from the property of his adversary. In addition to this, there is no reason why a plaintiff may not bring an action against a defendant who has made a groundless and causeless defence, if the defendant may sue for damages which he has suffered for an unfounded prosecution.

For the reasons stated, we are of the opinion that the Court below committed no error in instructing the jury to find for the defendant below (the defendant in error here). Accordingly the judgment of the Appellate Court, affirming the judgment of the Circuit Court, is affirmed.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> [PROBLEMS:

The defendant maliciously and without probable cause filed a petition for adjudging the plaintiff bankrupt and distributing his assets among his creditors. After a trial, the plaintiff was adjudged not bankrupt, and the petition was dismissed. Has the plaintiff an action? (1905, *Wilkinson v. G. B. S. Co.*, 141 Fed. 218.)

The defendant maliciously and without probable cause filed a petition for adjudging the plaintiff insane and placing him under guardianship. On trial of the cause, the petition was dismissed. Has the plaintiff an action? (1877, *Lockenour v. Sides*, 57 Ind. 360.)

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS RIGHT:

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. XIII, § 472, p. 471.

*Thomas E. Holland*, "Elements of Jurisprudence," 9th ed., c. XI, par. IV, p. 177.]

**SUB-TITLE (III): LOSS OF PERSONAL PRIVACY****333. PRINCE ALBERT v. STRANGE**

VICE-CHANCELLOR'S COURT OF ENGLAND. 1851

*2 De G. & Sm. 652*

THE original bill in the former of the above suits was exhibited by the Prince Albert, as plaintiff, against William Strange, a publisher in Paternoster Row, and the Attorney-General, as defendants.

The original bill stated that Her Majesty and the plaintiff had occasionally, for their amusement, made drawings and etchings, being principally subjects of private and domestic interest to themselves, and of which etchings they had made impressions for their own use, and not for publication. For greater privacy, such impressions had been, for part, made by means of a private press kept for that purpose, and the plates themselves had been ordinarily kept by Her Majesty under lock; and the impressions had been placed in some of the private apartments of Her Majesty at Windsor, and in such private apartments only. That the defendant, William Strange, or his confederates, had in some manner obtained some of such impressions, which had been surreptitiously taken from some of such plates, and had thereby been enabled to form, and had formed, a gallery or collection of such etchings, of which he intended to make public exhibition, without the permission of Her Majesty and the plaintiff, or either of them, and against their will; and that the defendant, William Strange, who was a printer and publisher, carrying on business at No. 21 Paternoster Row, London, had printed and published a work, of which the title-page or cover bore the following title: "A Descriptive Catalogue of the Royal Victoria and Albert Gallery of Etchings." . . . The bill stated that the work was published without the consent and against the will of the plaintiff and the Queen, and it contained other statements to the same effect as those of the affidavit of the plaintiff, mentioned below.

The prayer was that the defendant might be ordered to deliver up to the plaintiff all impressions and copies of the several etchings respectively made by the plaintiff, and that the defendant and his servants, agents, and workmen, might in the meantime be restrained by injunction from exhibiting the gallery or collection of etchings, or any such etchings; and from making or permitting to be made any engravings or copies of the same or any of them; and from in any manner publishing the same or any of them; and from parting with or disposing of the same or any of them; and from selling or in any manner publishing; and from printing the descriptive catalogue, or any such work being or purporting to be a catalogue of the etchings; and that all the copies of the catalogue in the possession or power of the defendant might be given up to be destroyed. . . .

After the order was made granting the injunction, the bill was amended making defendants thereto, in addition to Strange and the Attorney-General, two other defendants, named Jasper Tomsett Judge and J. A. F. Judge, and stating (among other things) that some of the impressions of the etchings were obtained in the following manner, viz., that certain of the plates were given to Mr. Brown, a printer at Windsor, for the purpose of printing off certain impressions thereof for Her Majesty and plaintiff; and that Mr. Brown employed therein a person of the name of Middleton, who, without Mr. Brown's consent or knowledge, and in violation of the confidence reposed in him, took impressions thereof for himself, and that the defendant, Jasper Tomsett Judge, had bought or in some manner obtained the same from Middleton. . . .

Dec. 13. *Mr. Russell, Mr. Warren, and Mr. Sidney Smith*, for the defendant Strange, in support of a motion to dissolve the injunction obtained upon the bill so far as it restrained the publication of the catalogue. The publication sought to be restrained contains nothing more than a description by name of a series of etchings executed by Her Majesty or the Prince, describing the subject of the etchings, with remarks and criticisms. The injunction was obtained on four affidavits, which do not make out any case of impropriety of conduct on the part of the defendant, Mr. Strange. It can scarcely be supposed that he had any evil intention when he took the course of, in the first place, bringing his intended publication under the eyes of the very parties whom he was charged with intending to offend. There may be a want of delicacy in the conduct of the defendant, and a want of comprehension of the feelings of persons in an elevated position, but there has been no infringement of any legal right. No one has a legal right to complain of the publication of a catalogue describing articles in his possession, letting the world know what they were. Another, who has seen the articles and acquired a knowledge of their nature, may embody in a publication the result of the exercise of his own faculties. It is not suggested that the property in the etchings has been interfered with. The defendant does not seek to publish even a likeness of them. An owner of a print is not the owner of a description which a stranger had made of it; nor can he hinder a stranger from describing it. There is no authority affording the least ground for such a proposition. . . .

The *Solicitor-General* [Sir John Romilly], Mr Serjeant *Talfourd*, and Mr. *W. M. James*, for the plaintiff. Leaving out all considerations of propriety and morality, and dealing with this as a plain question of law, we submit that, according to well-known principles recognized in Courts of Equity from the earliest times, the injunction is clearly sustainable. The case does not turn upon the question of copyright, but upon the clear and absolute property which Her Majesty and His Royal Highness had in the etchings, copies of which, without their knowledge and without their consent, it was proposed to exhibit for



the pecuniary profit of Mr. Strange and Mr. Judge. The principle is that the Court will restrain any person from making use of the property of another, contrary to the will and disposition of the owner. This principle extends to property of every description, and one species of property is as much regarded as another. . . .

Might a person go into the library of a literary man and give an account of any literary work on which he was engaged, or make a catalogue of all his manuscripts? Take the case of a chemist engaged in experiments from which most important results had been obtained. Would not the Court interfere to prevent the publication of the results derived from the skill and industry of such a chemist, by a person who had been permitted to witness the experiments? Upon what principle does the Court interfere to prevent the publication of letters, or of recipes in medical science? Upon the principle that there is property in these things, and that the Court of Chancery will not permit another to derive a benefit by infringing the right to such property. [The VICE-CHANCELLOR. Would a discharged banker's clerk be allowed to publish the accounts of all the customers? I do not mean to say whether that has any analogy to this case or not.] We submit that he would not. . . . It has been said that there has been here no violation of the right of private property. But there has been the abstraction of one attribute of property, which was often its most valuable quality, namely, privacy.

All the cases in which the Court has interfered to protect unpublished letters or manuscripts, or that ideal property which a man acquires in the remarks made by himself, proceed upon that principle of protecting privacy. In literary property the copyright dates from the time when the author gave it to the world. But in the case of etchings and prints the copyright is not called into legal existence until certain conditions are performed; and there seems to be no statutory protection against copying a painting. It appears to be an omission in the Act, the words of which only extend to engravings, mezzotints, &c., so that the design of the painter, when conveyed in form and colour to the canvass, must rely upon the common law for protection. [The VICE-CHANCELLOR. Suppose the servant of a painter to make a copy of a painting in his master's studio. Could he exhibit it?] We submit that he could not. . . .

With regard to the analogy sought to be instituted on the other side, between the present case and that of an abridgment of a work, we are willing to adopt the analogy; and we ask the defendant's counsel to produce a case in which it has been held that a person had a right to publish an abridgment of a work of another which was never by publication made *publici juris*. The law, as laid down in *Millar v. Taylor* (4 Burr. 2417), conclusively establishes the contrary of such a proposition. The argument, in fact, proceeds upon a confusion of the right of property, which is here invaded, with the statutory title to copy-right.

Copyright is not of a simple, but a complex, nature, involving two conditions, one of publication, and the other of exclusion. An author claims the right of multiplying the copies of his work, and of thus securing to himself present reputation and distant fame; and he also claims the advantage of excluding by statute law other persons from multiplying copies of the same work. But in this case the right claimed is like the right of an author to his unpublished work. It is the right of an artist to his unpublished engravings. In seeking the protection of that right from violation, he claims protection for the privacy of his property, the privacy being a valuable element of it. The subject of the right is property in its highest sense, because it is property of the owner's creation — property the result of his genius and skill. . . .

If the principle is to prevail that a person may get the production of another in any manner, and then publish such accounts of them to the world as he likes, a fatal blow will be struck at all privacy, no matter whether it exists in a lofty station, where it is confined within the narrow limits of a domestic circle, at all times necessarily much encroached upon amidst the round of public duty, or whether it exists in the humblest ranks of life. Whether it adds pecuniary value to property, as it does in many cases, or is only prized as a matter of affection and remembrance of feeling — whether the result of destroying privacy may be to inflict pain upon the feelings of the individual, or, as in the present case, to increase the honour and affection in which he is held — such considerations are altogether immaterial to the question at issue. . . .

Jan. 12, 1849. The VICE-CHANCELLOR [Sir J. L. KNIGHT BRUCE]. . . .

The publisher's counsel contend that the injunction against him ought so far to be dissolved, insisting that the portion of it which they impeach is not supported by any ground of title that a court of justice can recognize or deal with. They contend, in substance, that, so far, the plaintiff complains of an offence not against law, but against manners; with reference to which Mr. Russell remarked, in effect (and I agree with him), that the order and well-being of life depend greatly on things not within the cognizance of laws, and can in very many instances not be protected or vindicated by them. It was asserted, indeed, by a great orator and writer of the last generation, and perhaps truly, that manners are of more importance than laws, as giving their whole form and colour to our lives. Still, however, some breaches of good manners are breaches of law also. There is no difficulty here about the former. The question, I agree, is of the latter.

The defendants' counsel say that a man acquiring a knowledge of another's property without his consent is not by any rule or principle which a court of justice can apply (however secretly he may have kept or endeavored to keep it) forbidden without his consent to communicate and publish that knowledge to the world, to inform the world what the property is, or to describe it publicly, whether orally, or in print or writing.

I claim, however, leave to doubt whether, as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, it is certain that a person who, without the owner's consent, express or implied, acquires a knowledge of it, can lawfully avail himself of the knowledge so acquired to publish without his consent a description of the property. It is probably true that such a publication may be in a manner or relate to property of a kind rendering a question concerning the lawfulness of the act too slight to deserve attention. I can conceive cases, however, in which an act of the sort may be so circumstanced or relate to property such, that the matter may weightily affect the owner's interest or feelings, or both. For instance, the nature and intention of an unfinished work of an artist, prematurely made known to the world, may be painful and deeply prejudicial to him; nor would it be difficult to suggest other examples.

I may here, perhaps, remark in passing that there are several offences against propriety and morals, which, though causing most serious discomfort, pain, and affliction to individuals, the law refuses to treat as actionable, unless these offences have occasioned some recognizable damage of a particular kind, which it designates "special damage," but when they have done so permits to be brought into litigation and to be redressed civilly, to an extent proportioned to substantial justice, and therefore frequently much beyond the "special damage" which alone enabled the proceeding.

The plaintiff's counsel, however, contended that the questioned part of the injunction here prohibits only that which is or would be the use by the defendant of the plaintiff's property, or that of the plaintiff and his Consort, for purposes of pecuniary gain to the defendant, or some other purpose of his own, without consent; and this view of the matter, if correct, may be not without importance. It was suggested that, to publish a catalogue of a collector's gems, coins, antiquities, or other such curiosities, for instance, without his consent, would be to make use of his property without his consent; and it is true, certainly, that a proceeding of that kind may not only as much embitter one collector's life as it would flatter another — may be not only an ideal calamity — but may do the owner damage in the most vulgar sense. Such catalogues, even when not descriptive, are often sought after, and sometimes obtain very substantial prices. These, therefore, and the like instances are not necessarily examples merely of pain inflicted in point of sentiment or imagination: they may be that, and something else beside.

But, as I just now observed, and as we all know, pain inflicted in point of sentiment or imagination is not always disregarded in courts of justice. I alluded slightly to cases, of which some kinds of calumny and seduction are instances; and, as an example somewhat different, if a trespass upon property, the damage caused by which is so small as to be scarcely appreciable, and compensable amply by the smallest

coin, be accompanied by circumstances of oppression or malignity, insolence, affront, or reproach, which by themselves could not be made the subject of an action, they may be considered in the suit for the trespass, and swell the damages to a heavy amount. . . .

The question, however, does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that, whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent, be published; and I think, as I have said, that to use a dishonest knowledge of them for the purpose of composing and publishing, and so to compose and publish a catalogue of them, amounts to a publication of them within the principle of the rule.

Assuming the law to be so, what is its foundation in this respect? It is not, I conceive, referable to any consideration peculiarly literary. Those with whom our common law originated had not probably among their many merits that of being patrons of letters; but they knew the duty and necessity of protecting property, and with that general object laid down rules providently expansive — rules capable of adapting themselves to the various forms and modes of property which peace and cultivation might discover and introduce. The produce of mental labour, thoughts, and sentiments recorded and preserved by writing, became, as knowledge went onward and spread, and the culture of man's understanding advanced, a kind of property impossible to disregard, and the interference of modern legislation upon the subject, by the Stat. 8 Anne, professing by its title to be "for the encouragement of learning," and using the words "taken the liberty," in the preamble, whether it operated in augmentation or diminution of the private rights of authors, having left them to some extent untouched, it was found that the common law, in providing for the protection of property, provided for their security, at least before general publication by the writer's consent. The species or kind of the thing in which property was claimed had, of course, to be particularly considered, in considering the question whether a right in it was invaded, and how invasion should, in the particular case, be prevented or redressed; and this class of property, by nature not corporeal at all, or not exclusively corporeal, required to be defended against incorporeal attacks, and not at all or not exclusively against bodily assaults.

Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided nor prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known. This has been in effect often judicially declared, nor by any Judge more distinctly than by Lord Eldon, upon several occasions. . . .

Such then, being, as I believe, the nature and foundation of the common law as to manuscripts, independently of Parliamentary additions

and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labour is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress. . . .

The principles and rules which it applies to literary compositions in manuscript must, I conceive, be, to a considerable extent at least, applicable to these also. Mr. Justice Yates, in *Millar v. Taylor* (4 Burr. 2303), said that an author's case was 'exactly similar to that of an inventor of a new mechanical machine; that both original inventions stood upon the same footing in point of property, whether the case were mechanical or literary, whether an epic poem or an orrery; that the immorality of pirating another man's invention was as great as that of purloining his ideas. Property in mechanical works or works of art, executed by a man for his own amusement, instruction, or use, is allowed to subsist certainly, and may, before publication by him, be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually shew the bent and turn of the mind, the feelings and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing-table. A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it. Every one, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances.

Addressing the attention specifically to the particular instance before the Court, we cannot but see that the etchings executed by the plaintiff and his Consort for their private use, the produce of their labour, and belonging to themselves, they were entitled to retain in a state of privacy, to withhold from publication. That right, I think it equally clear, was not lost by the limited communications which they appear to have made, nor confined to prohibiting the taking of impressions, without or beyond their consent, from the plates their undoubted property. It extended also, I conceive, to the prevention of persons unduly obtaining a knowledge of the subjects of the plates from publishing (at least by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise.

But I am satisfied, I repeat, that the means of composing and forming the catalogue in question must, upon the materials now before the Court, be taken to have been obtained unduly, that is, without the consent of the plaintiff, without that of his Consort, and without any right, moral, equitable, or legal. Can I then deny it to be an interference with another's property? I think not. . . .

I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's right, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an injunction, and if not the more, yet certainly not the less, because it is an intrusion — an unbecoming and unseemly intrusion — an intrusion not alone in breach of conventional rules, but offensive to that inbred sense of propriety natural to every man — if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life — into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country.

To relax the restraint that has been imposed on the defendant is, consequently, what I am not now at least prepared to do. . . .

June 1, 2. Both causes now came on for hearing, evidence having been gone into on the part of the plaintiff and the Attorney-General, and being to the same effect as the affidavits already stated.

The defendant, J. T. Judge, had obtained an order to defend in forma pauperis.

The *Solicitor-General*, Mr. Serjeant *Talfourd*, and Mr. *W. M. James*, for the plaintiff, said that, as regarded the defendant, *Strange*, it was proposed merely to take a decree for a perpetual injunction, and not to ask for costs against him, as he appeared to have been possibly misled by the defendant, J. T. Judge, and to have acted inconsiderately merely.

Mr. *Russell* and Mr. *Warren* consented to this decree, on behalf of the defendant *Strange*, and expressed his acknowledgments for the lenient course taken towards him.

### 334. POLLARD v. PHOTOGRAPHIC COMPANY

CHANCERY DIVISION, SUPREME COURT OF JUDICATURE OF ENGLAND.  
1880

*L. R. 40 Ch. D. 345*

THE plaintiffs, a husband and wife, sued the defendant, a photographer carrying on business at Rochester under the style of the Photographic Company. A claim was indorsed on the writ for an injunction to restrain the defendant "from selling or offering for sale or exposing by way of advertisement or otherwise a certain photograph of the plaintiff Alice Morris Pollard got up as a Christmas card, and from selling or exposing for sale or otherwise dealing with such photograph."

A motion was now made on the part of the plaintiffs for an interim injunction in terms of the claim till the hearing. By arrangement the motion was treated as the trial.

Mrs. Pollard was photographed at the defendant's shop at Rochester



in August, 1888, and paid for likenesses of herself taken from negatives then made and for photographs of other members of her family. It was found by the plaintiffs that a photographic likeness of Mrs. Pollard taken from one of the negatives, got up in the form of a Christmas card, was being exhibited in the defendant's shop window at Rochester. A Mr. Andrews, a clerk of their solicitors, with a view to this action, purchased at the shop from Mr. Bax, the defendant's manager, a copy of Mrs. Pollard's photograph made up as a Christmas card. Affidavits were made by Mr. Andrews and Mr. Bax, for the purpose of the motion, which conflicted as to the details of what passed on the occasion of the purchase. The result of the evidence is stated in the judgment. The plaintiffs had not registered any copyright in the negative.

*Cozens-Hardy, Q. C., and Silvester, for the plaintiffs.*

The defendant was paid to take the negative for the particular purpose of supplying Mrs. Pollard; there is an implied contract not to use the negative for any other purpose, and he will be restrained from using the negative for any object that is obnoxious to the person who employed him. [NORTH, J. Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit or sell copies?] In that case there would be no contract or consideration to support a contract.

*Emden, for the defendant.* The only contract that the photographer entered into was that he would supply copies to Mrs. Pollard, which contract he fulfilled. A person had no property in his own features: short of doing what is libellous or otherwise illegal there is no restriction on the photographer using his negative. There is no question here as to statutory copyright; no one is registered. . . .

NORTH, J. The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say "express or implied," because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that a photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney for making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon

which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose, the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer: and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only.

The principles upon which I rest my judgment are well known, and of familiar application, and, though I am not aware that any case has been decided as to the negative of a photograph, there are many analogous cases in the books. . . .

It may be said that in the present case the property in the glass negative is in the defendant, and that he is only using his own property for a lawful purpose. But it is not a lawful purpose to employ it either in breach of faith, or in breach of contract. Again in *Murray v. Heath* (1 B. & Ad. 804), the plates were the property of the defendant, for they had not been delivered to or accepted by the plaintiff. So in the case of *Duke of Queensberry v. Shebbeare* (2 Eden, 339) the defendant was restrained from publishing a work of the Earl of Clarendon, although a person had been expressly allowed by the owner to make and retain as his own a copy of the manuscript, which copy he had sold to the defendant. There too an agreement or condition was implied that the manuscript should not be published. Again, it is well known that a student may not publish a lecture to which he has been admitted, even though by his own skill he had taken a copy of it in shorthand; and the receiver of a letter may not publish it without the writer's consent, though the property in the paper and writing is in him; and many similar instances might be given.

It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of protection being due for the products of a man's skill or mental labour; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law; for the Act of 25 & 26 Vict. c. 68, s. 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof,

unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed. . . .

The injunction will be perpetual, and the defendant must pay the costs of the action.

### 335. PECK *v.* TRIBUNE COMPANY

SUPREME COURT OF THE UNITED STATES. 1909

214 *U. S.* 185, 29 *Sup.* 554

[Printed *ante*, as No. 156.]

### 336. HENRY *v.* CHERRY AND WEBB

SUPREME COURT OF RHODE ISLAND. 1909

30 *R. I.* 13, 73 *Atl.* 97

CASE certified from Superior Court, Providence and Bristol Counties; *Charles C. Mumford*, Judge.

Action by James N. Henry against Cherry & Webb. A demurrer having been filed to the declaration, the case was certified to the Supreme Court for advice. Questions answered, and case returned to Superior Court for further proceedings.

*Bassett & Raymond* (*R. W. Richmond*, of counsel), for plaintiff.

*Edwards & Angell* (*Francis B. Keeney* and *Seeber Edwards*, of counsel), for defendants.

DUBOIS, C. J. This is an action of trespass *vi et armis*, brought by the plaintiff in the Superior Court. The material portion of the plaintiff's declaration, in two counts, reads as follows:

"First Count. For that at the time of the committing of the grievances hereinafter complained of the defendants were engaged in a general mercantile business of buying and selling dry goods, ladies' garments, etc., in said city of Providence, and extensively advertised their wares and merchandise in the public newspapers published in said Providence; that on the 10th day of April, A. D. 1908, the defendants, with force and arms, invaded the plaintiff's right of privacy in this, to wit, that they published in connection with their aforesaid advertisements a likeness or picture of the plaintiff in the issue of the Providence Evening Bulletin of that date, which said paper is one of the public newspapers in said Providence and has a large and extensive circulation throughout said city and State; that said picture or likeness of the plaintiff was easily recognized by his friends and acquaintances; that the plaintiff was pictured as seated in an automobile, apparently driving the same, and also in said picture were several other persons, represented as sitting in the rear seat of said automobile; that the said picture or likeness appeared in a prominent

place in said newspaper and was likely to and did attract much attention. Below the picture, in heavy black type, were the words 'Only \$10.50,' and below, on the next line, in heavy display type, were the words, 'The Auto Coats Worn by above Autoists are Water-Proof, Made of Fine Quality Silk Mohair — \$10.50 — in Four Colors.' And the plaintiff avers that he is not a public character and has in no way waived his right of privacy, and that the defendants then and there, to wit, on said 10th day of April, A. D. 1908, without the knowledge and consent of the plaintiff, and knowing that they had no authority so to do, caused said likeness or picture of the plaintiff to be published in said Evening Bulletin, which said publication tended to and did make the plaintiff the object of much scoff, ridicule, and public comment, contrary to the plaintiff's right of privacy in the premises so far as the acts of the defendants were concerned. And the plaintiff avers that the said publication was a trespass upon his said right of privacy, and as a result of said invasion of his right of privacy by the defendants as aforesaid he has been made the object of much ridicule, scoff, and gibes by those of his friends and acquaintances who have recognized his likeness in said publication, and has suffered great mental anguish, all of which the defendants did against the peace and to the damage of the plaintiff, as he says, one thousand dollars, as laid in his writ dated the 21st day of April, A. D. 1908."

"Second Count. For that, at said Providence, on the 10th day of April, A. D. 1908, the defendants then and there published in the Evening Bulletin, a public newspaper printed in said Providence and having a large circulation throughout said city and State, a picture or likeness of the plaintiff that would be and was recognized by the friends and acquaintances of the plaintiff; that in such picture the plaintiff was represented as apparently driving an automobile, in which were seated several other persons; that beneath said picture, in heavy black type, were the words, 'Only \$10.50,' and below, on the next line, in heavy display type, were the words, 'The Auto Coats Worn by Above Autoists are Water-Proof, Made of Fine Quality Silk Mohair — \$10.50 — in Four Colors'; that said picture was 'featured' in a prominent place in said newspaper, and tended to and did attract much attention; that said picture or likeness of the plaintiff, taken in connection with the words inserted beneath it (which said words are above referred to in this count), tended to and did expose the plaintiff to unwarranted humiliation and to the scoff, jeers, and gibes of his friends and acquaintances who recognized the said likeness or picture of the plaintiff. And the plaintiff avers that said publication of his said likeness or picture and of the words of the advertisement in connection therewith, hereinbefore referred to, was without his knowledge or consent, and was wholly unwarranted on the part of said defendants, and that by reason of said unwarranted publication of his said likeness or picture as aforesaid he has been subjected to great humiliation and held up to public ridicule and has suffered mental anguish therefrom, to the damage of the plaintiff, as he says, \$1,000, as laid in his writ dated the 21st day of April, A. D. 1908."

To this declaration the defendants demurred upon the following grounds:

"First, the form of action should be trespass on the case, and not trespass, as declared upon";

and to the first count for the reasons following:

"First, said count sets forth no cause of action; second, said count alleges no right for the invasion of which the plaintiff is entitled to recover damages against the defendants; third, the law does not regard the right of privacy as a right for the invasion of which a person is entitled to recover damages";

and to the second count for the following causes:

"First, said count is indefinite and uncertain in its statement of the cause of action, and it is impossible therefrom to determine whether the plaintiff relies upon an action for alleged libel, or for an alleged invasion of his right of privacy; second, said count states no cause of action against the defendants; third, if the plaintiff relies upon an action for libel, the alleged publication is not defamatory; fourth, if the plaintiff relies upon an action for libel, the alleged publication is not libellous per se, and said count contains no averment of special damages; fifth, said count alleges no right for the invasion of which by the defendants the plaintiff is entitled to recover damages against the defendants."

Whereupon a Justice of the Superior Court entered the following order of certification:

"This cause being before the Court for hearing upon the defendant's demurrer to the plaintiff's declaration, and thereupon certain questions of law arising which, in the opinion of the Court, are of such doubt and importance and so affect the merits of the controversy that they ought to be determined by the Supreme Court before further proceedings, it is ordered that the following questions be certified to the Supreme Court under the provisions of section 478 of the Court and Practice Act, namely: First. Has a person at common law a right designated as a 'right of privacy,' for the invasion of which an action for damages lies? Second. Is the unwarranted publication of a person's photograph for advertising purposes actionable at common law, where the only injury alleged is that of mental suffering?" . . .

Treating the first question literally, it might easily be answered in the negative, for we are unable to find any opinion, decision, or dictum which determines that such a right was so designated at common law. But we are unwilling to dismiss so important and interesting a question upon such a technical ground. We prefer to treat both of the questions as broadly as possible within the limits of the case in which they have arisen. Perhaps the questions may as well be considered as if they read: Has a person a right of privacy, for the invasion of which a action for damages lies at common law? Is the unwarranted publication of a person's photograph for advertising purposes an invasion of such right? and, Can an action for such an invasion be maintained at common law, where the only injury alleged is that of mental suffering? It is apparent that, if the first question should be answered in the negative, no necessity would exist for answering the others, and that, if the first should be answered affirmatively and the second in the negative, it would then become unnecessary to answer the third.

The consideration of the case may be simplified by eliminating the second count of the declaration, which, as claimed by the plaintiff, charges the defendants with libel.

"A libel is a malicious defamation expressed in printing or writing, or by signs, pictures, etc., tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule. And an action on the case is maintainable against any person who falsely and maliciously publishes any libel against another." 2 Selwyn's Nisi Prius (7th Am. ed.) \*1045.

It is perfectly clear, upon inspecting the second count, that nothing therein contained charges the defendants with malice, or with the publication of anything defamatory, scandalous, or otherwise than the exact truth. Such a count cannot be regarded as charging libel against the defendants, and as they have demurred to the same as aforesaid, and as the same is clearly bad on demurrer, it may be disregarded in the further consideration of the case.

It must be conceded at the outset that the common law recognizes sundry personal rights and privileges, and gives a right of action for interference with the same, and that some of these rights so recognized include immunity from intrusion. But, as we understand the question, the right of privacy therein alluded to contemplates a simple right, uncomplicated with and uninfluenced by other rights, as, for example, the right to liberty, property, or reputation. The theory that every one has a right to privacy, and that the same is a personal right, growing out of the inviolability of the person, defined by Judge Cooley in his work on Torts (2d ed.), p. 29, as: "Personal Immunity. The right to one's person may be said to be a right of complete immunity, to be let alone" — and that a person is entitled to relief at law or in equity for an invasion of the same, is generally understood to have been first publicly advanced in an article entitled "The Right to Privacy," published in 4 Harv. L. Rev. 193 (December, 1890), wherein some of the necessities for invoking such relief are set out, as follows:

"Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons, and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case, brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration. Of the desirability — indeed, of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become



a trade, which is pursued with industry, as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand."

From time to time since the publication of this article the theory has been presented in cases before various tribunals; but it has never been approved or adopted by any Court of last resort before the year 1905, when, in the case of *Pavesich v. N. E. Mut. L. Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Am. & Eng. Ann. Cas. 561, it was held that the invasion of a person's right of privacy is actionable, regardless of special damage to person, property, or character. Such right of privacy was defined by Mr. Justice Cobb, speaking for the Court, as the right, if one so desires, "to live a life of seclusion," and by way of illustration he remarks that the right would prevent the publication of "those matters and transactions of private life which are wholly foreign, and can throw no light whatever" on the competency for office of any public man. In *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828 (1902), Chief Judge Parker describes it as the right that a man has

"to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise."

Judge Gray, in his dissenting opinion in *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671 (1895), held that the erection of a statue of a deceased relative violated the right.

The right of privacy is said to be the "right to be let alone." As is pointed out by Cobb, J., in *Pavesich v. N. E. Mut. L. Ins. Co.*, *supra*, the Roman law recognized a right of privacy when it made actionable to speak to one without permission, or to follow him on the street. It is asserted that a man has a right to withdraw from the world, to leave a blank as if he never had been, and other human beings are forbidden to recognize his existence or speak of his memory. In the case of *Schuy-*

ler v. Curtis, 27 Abb. N. C. 387, 15 N. Y. Supp. 787, and in the Appellate Division of the same Court (64 Hun), 594, 19 N. Y. Supp. 264, the right of privacy was recognized as prohibiting the erection of a statue of a deceased relative, on the theory that the flaunting of the memory of the plaintiff's deceased relative before the world invaded the plaintiff's right to be let alone. This case was reversed in the Court of Appeals (147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671); but the Court was of the opinion that if the right of privacy existed, in a proper case it would prohibit talk of one's deceased relatives, or a statue of them, and presumably a picture published in the newspaper, as effectually as if the suit was brought by the person whose picture was published.

These definitions show that the right of privacy contended for would embrace all forms of interference with the mental well-being of an individual, whether by publishing his picture, by gossip, or by pointing him out as possessed of peculiar qualities. The gravamen of the offence would consist in the interference with his right of seclusion, irrespective of the intent of the intermeddler. Mr. Justice Gray, in his dissenting opinion in Schuyler v. Curtis, *supra*, regards the right of privacy as a "form of property," and bases his claim that equity should interfere by an injunction solely on that ground, quoting Prince Albert v. Strange, 2 De Gex & S. 652, Gee v. Pritchard, 2 Swanst. 402, and other English cases, all of them basing the interference of equity on a violation of complainant's property rights. After citing the above decisions, the judge proceeds:

"These decisions are authority for the doctrine that equity will interfere to prevent what are deemed to be violations of personal legal rights, and the only limitation upon the application is that the legal right which is to be protected shall be one cognizable as property."

A careful reading of the opinion leads to the conclusion that it was because the judge regarded this right as one of property that equity could furnish relief when it was prohibited from so doing in cases of libel and injury to the reputation generally. In the dissenting opinion of the same justice in Roberson v. Rochester Folding Box Co., *supra*, a dissent concurred in by two other justices, he writes:

"I think that this plaintiff has the same property in the right to be protected against the use of her face for the defendant's commercial purposes as she would have if they were publishing her literary compositions."

In this opinion, also, the right of equity to interfere is based purely on the right of property.

No reason save the above analogy is given in the opinion for considering the right of privacy as a property right. In our opinion, the analogy is not a sound one. . . .

In the case of Pavesich v. N. E. Mut. L. Ins. Co., *supra*, Mr. Justice Cobb, having made the concession that prior to 1890 every adjudicated

case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and that therefore a claim to a right of privacy, independent of a property or contractual right, or some right of a similar nature, had up to that time never been recognized in terms in any decision, and that the entire absence for a long period of time, even for centuries, of a precedent for an asserted right, should have the effect to cause the Courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the lawmaking power, argues as follows:

"But such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case, 'although there be no precedent, the common law will judge according to the law of nature and the public good.' Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, 'it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.' Broom's Leg. Max. (8th ed.) 193. This results from the application of the maxim 'Ubi jus ibi remedium,' which finds expression in our Code, where it is declared that 'For every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other.' Civ. Code Ga. 1895, § 4929. The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved than he has to violate the valid regulations of the organized government under which he lives. The right of privacy has its foundation in the instincts of nature. It is recognized intuitively; consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. This idea is embraced in the Roman's conception of justice, which 'was not simply the external legality of acts, but the accord of external acts with the precepts of the law prompted by internal impulse and free volition.' McKelvey's Roman Law (Dropsie) §123. It may be said to arise out of those laws sometimes characterized as immutable, 'because they are natural, and so just at all times and in all places, that no authority can either change or abolish them.' 1 Domat's Civil Law, by Strahan (Cushing's ed.) 49. It is one of those rights referred to by some law-writers as absolute, 'such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.' 1 Bl. 123."

In the course of his opinion he dismissed from his consideration the case of *Atkinson v. Doherty Co.*, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507 (1899), with the remark that all that was decided in that case was that the right of privacy dies with the person, and "therefore the decision in its facts is authoritative no further than the decision of the New York Court of Appeals in *Schuyler v. Curtis*." He asserts that his conclusion is in conflict with neither of these cases and closes the discussion of them with the remark that the right of privacy is personal.

It is obvious that a right cannot be one of person and of property at one and the same time. The conclusion would seem to be that, if the right of privacy exists, and has been recognized by the law, it must be as a personal tort right. It cannot be a right of property. The gravamen of the offence in a violation of the right of privacy is the interference with the seclusion of the individual, and not of the publication. In the case of *Pavesich v. N. E. Life Ins. Co.*, supra, the case relied on by the plaintiff, and in the plaintiff's own case, the count charging the violation of the right of the privacy is trespass *vi et armis* for a direct injury to the person like an assault. If, however, the publication were an ingredient of the action, then the proper count would be trespass on the case for an indirect injury to the person, as is the case in libel and slander. The right of privacy is recognized in the Georgia case as violated when the only damage alleged is mental suffering. The law divides all causes of actions into two classes with respect to damages. First, those in which the act, in and of itself, is unlawful. In this class, damage will be presumed, and, in the absence of proof of actual damage, nominal damages will be awarded. Second, those in which the act is regarded as lawful, unless actual damage results, and in this class pecuniary loss must be shown. In the first class may be placed all direct infringements of absolute personal or property rights, such as false imprisonment, assault, trespass on land, or conversion. In all of these, the act of false imprisonment, or assault, etc., being shown, the right of action is complete, and nominal damages may be recovered of right. In the second class may be placed all actions on the case, such as nuisances, negligence in general, and libel and slander. In none of these will mental suffering alone sustain a right of action. *Owen v. Henman*, 1 Watts & S. 548, 37 Am. Dec. 481; *Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. 401; *Lynch v. Knight*, 9 H. L. Cas. 577; *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308; *Dockrell v. Dougall*, 78 L. T. N. s. 840 (1898); *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 Atl. 202, 9 L. R. A. N. s. 740. One apparent exception exists to this rule: In libel and slander, when the words spoken or pictures published are of such a nature that the Court can conclude, as a matter of law, that they will tend to degrade the person, or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided, then pecuniary damage is presumed, and the words are held libellous or slanderous *per se*. 25 Cyc. 253.

If the gravamen of the action for a breach of the right of privacy is the publication of the information or of the picture taken, then the injury is an indirect injury to the person, resembling libel, and, in common with that action, actual pecuniary damage must be alleged and proved to entitle the plaintiff to recover. If, however, the invasion of the right of seclusion is the gravamen of the action, the case is analogous to assault, and, the pecuniary damages being presumed by the law, the mental suffering sustained because of the peculiar method of publishing may be shown by way of aggravation of damages. It is evident, therefore, that the gist of the action for a breach of the right of privacy is the violation of a right of personal seclusion, and not the subsequent publication: (1) Because of the definitions of the right of privacy; (2) because of the form of action, trespass *vi et armis*, and not trespass on the case; (3) because no special damage is alleged.

In no opinion or dictum is the right of privacy based upon natural right prior to the opinion in the case of *Pavesich v. N. E. Life Ins. Co.*, *supra*. Mr. Justice Gray in his dissenting opinions in *Schuyler v. Curtis*, *supra*, and in *Roberson v. Rochester Folding Box Co.*, *supra*, and Judge Colt in *Corliss v. Walker* (C. C.) 64 Fed. 280, 31 L. R. A. 283, contend for the existence of the right of privacy as an extension of the right of property. The opinion in the *Pavesich Case*, *supra*, however, is founded upon the doctrine of a natural right. This was the second case, involving the existence of the right to privacy, that was decided by a Court of last resort. In the first case, *viz.*, *Roberson v. Rochester Folding Box Co.*, *supra*, the question whether such a right existed was decided in the negative. Commenting upon this decision, Mr. Justice Cobb made allusions to both the majority and minority opinions, and among others the following:

"In *Roberson v. Rochester Folding Box Co.* (1901) 46 App. Div. 30, 71 N. Y. Supp. 876, decided by the Appellate Division of the Supreme Court of New York, it appeared that lithographic likenesses of a young woman, bearing the words 'Flour of the Family,' were without her consent printed and used by a flour milling company to advertise its goods. The declaration alleged that in consequence of the circulation of such lithographs the plaintiff's good name had been attacked, and she had been greatly humiliated and made sick, and been obliged to employ a physician, and prayed for an injunction against the further use of the lithographs and for damages. It was held that the declaration was not demurrable. It was also held that, if a right of property was necessary to entitle the plaintiff to maintain the action, the case might stand upon the right of property which every one has in his body. This case came before the Court of Appeals of New York in 1902, and the judgment was reversed. 171 N. Y. 540, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828. This is the first and only decision by a Court of last resort involving directly the existence of right of privacy. The decision was by a divided Court; Chief Judge Parker and three of the associate judges concurring in a ruling that the complaint set forth no cause of action either at law or in equity, while Judge Gray, with whom concurred two of the associate judges, filed a dissenting opinion, in which it



was maintained that the injunction should have been granted. While the ruling of the majority is limited in its effect to the unwarranted publication of the picture of another for advertising purposes, the reasoning of Judge Parker goes to the extent of denying the existence in the law of a right of privacy, 'founded upon the claim that a man has a right to pass through this world without having his picture published, his business enterprises discussed, or his eccentricities commented upon, whether the comment be favorable or otherwise.' The reasoning of the majority is, in substance, that there is no decided case, either in England or in this country, in which such a right is distinctly recognized; that every case that might be relied on to establish the right was placed expressly upon other grounds, not involving the application of this right in any sense; that the right is not referred to by the commentators and writers upon the common law or the principles of equity; that the existence of the right is not to be legitimately inferred from anything that is said by any of such writers; that a recognition of the existence of the right would bring about a vast amount of litigation; and that in many instances where the right would be asserted it would be difficult, if not impossible, to determine the line of demarcation between the plaintiff's right of privacy and the well established rights of others and of the public. For these reasons the conclusion is reached that the right does not exist, has never existed, and cannot be enforced as a legal right. We have no fault to find with what is said by the distinguished and learned judge who voiced the views of the majority as to the existence of the decided cases, and agree with him in his analysis of the various cases which he reviews, that the judgment in each was based upon other grounds than the existence of a right of privacy. We also agree with him so far as he asserts that the writers upon the common law and the principles of equity do not in express terms refer to this right. But we are utterly at variance with him in his conclusion that the existence of this right cannot be legitimately inferred from what has been said by commentators upon the legal rights of individuals, and from expressions which have fallen from judges in their reasoning in cases where the exercise of the right was not directly involved. So far as the judgment in the case is based upon the argument *ab inconvenienti*, all that is necessary to be said is that this argument has no place in the case if the right invoked has an existence in the law. But if it were proper to use this argument at all, it could be said with great force that as to certain matters the individual feels and knows that he has a right to exercise the liberty of privacy, and that he has a right to resent any invasion of this liberty; and if the law will not protect him against invasion, the individual will, to protect himself and those to whom he owes protection, use those weapons with which nature has provided him, as well as those which the ingenuity of man has placed within his reach. Thus the peace and good order of society would be disturbed by each individual becoming a law unto himself, to determine when and under what circumstances he should avenge the outrage which has been perpetrated upon him or a member of his family."

Mr. Justice Cobb pays tribute to conservatism, but warns against its undue application, as follows:

"The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer, whether at the bar or upon the bench, cannot be overestimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and



which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right."

It is evident, therefore, that the Court considered the right of privacy as a natural right, and that natural rights are something reserved from all governments when society was formed; in other words, that there are rights reserved to the people, other and above those guaranteed by the Constitutions of the United States, and States, and that these rights are enforceable in a Court of Justice. . . .

In the Pavesich Case, *supra*, the Court found that the right of privacy is "guaranteed to persons in this State both by the Constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." In another portion of the opinion the principle of the right of privacy is found to have been guaranteed by an interpretation of the word "life." . . . It is proper to point out that the comprehensive provisions of Civ. Code Ga. 1895, § 4929, hereinbefore set forth, are entirely lacking in our Constitution or statutes. The provisions most closely resembling the same are to be found in Const. art. 1, § 5, as follows:

"Every person within this State ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without purchase, completely and without denial, promptly and without delay, conformably to the laws"—

. . . The function of adjusting remedies to rights is a legislative rather than a judicial one, and up to the present time the Legislature of this State has omitted to provide a remedy for invasion of the right of privacy. . . . But inaction upon the part of the Legislature, however long continued, cannot confer legislative functions upon the Judiciary. Whenever public opinion becomes sufficiently strong, legislative action is sure to follow; for, in general, legislation is the coinage of public opinion into statutes. . . .

We pass, therefore, to the consideration of the claim of Mr. Justice Cobb that the principle of the right of privacy was well developed in the Roman law, and from there was carried into the common law, where it appears in various places. He finds that "shouting until the crowd gathered round one," or "following an honest woman or young boy or girl," or "attracting attention to another as he was passing along the highway or standing upon his private grounds," were actionable at Roman law. The recognition of the principle underlying these actions in the Roman law is found in the common law in the law of nuisance, both public and private; for example, public scolds and eavesdroppers. Lord Coke is found to have sanctioned it in *Semayne's Case*, 5 Coke, 91, when he gives force to the maxim that "every man's house is his castle." So, too, the same Court claims, every Constitution sets its approval on

a tort right of privacy when it prohibits unreasonable search. The law of evidence contributes to this ever-present right "to be let alone" when it forbids husband and wife to divulge privileged communications, and sets a seal upon the knowledge of an attorney gained from his client. From these instances the Court concludes that the legal principles of the Roman law are introduced into the common law, and that "liberty of privacy has been recognized by the law and is entitled to continual recognition."

It is difficult to discover how the theory of public nuisance, the first principle of which is that a private individual cannot remedy his fancied wrong, is made to support an absolute right of privacy such as has been described in the Roman law and sanctioned in the Georgia Case. Blackstone defines a nuisance as "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." 3 Bl. Com. (Sharswood's Ed.) \*216. The very theory of nuisance is the doing of something intrinsically lawful in a manner damaging to others, and it is the resultant damage that creates the wrong. The right of privacy, on the other hand, which the Supreme Court of Georgia seeks to establish, is an absolute tort right, the merest interference with which is an actionable wrong. In nuisance, not only must special damages be alleged to sustain an action, but it is well settled that mental suffering alone will not constitute damage sufficient to sustain an action (*Owen v. Henman*, supra; *Sparhawk v. Union Passenger Ry. Co.*, supra;) a branch of similar rule obtaining in libel and slander cases not actionable per se, where special damage must be shown (*Lynch v. Knight*, supra; *Pollard v. Lyon*, supra; *Dockrell v. Dougall*, supra); and in negligence cases (*Simone v. Rhode Island Co.*, supra). In the right of privacy, however, in the Georgia Case, and in the case now before the Court, no damage is alleged other than mental suffering. The law of nuisance, not only does not recognize a right of privacy, but is in theory incompatible with it.

The rule, "Every man's house is his castle," does not rest on a right of personal privacy; otherwise, the same immunity would follow the person when without his house, or when the officer had found the outer door open and broke in an inner paneling. The same is true of provisions as to unreasonable searches, based squarely on this old maxim and now defended by the Constitution. So, too, it is apparent that the divulging of communications between husband and wife rests on some principle other than the right of privacy, else the bar would still continue when testifying against each other in a divorce suit. These rules are and always have been based on principles of sound public policy, irrespective of the wishes, or desires, or interests of the persons affected. It is not claimed that these instances were ever based on a right of privacy. The contention is that at best they might be or ought to be, and that, because certain results may be obtained by applying the theory of absolute right of privacy, therefore a right of privacy is

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established. Such an argument is fallacious, and none of the instances given recognize or support the right of privacy in the common Law.

Every exponent of the right of privacy cites as an authority in support of his contentions one sentence in Cooley on Torts, p. 29, where the learned author is discussing the right of personal immunity, and the sentence is as follows:

"The right to one's person may be said to be a right of complete immunity; to be let alone."

The meaning of this sentence is amply explained by the one immediately following:

"The corresponding duty is not to inflict an injury, and not, within such proximity as might render it successful, to attempt the infliction of an injury. In this particular the duty goes beyond what is required in most cases; for usually an unexecuted purpose or an unsuccessful attempt is not noticed."

The paragraph is given over entirely to a discussion of the doctrine of assault. The author is not, therefore, ushering in a new right of complete immunity. The right "to be let alone" refers unmistakably to the right to be free from bodily injury, or from a reasonable fear of bodily injury, at the hands of a fellow being.

The principle underlying the right of privacy is not analogous to that upon which assault is based. In *State v. Baker*, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863 (1897), this Court, speaking through Mr. Justice Tillinghast, adopted the definition of assault given by Mr. Bishop as "any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being" (2 Bish. Cr. L. § 23). . . . Apprehension of immediate physical harm is not an essential element of the right of privacy. But the incompatibility between the principle of assault and that of the right of privacy is most strikingly brought out by the familiar rule that words alone can never constitute an assault. Cooley, Torts, 167. If words cannot constitute an assault, how, then, can writings; and, if writings cannot, how could the publication of a picture? It would seem reasonable to conclude that the principle of the right of privacy finds no support in the doctrine of assault.

It has also been suggested that the principle of the right of privacy finds support in the law of libel. Enough has already been said to show the fallacy of this contention.

The foregoing considerations, together with an examination of the authorities, lead us to the same conclusion as that reached by a majority of the Court in *Roberson v. Rochester Folding Box Co.*, supra, viz.,

"that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided."

It may be proper to state, however, that since the rendition of the foregoing decision the Legislature of the State of New York has enacted chapter 132, p. 308, of the Laws of New York of 1903, entitled "An Act to prevent the unauthorized use of the name or picture of any person for the purposes of trade," which went into effect September 1, 1903, whereby persons offending against its provisions are not only declared to be guilty of a misdemeanor, but also are made liable, in civil actions, at the suit of persons injured by such unauthorized use of name or picture, to respond in damages, including exemplary damages, for such injury. The constitutionality of this statute has been sustained by the Court of Appeals of New York in the case of *Rhodes v. Sperry & Hutchinson Co.* (Oct. 23, 1908), 193 N. Y. 223, 85 N. E. 1097.

As we have been unable to discover the existence of the right of privacy contended for, we must answer the first question, certified to us, in the negative.

The second question, considered solely with reference to the first count of the declaration, the second count for libel being insufficient for that purpose, as hereinbefore set forth, must also be answered in the negative.

Having thus decided the questions certified to us, we herewith send back the papers in the cause, with our decision certified thereon, to the Superior Court for further proceedings.<sup>1</sup>

<sup>1</sup> [PROBLEMS:

The plaintiff was tried on a charge of murdering his pupil. The Scotch jury returned a verdict of "not proven." The trial caused great public interest. The defendant, who kept a wax-works museum, in which were exhibited life-size models of famous people, historic scenes, and horrible crimes, exhibited therein the plaintiff's effigy. Has the plaintiff an action? (*Monson v. Tussaud*, 10 Times L. Rep. 199, 277.)

The plaintiff was an actress playing in a sensational piece at the theatre. The defendant, from a theatre-box, took a flash-light photograph of the plaintiff on a trapeze, and was selling the picture. Has she an action? (*Van Zandt v. Epstein*, Chicago Legal News, Feb., 1887.)

The defendant physician brought with him, to attend the plaintiff in childbirth, a man S., unmarried and not a physician. The plaintiff at the time believed S. to be a physician. Has she an action? (1881, *De May v. Roberts*, 46 Mich. 160.)

The defendant obtained the plaintiff's picture from the photographer who had taken it for the plaintiff. He published it together with A.'s picture. The plaintiff (who was not named) was described as that of a man who had early taken an insurance policy with the defendant, and was now glad of it. A. was described as one who had not taken a policy and was now sorry; his picture showed him as a sickly man. In fact, the plaintiff had taken no policy with the defendant. Has he an action? (1905, *Pavesich v. New England M. L. Ins. Co.*, 122 Ga. 190, 50 S. E. 68.)

The defendant without authority published the name of the plaintiff as one who shared in responsibility for the defendant's enterprise. The plaintiff seeks to stop this use of his name, on the ground that it exposes him to the risk of litigation. (*Walter v. Ashton*, 1902, 2 Ch. 282.)

The defendant sheriff, after arresting the plaintiff and before trial, took the plaintiff's photograph and sent it to other police bureaus, to be placed in the

"rogues' gallery." The plaintiff was afterwards acquitted of the charge. Has he an action? (1900, *State v. Clausnier*, — Ind.—, 57 N. E. 541; 1906, *Schulman v. Whitaker*, 117 La. —, 42 So. 227; 1909, *Downs v. Swann*, 111 Md. —, 73 Atl. —, collecting the cases.)

The defendant's employee sent the following bogus telegram, purporting to come from the plaintiff: "To Mr. Gann: Be sure to go to Heidelberg; am on excursion there. Lola Mac." Has the plaintiff an action? (1901, *Magouirk v. Tel. Co.*, 79 Miss. 632, 31 So. 206.)

The plaintiff, as executor of the celebrated artist Whistler, sought to restrain the defendants from publishing verbatim certain letters of Whistler written to personal friends and obtained from such friends by the defendants. The defendants pleaded that they had been authorized by Whistler during his lifetime to write his biography and to use such information as they could obtain, and that they did not claim the right nor have the intention to publish the letters themselves, but did claim and intend to use the information contained in them. Is this defence valid? (*Philip v. Pennell*, 1907, 2 Ch. 577.)

#### ESSAYS:

*Samuel D. Warren, Louis D. Brandeis*, "The Right to Privacy." (H. L. R., 1890-91, IV, 193.)

*Augustus N. Hand*, "Schuyler against Curtis and the Right to Privacy." (A. L. Reg., 1897, 36, 745.)

*Denis O'Brien*, "The Right of Privacy." (C. L. R., 1902, II, 437.)

#### NOTES:

"Insults, malicious: no ground for action." (C. L. R., VIII, 147.)

"Privacy; Right of." (C. L. R., IX, 641.)

"Privacy, Right of: Nature and extent of the right." (H. L. R., as follows):

"Basis and extent of the right of privacy." (IV, 193-220; XII, 270.)

"Development of the law." (VIII, 280.)

"Existence of the right." (XVI, 72.)

"Nature of the rights of relatives of deceased person." (IX, 354.)

"Property right of person in publication of likeness." (XV, 227.)

"Exhibition of statue." (V, 148.)

"Exhibition of statue of plaintiff's deceased aunt." (IX, 354.)

"Exhibition of wax-work figure of plaintiff: whether libel." (VII, 492.)

"Illustrated account of surgical operation, patient's identity concealed." (X, 179.)

"Name and likeness of deceased person used as label for brand of cigars." (XIII, 415.)

"Operation in the presence of medical students." (X, 179.)

"Publication of biography and sale of pictures of deceased person." (VII, 182.)

"Publication of portrait with request to vote on most popular man." (VII, 425.)

"Unauthorized published statements as to opinion of certain medicine." (XII, 207.)

"Unauthorized use of portrait for advertising purposes." (XV, 227.)

"What constitutes infringement of the right." (X, 179.)

"Infringement of the right: Unauthorized use of portrait for advertising purposes." (XVIII, 625.)

"Right of Privacy; Breach of trust." (M. L. R., V, 378.)]

## BOOK II: THE CAUSATION ELEMENT

### INTRODUCTION: THEORY AND HISTORY

344. JOHN H. WIGMORE. *A General Analysis of Tort Relations*. (Harvard Law Review, 1895, VIII, 377.) II. THE CAUSATION ELEMENT IN A TORT

The legal material involving the Causation element is much larger than that of the Damage element; but it is covered by a few broad principles.

The general idea of Causation seems to involve in Anglo-American law three main notions: —

A. *Causation, in general*. We find, first, a fundamental notion that the defendant must have rationally *caused* the harm in question. This is to-day almost axiomatic; although in primitive and mediæval times many kinds of connection, short of rational causation by modern standards, sufficed to fix liability. The superstitious attitude of the period made accursed the man and the thing by whom the offence came, whether in strictness it was or was not caused thereby.<sup>1</sup> The accepted ethical axiom of to-day, Causation, rarely gives rise to legal difficulty in its application; except in one or two cases commonly treated under the law of Damages, *e. g.* whether a particular disease was caused by a carrier's negligence or by a surgeon's bungling, whether a loss of business profits was caused by alleged unlawful conduct or by external events, etc. It is mainly an issue of fact for the jury.

A special problem is presented where several wrong-doers have co-operated and the apportionment of Causation to the real source is necessary; as where dogs of several persons combine in worrying sheep. Usually the knot is cut in Alexandrine fashion; as where the liquor-damage statutes provide that, during the period of disability of a father by intoxication to support his family, any liquor-seller furnishing liquor during that time shall be liable; or where the common-law principle makes any one of joint tort-feasors liable for the whole damage.

B. *Activity in Causation*. Next we find a cardinal principle (not without exceptions) requiring that the person to be made responsible must be fixed with an initiating act or activity, an exercise of volition, remote or near, without which he cannot be brought to bar. This is the broader phase of the well-known principle that an action of tort does not lie for a mere nonfeasance. All the harm in the world may come to X, but Y cannot be made responsible unless we can fix upon him some active interposition.<sup>2</sup> Thus, one who, as in Bentham's well-

<sup>1</sup> See the article on the History of Responsibility for Tortious Acts, in 7 Harvard Law Review, 315 ff. (reprinted in Select Essays in Anglo-American Legal History, Vol. III; in part quoted *post*, in No. 348).

<sup>2</sup> It is a common error to suppose that "negligence," as the source of culpability, involves often or usually a mere omission, a not-doing as distinguished from positive doing in a careless way. But all negligence, in Torts, is founded ultimately on a doing an action. If the source is in appearance an omission, as



known illustration, sees a man drowning and with power to save him fails to do so, or, as in the Roman Law glosses, sees an absent neighbor's windows open and perceives without preventing the deluge of the exposed rooms by a rain-storm, may stand idle and laugh with civil impunity at the harm which ensues. So also, one who is unwillingly carried upon another's land is not guilty of a trespass. We may or may not quarrel with this morality, but the notion is now a racial feature of our legal system. The application of it gives rise to little dispute, but there are one or two exceptions of policy which are to be noted. (1) The possession or ownership of real property often fixes a responsibility for harm where not a hand has been lifted by the defendant; thus, one who acquires land on which is a noisome pond or a tottering building may become responsible for harm caused thereby. Incidentally the distinction between owner and occupier may come into play. So also statutes fix civil responsibility upon municipal corporations for defective ways, etc., and statutes sometimes make the owners of buildings liable for disability caused by the sale of intoxicating liquors therein, though no active initiation can be brought home to the defendant. (2) There is perhaps a growing disposition to put a civil responsibility upon those who by nonfeasance allow others to suffer bodily harm, where the circumstances place the defendant in a peculiar relation of special moral duty — as where a brother allows a sister in the same house to starve.

C. *Culpability in Causation.* But one is not made responsible even for every harm actively caused by him. To quote Mr. Justice Holmes again: —

"If running down a man is a trespass when the accident can be referred to the act of spurring, why is it not a tort in every case, as was argued in *Vincent v. Stinehaur*, seeing that it can always be referred more remotely to his act of mounting and taking the horse out? The reason is that if the intervening events are such that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so. . . . If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical consequences ending in damage. The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability, . . . to give a man a fair chance to avoid doing the harm before he is held responsible for it. . . . Accordingly it would be possible to state all cases of negligence in terms of imputed or presumed foresight."<sup>1</sup>

(I) The phrasing and the application of this third element gives rise to the greater part of litigation in this field. The general question is, Where shall the line be drawn to express that relation between the defendant's conduct and

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where an engineer fails to ring the bell or to keep a lookout, it is reducible to a mismanagement, an improper doing. Speaking accurately, the term "negligence" expresses merely the relation between this original act and the harmful consequence, *i. e.* the probability of the harm; and therefore the culpability consists in putting one's hand to the deed (thus always an Action) in the face of this probability of harm. Mr. Justice Holmes has pointed this out long ago (*Common Law*, pp. 152, 161): "In all these cases it will be found that there has been a voluntary act on the part of the person to be charged. . . . It is necessary that he should have chosen the conduct which led to the harm. . . . The philosophical analysis of every wrong begins by determining what the defendant has actually chosen, that is to say, what his voluntary act or conduct has been."

<sup>1</sup> *The Common Law*, pp. 92, 95, 144, 147.

the harmful consequence which fairness and policy regard as completing civil responsibility? Observe that it is a question of a *relation*. From the defendant's point of view, we are apt to speak of his "negligence;" from the standpoint of the harm done, we are apt to speak of a "natural" or "probable" consequence. But both of these terms, properly understood, are relative; at whichever standpoint we take, the harm must be viewed with reference to the conduct, and the conduct with reference to the harm. The further grouping of classes of cases under this head, with reference to the help to be gained by treating similar questions together, is an interesting subject, but one for which space does not here suffice.

The general principle of the preceding paragraph — which may also be called *Culpability*, a term expressing the leading idea common to "natural," "probable," "ordinary," and the other words — suffers an important variation in two large groups of cases, in which the Court does not leave the application of the general principle to the jury, but declares the defendant culpable or not culpable by specific rules of law. Here it is no longer left as an open question for the jury whether the harm in question was the "natural and probable" or normal consequence of the defendant's conduct. The Court may declare once for all that certain harms are always to be regarded under certain circumstances as being or not being the normally apprehendible consequences of certain conduct; hence, given the conduct and the consequence, and the defendant is responsible, or not, without further inquiry. This is therefore, after all, not so much a variation from the principle of Culpability of Causation as a permanent reduction of the general principle to specific rules for specific cases. As Mr. Justice Holmes puts it: —

"There are also many cases in which the teaching of experience has been formulated in specific rules. . . . There is no longer any need to refer to the prudent man or general experience. The facts have taught their lesson, and have generated a concrete and external rule of liability. He who snaps a cap upon a gun pointed in the direction of another person known by him to be present is answerable for the consequences."<sup>1</sup>

(II) *Remoteness*. In the one class of cases, the Court rules that the consequence was too "remote." These rulings are precedents (as the verdicts of juries are not). Hence to the lawyer they become important. Such rulings have been made for every variety of harm and for numerous combinations of circumstances. If the ruling affirms "remoteness" in law, the defendant is exonerated as a matter of law. If the ruling denies "remoteness" in law, the defendant is not exonerated as matter of law, but the case goes to the jury to apply the general test of culpability to the circumstances, and they may or may not exonerate him. — These rulings of law may be classified in several ways. The object should be to classify them so as to obtain the most value from analogies and thus to attain the greatest consistency.

(III) *Negligence per se*. At the other extreme, the Court may rule that the harmful consequence was so obviously probable that the defendant is responsible as matter of law; hence, the case does not go to the jury for their application of the general test. In classifying these rules, we find three general sorts:

(1) We find a number of miscellaneous general rules determined by the Courts from time to time. With reference to certain harms, the keeping of dogs, cattle, and other animals, the storing of explosives, the use of weapons, and other sorts

<sup>1</sup> The Common Law, pp. 150, 152.

of conduct, have been declared to be to some extent governed by this test. But the important thing to notice is that such rules *may* be formulated for responsibility for every kind of legal harm. In trespass and conversion, the question whether we walk on land and deal as owners with personalty at our peril; in libel, the question how far, with reference to inadvertent publication, we put defamatory statements on paper at our peril; in loss of service, the question how far we employ another at peril, with reference to a possible existing contract of his, — for all the different kinds of harm the question may come up. These germane questions all throw light upon one another, and their consideration in one place helps us to discuss intelligently the comparative policies of different situations.

(2) We have a principle of limited application that “unlawful” acts — signifying an illegality, usually statutory, independent of the question at issue — are done at peril. The application of this principle is attended with a looseness and a confusion with which we need not here try to deal.

(3) In numerous cases, also, Courts are found ruling that on the facts of case the defendant is guilty of negligence as a matter of law. The difference between this and the preceding forms of the principle seems merely to be that the Court lays down no general rule for a class of cases, and does not intend to go beyond the complex of facts then before it. But the three forms shade off into each other at a point almost indistinguishable.

Within these foregoing headings it seems that all genuine questions of Causation are included.

345. EDWARD WESTERMARCK. *Origin and Development of Moral Ideas*. (1906. Vol. I, pp. 30–70, in part.) [A study of the customs of primitive peoples and their conceptions of Revenge shows] that under certain circumstances, either in a fit of passion, or when the actual offender is unknown or out of reach, Revenge may be taken on an innocent being, wholly unconnected with the inflicter of the injury which is sought to revenge. . . . In such cases the whole group take upon themselves the deed of the perpetrator, and any of his fellows, because standing up for him, becomes a proper object of revenge. . . . But any consideration of guilt or innocence is overshadowed by the blind subordination to that powerful rule which requires strict equivalence between injury and punishment. . . . All these phenomena are so inseparably connected with each other that no one can say where one passes into another. Their common characteristic is that they are mental states marked by an aggressive attitude towards the cause of pain. . . .

Moral Indignation or disapproval, like [Revenge, which may be termed] Non-Moral Resentment, is a reactionary attitude of mind directed towards the cause of pain. . . . Moral Indignation resembles Non-Moral Resentment even in this respect that, in various cases, the aggressive reaction turns against innocent persons who did not commit the injury which gave rise to it. . . . And even Punishment, which, in the strict sense of the term, is a more definite expression of public, or moral, indignation than the custom of private retaliation, is often similarly indiscriminate. Like Revenge, and for similar reasons, Punishment sometimes falls on a relative of the culprit in cases when he himself cannot be caught. . . . In other cases an innocent person is killed for the offence of another, not because the offender cannot be seized, but with a view to inflicting on him a loss according to the rule of like

for like. The punishment, then, is meant for the culprit, though the chief sufferer is somebody else. . . . The retribution of a god is, in many cases, nothing but an outburst of sudden anger, or an act of private Revenge, and as such particularly liable to comprise, not only the offender himself, but those connected with him. . . . The retributive sufferings which innocent persons have to undergo in consequence of the sins of the guilty, are not always supposed to be inflicted upon them directly as a result of divine resentment. They are often attributed to infection. Sin is looked upon in the light of a contagious matter which may be transmitted from parents to children, or be communicated by contact. . . . In this materialistic conception of sin there is an obvious confusion between cause and effect, between the sin and its punishment. Sin is looked upon as a substance charged with injurious energy, which will sooner or later discharge itself, to the discomfort or destruction of anybody who is infected with it. . . .

Closely connected with the primitive conception of sin, is that of a curse. In fact, the injurious energy attributed to a sinful act, is in many cases obviously due to the curse of a god. The curse is looked upon as a baneful substance, as a miasma which injures or destroys anybody to whom it cleaves. The curse of Moses was said to lie on Mount Ebal, ready to descend with punishments whenever there was an occasion for it. The Arabs, when being cursed, sometimes lay themselves down on the ground, so that the curse, instead of hitting them, may fly over their bodies. According to Teutonic notions, curses alight, settle, cling, they take flight, and turn home as birds to their nests. . . .

Thus, from the conception that sins and curses are contagious, it follows that an innocent person may have to suffer for the sin of another. His suffering does not necessarily relieve the sinner from punishment; sin, like an infectious disease, may spread without vacating the seat of infection. But, as we have seen, it may also be transferred, and sin-transference involves vicarious suffering. . . .

To sum up: — The fact that punishments for offences are frequently inflicted, or are supposed to be inflicted, by men or gods upon individuals who have not committed those offences, is explicable from circumstances which in no way clash with our thesis that moral indignation is, in its essence, directed towards the assumed cause of inflicted pain. In many cases the victim, in accordance with the doctrine of collective responsibility, is punished because he is considered to be involved in the guilt — even when he is really innocent — or because he is regarded as a fair representative of an offending community. In other cases, he is supposed to be polluted by a sin or a curse, owing to the contagious nature of sins and curses. . . .

346. HISTORY OF GERMANIC LAW. *Heinrich Brunner*. (1892. 1st ed., Vol. II, § 125, p. 549.) The ancient law was harsh. A man was liable not only for harm caused unintentionally, but also for any harm which came about through him; and the liability extended to persons who would in our modern view seem to have had little or no connection with the harm. Excusable accident was not recognized. The law sought to hold somebody liable, and laid hold of him by principles of causal connection which are to us nowadays scarcely comprehensible. The scope of liability was so broadly bounded that it made a man liable for any misfortune which in its origin was somewhere traceable to his region of existence. Certain liabilities were fixed on him by virtue of his clan-relationships, or of his status as guardian, or as householder with a body of free retainers, or as lord of the manor, or as a member of the hundred or the township, irre-

spective of his privity to the wrongful act. But more than this, the owner of property was responsible for harm done by his menials, by his domestic animals, and even by his inanimate chattels. And still further as a tradesman and a master he was under an extensive liability for injuries received by his hired workmen in the course of their service to him. The master paid the "head-money" of a workman who was killed in his service, as well as the damages (at the usual tariff) for lesser injuries, except only when the injury was attributable to some third person, so as to exonerate the master; and the master was also liable for wrongs done by his servants. For example, if a person lost his life accidentally, by fire or water or tree, while in another's service, the master was responsible for the "homicidium;" and if a person was sent away or sent for, in the service of another, and lost his life on the errand, the employer was regarded as the "causa mortis."

347. SIR F. POLLOCK and FREDERIC WILLIAM MAITLAND. *The History of English Law Before the Time of Edward I.* (1899. 2d ed., Vol. II, p. 470.) Causation in Ancient Law. Guesswork perhaps would have taught us that barbarians will not trace the chain of causation beyond its nearest link, and that, for example, they will not impute one man's death to another unless that other has struck a blow which laid a corpse at his feet. All the evidence, however, points the other way: — I have slain a man if but for some act of mine he might perhaps be yet alive. Very instructive is a formula which was still in use in the England of the thirteenth century; one who was accused of homicide and was going to battle was expected to swear that he had done nothing whereby the dead man was "further from life or nearer to death."<sup>1</sup> Damages which the modern English lawyer would assuredly describe as too remote, were not too remote for the author of the *Leges Henrici*. At your request I accompany you when you are about your own affairs; my enemies fall upon and kill me; you must pay for my death.<sup>2</sup> You take me to see a wild-beast show or that interesting spectacle a madman; beast or madman kills me; you must pay. You hang up your sword; some one else knocks it down so that it cuts me; you must pay. In none of these cases can you honestly swear that you did nothing that helped to bring about death or wound.<sup>3</sup> . . .

But the most primitive laws that have reached us seem to point to a time when a man was responsible, not only for all harm done by his own acts, but also for that done by the acts of his slaves, his beasts, or (for even this we must add) the inanimate things that belonged to him.<sup>4</sup> . . . Our English law of deodands gives us a glimpse into a far-off past. In 1846<sup>5</sup> we still in theory maintained the

<sup>1</sup> Leg. Hen. 90, Par. 11: "Quod per eum non fuerit vitae remotior morti propinquior." Bracton, f. 141 b: "per quod remotior esse debeat a vita et morti propinquior." Note Book, pl. 1460: "Nec per ipsum fuit morti appropriatus nec a vita elongatus." Munim. Gildh. i. 105: "Iuravit . . . quod numquam ipsam Isabellam verberavit, unde puer, de quo fecit aborsum, propinquior fuit morti et remotior a vita." Brunner, *Forschungen*, p. 495, gives a similar formula from the Icelandic *Gragas*.

<sup>2</sup> Leg. Hen. 88, Par. 9.

<sup>3</sup> Leg. Hen. 90, Par. 11.

<sup>4</sup> Brunner, *op. cit.* 507–523.

<sup>5</sup> Stat. 9–10 Vic. c. 62. For the law of deodands, see Bracton, f. 122; Fleta, p. 37; Britton, i. 14, 15, 39; Staundford, P. C. f. 20; Coke, Third Inst. 57; Hale, P. C. i. 419; Stephen, *Hist. Crim. Law*, iii. 77.



rule that any animate or inanimate thing which caused the death of a human being should be handed over to the king and devoted by his almoner to pious uses, "for the appeasing," says Coke, "of God's wrath," . . . Horses, oxen, carts, boats, mill-wheels and cauldrons were the commonest of deodands. . . . The deodand may warn us that in ancient criminal law there was a sacral element which Christianity could not wholly suppress, especially when what might otherwise have been esteemed a heathenry was in harmony with some of those strange old dooms that lie embedded in the holy books of the Christian. Also it is hard to acquit ancient law of that unreasoning instinct that impels the civilized man to kick, or consign to eternal perdition, the chair over which he has stumbled.

348. JOHN H. WIGMORE. *Responsibility for Tortious Acts: Its History*. (1894. Harvard Law Review, VII, 315, 383, 442; reprinted in *Select Essays in Anglo-American Legal History*, III, p. 474.) "No conception can be understood except through its history," says the Positivist philosopher; and of no legal conception in Anglo-American law is this more true than of the notion of Responsibility for Tortious Acts. By this phrase is indicated that circumstance or group of mental circumstances attending the initiation and eventuation of an acknowledged harmful result, which induces us to make one person rather than another (or than no one at all) civilly amenable to the law as the source of the harmful result (and independently of whether this person can show some recognized justification for the harm). It is this notion whose history we find it possible to trace back in a continuous development in our Germanic law, without a break, for at least two thousand years.

To get a starting-point, let us look back from present principles. The law to-day, so far as we are entitled to take it as standing on a rational basis, distinguishes classes of culpable causation which may be roughly generalized for present purposes as follows: (1) Cases where the source of harm is pure misadventure, as where a customer is handling a supposed unloaded gun in a gun-store, and it goes off and injures the clerk; (2) Cases where no design to injure exists, but a culpable want of precaution and foresight is found; (3) Cases where no design to injure exists, and yet no inquiry into the actor's carefulness is allowed, — in other words, where he does the specific harm-initiating act "at his peril," as where he fires a gun in the street, or sells goods which prove to be those of another; (4) Cases where actual design to produce the harm exists.<sup>1</sup> Now, the thing to be noted is that the primitive Germanic law knew nothing of these refinements; it made no inquiry into negligence, and it based no rule on the presence or absence of a design or intent; it did not even distinguish, in its earlier phases, between accidental and intentional injuries. The distinctions of to-day stand for an attempt (as yet more or less incomplete) at a rationalized adjustment of legal rules to considerations of fairness and social policy. But the in-

<sup>1</sup> Compare Holmes, *Common Law*, cc. iii, iv., esp. pp. 92 ff., 144 ff.; Pollock, *Torts*, p. 19. It is here assumed, for present purposes, that in the few classes of cases where actual malicious motive is material, no question of responsibility, properly considered, is involved, but rather a question of the loss of a privilege; as pointed out by Mr. Justice Holmes in his article on *Privilege, Malice, and Intent* (*Harvard Law Review*, VIII, 1; 1894), and by the present author in an article on the *Tripartite Division of Torts* (*id.* VIII, 200, 377; 1894). Professor Whittier, in his article on *Mistake in the Law of Torts* (*id.* XVI, 335; 1902), does not accept this analysis.



discriminate liability of primitive times stands for an instinctive impulse, guided by superstition, to visit with vengeance, the visible source, whatever it be, — human or animal, witting or unwitting, — of the evil result. Both these extremes are fairly clear; it is the transition from one notion to the other which forms the interesting and complex process.

In endeavoring to realize the nature of the primitive canons of Responsibility, one must take into consideration the essentially superstitious and unreasoning spirit which pervaded the jural doings of primitive society; for the notion here dealt with was only one of the vehicles of his expression. One need not here to call to mind in detail the characteristics of primitive culture;<sup>1</sup> only certain of the more germane may be noted. The instinct of revenge, as an aggressive reaction from inflicted pain, preceding any developed sense of justice; the prevalence of clan-organization and clan-responsibility; the idea of transgression as associated with ceremonial observances; the implicit belief in taboo and curse; the propitiation of ghosts and deities by gifts and sacrifices; the sense of pollution and contamination (as by the touching of blood or of a corpse); the inheritance of guilt; the appeal to a decision of the Deity or of chance in litigation (as by the subjection to ordeals, the swearing of exculpatory oaths, the engaging in formal combat); the arbitrary formalism of words and phrases in pleading and oaths, — these give the tone to the times. In the light of these it is easy to understand that the notion of Responsibility for Harmful Results was determined largely by crude primitive instincts of superstition, — that our ancestors were satisfied with finding a visible source for the harm and following out their ideas of justice upon it.

It must be remembered, moreover, that we are here dealing with a sentiment characteristic of primitive justice everywhere. It was, beyond question, universal.<sup>2</sup> . . .

In this particular field, too, there are numerous manifestations, all akin. The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer; the owner of an instrument which caused harm was

<sup>1</sup> The keenest and most comprehensive analysis of these related features of primitive life is to be found in *The Origin and Development of Moral Ideas*, by Edward Westermarck (lecturer at Helsingfors and at London; Eng. ed., 1906), Vol. I (Vol. II, 1908, has little). Next in suggestiveness and insight should be mentioned G. Glotz' *La solidarité de la famille dans le droit criminel en Grèce* (Paris, 1904). A general survey of the primitive attitude in English law is given in Professor J. B. Ames' article on "Law and Morals," 1908 (*Harvard Law Review*, XXII, 97).

<sup>2</sup> 1888, *P. F. Girard*, *Les actions noxales*, in *Nouvelle revue historique du droit français et étranger*, XII, 38: "There is a phenomenon which one can discern throughout all antiquity, — that is, vengeance, the physical, unreasoning emotion, which drives the victim of an injury to a violent reaction against the immediate author of the injury. He who regards himself as offended against, takes vengeance for the offence as he will and as he can, alone or with the help of others, recognizing only the brute fact that he has suffered, and dominated by a feeling of resentment measured solely by the harm he has undergone. . . . The victim of the harm knows nothing but the harm done to him. He does not concern himself with the intent of the doer. . . . He therefore revenges himself for the harm-causing act, even though it may have been unintentional. . . . Moreover, for the same reason, the victim takes his revenge even where the immediate author of the harm is not capable of intending it, — where it is not a human being, but an animal, or an inanimate object."

responsible, because he was the owner, though the instrument had been wielded by a thief; the owner of an animal, the master of a slave, was responsible because he was associated with it as owner, as master; the master was liable to his servant's relatives for the death, even accidental, of the servant, where his business had been the occasion of the evil; . . . while the one who harbored or assisted the wrongdoer, even unwittingly, was guilty, because he had associated himself with one tainted by the evil result. Of these various forms of the primitive notion which determined responsibility, we are here concerned with only a few, — those that have a more or less intimate connection with later doctrines of the English law of torts, and are therefore for us more worth tracing from early times. . . .

We have, then, to deal with the primitive notion which instinctively visits liability on the visible offending source, whatever it be, of a visible evil result. The notion, as applied to persons, is that of the *schædliche Mann*, a person from whom some evil result has proceeded. It can best be illustrated in advance by . . . an example showing an exceptionally late survival of these ideas, and at the same time the transition to different standards: —

"Owen Alwerk was brewing beer. During his absence the child of Swein Pons came in and stood by the kettle. The kettle slipped from its hook, and the liquid burned the child so that it died on the third day. The relatives of the child pursued Alwerk, who fled to the house of a friend for refuge. The master of the house opposed the entrance of the pursuers, and an affray ensued, in which the master by inadvertence killed his own nephew. The affair was laid before six men as judges; and they decided at first that Alwerk must pay the head-money for the dead child and for the dead nephew, and must besides make a pilgrimage to Rome. But Alwerk opposed the judgment, and to such a good purpose that they altered it to this effect, — that he should be absolved without more from the child's death, and from the nephew's if he swore that he did not urge on the master of the house to fight."<sup>1</sup>

With these preliminary illustrations of the attitude of mind we are dealing with, we may take up, in the order of topics already named, the primitive ideas for the exposition of which we are indebted to the great Brunner.

*a. Harm connected with a Personal Deed.* It is not possible to draw hard-and-fast lines in tracing the stages of development; we can simply note that there were several stages, and point to particular rules or passages as illustrating approximately this or that successive form.

1. Of the primitive form of absolute liability we find a few comparatively late traces. . . . It may be noted here that the proceeding of attain was only a later form of the same early notion. In early times it was a general custom, where adultery or the like was discovered, to slay every living thing within the house, whether man or beast. The legal visitation of the sins of the fathers upon the children was one of the latest survivals of this idea.

2. As times change, and superstition begins to fade, the notion of "misadventure," "ungefaehr," is hazily evolved, and facts of the sort are regarded as ground for an appeal to the king or the lord on the offender's behalf. The strict law is thus regarded as requiring his punishment; but no vengeance can be wreaked upon him, no blood-feud started by the members of the victim's family: . . .

"Mabel, Derwin's daughter, was playing with a stone at Yeovil, and the

<sup>1</sup> A. D. 1439, Richthofen, K. v., Friesische Rechtsquellen, 570; 1840.

stone fell on the head of Walter Critels, but he had no harm from the blow; and a month after this he died of an infirmity, and she fled to church for fear, but [the jurors] say positively that he did not die of the blow. Therefore let her be in custody until the king be consulted." <sup>1</sup>

It is to be noted that a killing done in *self-defence* was regarded as one of those which required to be pardoned in this way by the king; and this notion long left its impress on English criminal law. . . .

3. But still, in the earlier days, the malefactor by misadventure must at least pay a fine, though released from the penalty of death, and later on, when the blood-feud had disappeared and a fixed payment was the regular form of civil liability, he must pay a portion of the ordinary amount. . . .

*b. Harm connected with Animals.* The successive phases of development are nearly akin to those already considered.

1. Of the primitive idea of full liability for harm caused by one's animals, there are a few traces. . . .

2. In the next phase, the injured party is found without the privilege of carrying out the blood-feud; this recognition of the unintentional nature of the deed seems to have come earlier here than in any other class of cases. But the owner is still answerable for the *wergeld* or the *compositio* appropriate to the harm done, — by most laws for the full sum, by others for an aliquot part; and in many cases the value of the mischievous animal, if surrendered, can be used in reduction of this sum. . . .

3. The next step is to absolve the owner entirely, if he divests himself of all relation with the accursed thing by putting it from him entirely; and this would take place, (1) in the beginning, by handing it over to the injured party for the infliction of vengeance (or, as above, in time, as in some sort a compensation or perquisite), and (2), later, by merely turning the animal loose. . . .

The owner would thus not be liable if the animal had escaped; for he is no longer connected with it, he is absolved:

Twisden, J.: <sup>2</sup> "If one hath kept a tame fox, which gets loose and grows wild, he that hath kept him before shall not answer for the damage the fox doth after he hath lost him, and he hath resumed his wild nature:" this may be a trace of the early notion.

Moreover, the notion that the owner is liable if he harbors or takes the animal back after repudiation, became, when rationalized as time went on, one of the sources (apparently) of the *scienter* rule in English law.

It must be added that the feature of delivering to the opposite party for his purpose of wreaking private vengeance was largely supplanted by the idea of forfeiture to the authorities for public punishment: sometimes the animal was outlawed, and could be killed by any one; later it was forfeited to the lord or to the church. Sometimes it was tried for its offence, and the theories and methods of trying and punishing animals form a long and interesting sidepath from the present subject.<sup>3</sup>

4. Along with all this we find in various regions in later times the requirement of an exculpatory oath as a preliminary to allowing the owner to free himself

<sup>1</sup> Selden Society, Vol. I. Pleas of the Crown, I, No. 188 (A. D. 1225).

<sup>2</sup> *Mitchel v. Alestree*, 1 Vent. 295 (1676).

<sup>3</sup> *K. v. Amira*, *Thierstrafen und Thierprocesse* (1892); E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (1907); Westermarck, *Origin, etc.*, pp. 254-260.

by giving up the animal. The oath perhaps at first declares merely that the owner was not privy to the wrong; but later it is that the owner was not aware of the animal's vice. . . .

From this basis (and perhaps that just mentioned) the later doctrines as to animals *ferae et mansuetae naturae*, and as to a *scienter* of the tame animal's viciousness in cases of violent injuries, would easily work out.

*c. Harm connected with Inanimate Things.* Here we may trace, *mutatis mutandis*, stages of development substantially analogous to those found in the preceding class of cases.

1. Of the most primitive form, subjection to the blood-feud for injuries caused by things belonging to a person, and without the owner's personal use of them, there are only a few traces, for the change came early.

In the early times, when rape or adultery was committed in a house, its inmates were killed, and the house (of commission or of refuge) was destroyed.

2. This passes into a mere pecuniary liability, accompanied sometimes by the duty of handing over the injuring thing, sometimes by the privilege of using its surrender to reduce the amount of the payment. The rule was, in Schleswig, if one is building a house, and a beam falls and kills a man, the beam is to be given over to the dead man's heirs (or, by later law, merely thrown away), and the owner also pays them 9 marks.

3. The notion of complete exculpation by a surrender or repudiation of the offending thing, or by an abstention from using it again, very early makes its appearance: . . .

In the case above, from Schleswig, if the beam is built in after all, the whole house is forfeited. . . .

In the laws of Henry I, the owner of weapons used by another to do harm must not take them into his hands again till they are "in omni calumpnia munda."

The notions with regard to the forfeiture of such noxal things passed through phases similar to those respecting animals; and the "deodand" is one of the traces in later law.<sup>1</sup> . . .

5. Finally, but coming at different times with respect to different classes of things, we find something approaching a rationalization of the rules. In some clear cases there is an absolute exculpation, without more said; in others, there is a foreshadowing of a test of due care or the like. A treatise of the 1500s in France lays down that . . . when a man is killed during the erection of a house, neither the structure nor the master shall bear any liability, if a warning notice had been given.<sup>2</sup> . . .

But to-day in torts we do certainly consider, not merely the sufferer's damage, but the blamableness of the defendant's conduct; while no such distinction was yet made, in the 1300s, even in cases of mere "misadventure." . . . The evidence seems plain that the rationalization towards the present standards

<sup>1</sup> Holmes, Common Law, 25, citing, among other cases, "If my horse strikes a man, and afterwards I sell my horse, and after that the man dies, the horse shall be forfeited" (Plowden, 260). Every one is familiar with the fossil remains of the deodand in the clause of the criminal indictment stating the value of the weapon with which a murder was done.

<sup>2</sup> But as late as 1466 a counsel thus argued in England: "If I am building a house, and when the timber is being put up a piece of timber falls on my neighbor's house and breaks his house, he shall have a good action, etc.; and yet the raising of the house was lawful, and the timber fell, *me invito*, etc." (Fairfax, in the Thorn-cutting case, Y. B. 6 Edw. IV, 7, pl. 18, quoted *post*, in No. 475.)

began at a much earlier period than has been supposed. In other words, there has never been a time, in English law, since (say) the early 1500s, when the defendant in an action for Trespass was not allowed to appeal to some test or standard of moral blame or fault in addition to and beyond the mere question of his act having been voluntary; *i. e.*, conceding a voluntary act, he might still exonerate himself.

### TITLE A: CAUSATION, IN GENERAL

#### SUB-TITLE (I): CAUSATION, AS A CONCEPTION OF PRACTICAL LOGIC AND MORAL RESPONSIBILITY<sup>1</sup>

350. ALFRED SIDGWICK. *Fallacies: A View of Logic from the Practical Side.* (1884, p. 334.) When S is observed to happen earlier in time than S; if we inquire as to the various ways in which these may conceivably be related to each other in Causation, we find: —

*First*, S may be the *cause* of S:

(1) As what is often loosely called the sole cause. That is, if S had not happened, S would not have happened, all other circumstances in S's environment being "accidental" to S: as where S is the passing of a bullet through a healthy man's brain, and S the death of the man.

(2) S and a third circumstance, Z, may have been jointly essential to S's happening. That is, without their combination, S would not have happened: as where Z is a certain person's weak state of health, S is the arrival of fever-infection, and S his consequent fever.

(3) S and Z may have jointly contributed to S's existence, without their combination being essential to the production of S at all. That is, without one of them, S might have happened, but not to so great an extent or intensity: as where S and Z are a pair of horses, and S the movement of the carriage.

(4) S may have been itself due to a former case of S, but may now be in its turn cause (whether sole or otherwise) of the present S: as where S is a rise in the bank rate, and S a general uneasiness in the money-market.

*Secondly*, S and S may be *co-effects* of Z: as where S is day, S is night, and Z is the earth's revolution in the sunlight: or where Z is a "centre of depression," S is a falling barometer, and S a storm.

*Thirdly*, Z may have been (sole or other) cause of S, and S *accidental*: —

(1) Simply accidental, as where S is the act of blowing, S is the flying open of the watch-case, and Z is the pressure of my finger on the spring. (Along with this may be classed the case where Z is the effect of S, and S accidental; as where S is the arrival of a comet, Z a letter in the Times about it, and S a war.)

(2) Z may have been the cause of S, and S a hindrance: as where S is the flourishing state of trade in America, Z is the "boundless resources of the country," and S is the system of Protective Duties.

351. J. J. BURLAMAQUI. *Principles of Natural and Politic Law* (transl. Nugent. 3d ed. 1784. Vol. I, p. 34; Part I, c. III). *Principle of Imputability.* Since man is the immediate author of his actions, he is accountable for them; and in justice and reason they can be imputed to him. This is a point of which we think it necessary to give here a short explication. The term of "imputing" is borrowed of arithmetic, and signifies properly, to set a sum down to somebody's account. To impute an action therefore to a person, is to attribute it to him as to its real author, — to set it down, as it were, to his account, and to make him answerable for it. Now it is evidently an essential quality of human actions, as produced and directed by the understanding and will, to be suscepti-

<sup>1</sup> This is in contrast with the primitive idea shown in Nos. 346–349, *ante*.



ble to imputation; that is, it is plain that man can be justly considered as the author and productive cause of those actions, and that for this very reason it is right to make him accountable for them, and to lay to his charge the effects that arise from thence as natural consequences. In fact, the true reason why a person cannot complain of being made answerable for an action, is that he has produced it himself knowingly and willingly. Every thing, almost, that is said and done in human society supposes this principle generally received, and every body acquiesces in it from an inward conviction.

We must therefore lay down, as an incontestable and fundamental principle of the imputability of human actions, that every voluntary action is susceptible of imputation; or, to express the same thing in other terms, that every action or omission subject to the direction of man, can be charged to the account of the person in whose power it was to do it or to let it alone; and on the contrary, every action, whose existence or non-existence does not depend on our will, cannot be imputed to us. Observe here, that omissions are ranked by civilians and moralists among the number of actions; because they apprehend them as the effect of a voluntary suspension of the exercise of our faculties. . . . We give in general the name of "moral cause" of an action to the person that produced it, either in the whole or part, by a determination of his will.

352. *ATCHISON, TOPEKA, & SANTA FE R. CO. v. BALES*. (1876. 16 Kan. 252, 256; action for damage done by the spread of a prairie fire.) *Valentine, J.* The word "cause" has various meanings, and shades of meanings. Philosophically speaking, the sum of all the antecedents of any event, constitutes its cause. Ordinarily, however, we consider each separate antecedent of an event as a cause for such event, provided however that the event could not have happened except for such antecedent. Taking this view of cause and effect, there may be many causes conjointly and consecutively contributing to produce one and the same final result. And these causes may differ vastly in their proximity or remoteness to or from such final result. But still, any one of them may, as we think, be selected as the responsible cause for such final result, provided it be selected in accordance with rules of law settled and established by the numerous adjudications of the Courts. . . . Observing these rules and limitations, an unlimited number of causes and effects may intervene between the first wrongful cause and the final injurious result, and still the author of such wrongful cause be held responsible for the last as well as the first and for every intermediate result. In the burning of prairie grass, like the case at bar, the number of causes and effects that may intervene between the first cause and the final result is illimitable. Each blade of grass is a separate and distinct entity, and the burning of each blade is both an effect and a cause. It is the effect of the burning of the blades immediately preceding it, and the cause, along with other blades, of the burning of the blades immediately succeeding it. And yet all these causes and effects are so intimately interlinked and blended with each other that we look upon the whole of them as constituting but one grand, united, continuous and single whole. We look upon the whole fire as only one fire, and the whole of these separate causes as merely one cause.

353. *HAYES v. MICHIGAN CENTRAL RAILROAD COMPANY*. (1883. 111 U. S. 228. Action against a railroad company, for personal injury received by the plaintiff, a deaf-and-dumb boy, in falling under the train; the plaintiff had passed from a public park on to the railroad right of way; the defendant was by

law bound to maintain a fence at that point, but the fence was broken down; and the plaintiff passed through at that point. The facts are more fully stated in No. 530, *post.*) *Matthews, J.* . . .

3. It is further argued that the direction of the Court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, "*causa causans*," this is no doubt strictly true. But that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*, — a cause which if it had not existed, the injury would not have taken place, — an occasional cause? and that is a question of fact, unless the causal connection is evidently not proximate. . . .

### 354. QUILL *v.* EMPIRE STATE TELEPHONE & TELEGRAPH COMPANY

COURT OF APPEALS OF NEW YORK. 1899

159 N. Y. 1, 53 N. E. 679

APPEAL from Supreme Court, general term, Fifth department.

Action by Jeremiah Quill against Empire State Telephone & Telegraph Company. From a judgment of the general term affirming a judgment for plaintiff (37 N. Y. Supp. 1149), defendant appeals. Reversed.

*Frederic E. Storke*, for appellant. *E. C. Aiken*, for respondent.

PARKER, C. J. The plaintiff, while standing on the south side of a telephone-pole belonging to this defendant, and under the end of the lower cross-arm, was struck by a glass insulator which, in an attempt to change the telegraph wire, was thrown from the pin upon which it had been placed. The taut wire, as it was being raised, caught under the insulator, and lifted it from the pin. The person who raised the wire was not in the employ of the defendant, nor connected with it in any way. He was an employee of the city of Auburn, who discovered that there was some difficulty with the wires, and went up the pole of his own accord for the purpose of remedying it. For the injuries that the plaintiff suffered he succeeded in obtaining a judgment against the defendant, predicated necessarily upon the ground that the defendant failed to perform some duty that it owed to the travelling public, of which the plaintiff was one. It is very difficult to point out the act claimed to constitute an omission of duty. Indeed, without an ingenious use of authority, which seems sometimes to be resorted to to prove what is obviously untrue, the task would scarcely be undertaken by any one. The facts are not in controversy, and a statement of them will, I think, support the assertion made.

It is true that the defendant was the owner of the pole, which was in height ninety-six feet, in circumference at the base six feet, and had upon it twenty cross-arms, each of which was ten feet in length and bore ten pins. The bottom cross-arm, from which the insulator fell,

was forty-seven feet from the ground. Now, while this was the defendant's pole, it did not make use of all the arms. The two uppermost arms were occupied by the American Telephone & Telegraph Company; the thirteen arms immediately below were used by this defendant; the succeeding four arms below had no wires on whatever; the twentieth and last arm was used exclusively by the Western Union Telegraph Company, and it was from this arm that the insulator fell. It seems that when this large pole was being erected for the use of the defendant, the manager of the Western Union Telegraph Company complained that the effect of it would be to interfere with his company's use of a pole near by, which carried the wires of that company, and thereupon he was told that, as soon as defendant's pole was up, the Western Union Company could either put on a cross-arm or use the bottom cross-arm which the defendant had put on, as defendant would have no use for it. This settlement of the difficulty was accepted, and immediately after the erection of the pole the Western Union Company took possession of the lower cross-arm, and exclusively used it from that time on until after the happening of the accident. . . . The situation, then, so far as this defendant is concerned, is this: It turned over to another company the use of part of its property, consisting of an arm of a telephone pole and pins thereon, all of which were, and still are, in perfect condition. The Western Union Telegraph Company took possession of the pole, strung seven or eight wires thereon, and thereafter continued in the exclusive occupation of it down to the 27th of June, 1891, when an employee of the city government having no relation whatever to any of the corporations owning or using the pole, went upon it for the purpose of making some temporary alteration in the position of the wires, and in attempting to do so lifted directly upward a wire that rested against one of the pins, and which caught under the glass insulator, raised it up from the pin, and threw it to the ground.

The defendant is certainly not responsible, under this evidence, on the ground that it turned over to the Western Union Company the insulator thrown off, for it did not furnish it. Nor is it responsible for every act done or omitted on the lower arm of the pole, simply because it owns it. The neglect, if any there was, on the part of either the owner or the occupant of the pole, was that of the Western Union Company in omitting to catch the insulator on the thread of the pin; and for its omission of duty the owner is not responsible. . . . In this case the evidence points to the Western Union Telegraph Company as the company responsible for the insulator being upon the pin without being screwed down; but, in any event, the state of the evidence is such that it will not support a finding that this defendant furnished the insulator, or put it on, or had anything to do with it whatever. The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur except O'Brien, J., dissenting.

*Judgment reversed, etc.*

355. OHIO & MISSISSIPPI R. Co. *v.* LACKEY (1875. 78 Ill. 55); holding unconstitutional a statute providing that "every railroad company shall be liable" for the burial expenses of "all persons who may die on the cars"). *Breese, J.*: On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred? An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. . . . It is not claimed that the liability attaches for a violation of any law, the omission of any duty or the want of proper care and skill in running their trains. The penalty is not aimed at anything of this kind. We say "penalty," for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case; nor are they in the contemplation of the statute. A passenger on the train dies from sickness; he is a man of wealth; why should his burial charges be charged to the railroad company? There is neither reason nor justice in it. And if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases. . . .

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### 356. BERTHOLF *v.* O'REILLY

COURT OF APPEALS OF NEW YORK. 1878

74 N. Y. 509

[Printed *post*, as No. 522.]

### 357. WEEKS *v.* McNULTY

SUPREME COURT OF TENNESSEE. 1898

101 *Tenn.* 495, 48 *S. W.* 809

APPEAL from Circuit Court; JOSEPH W. SNEED, Judge. Action by Lottie Weeks against Frank McNulty and others. Judgment for defendants. Complainant appeals. Affirmed.

*Jerome Templeton and Chas. T. Cates, Jr.*, for appellant. *Washburn, Pickle & Turner*, and *Mynott, Fowler & Mynott*, for appellees.

MCALLISTER, J. Plaintiff brings this suit to recover damages for the death of her husband, Arthur E. Weeks, which is alleged to have been occasioned by the negligence of the defendants. The grounds of the liability alleged in the declaration are: First, that defendants were owners and proprietors of the Hotel Knox, a public inn in the city of Knoxville, and had negligently permitted said hotel to be in an unsafe and dangerous condition; and, second, that defendants had not employed a sufficient complement of servants for the protection of the

hotel and guests; and third, that the servants employed were incompetent, whereby said hotel was on April 9, 1897, destroyed by fire, and plaintiff's intestate, Arthur E. Weeks, who was a guest therein, lost his life. The more specific grounds of negligence are stated in the second count of the declaration, viz.: That defendant had failed to provide fire escapes, as ordered by an ordinance of the city of Knoxville, or other reasonable means of escape from said building; that defendants failed to arouse deceased, or give him proper warning of said fire, and that this failure was due to defendants' omission in not employing a responsible watchman. . . . Defendants pleaded not guilty. The case was tried by a special jury, to whom a large volume of testimony was submitted. The trial resulted in a verdict and judgment for defendants. Plaintiff appealed, and has assigned errors.

The facts necessary to be stated are that the defendant Frank McNulty was the owner and proprietor of a public inn in the city of Knoxville, known as "Kotel Knox." Plaintiff's intestate, Arthur Weeks, was a travelling man, representing the Rochester Stamping Works and the Robinson Cutlery Company, of Rochester, N. Y. On the evening of April 7, 1897, said Weeks reached the city of Knoxville, registered at the Hotel Knox, and was assigned to room 49 on the third floor. About three o'clock in the morning following, Hotel Knox was destroyed by fire, and said Weeks perished in the flames. The fire was first discovered by the night watchman of the hotel, who immediately gave the alarm, ascended the stairway leading to the second and third floors, knocked upon the doors, and made every effort to arouse the guests. It is in proof that the guests were all aroused and escaped, excepting deceased and one other. It is in evidence that one of the guests, as he passed out, heard some one in 49 pounding at the door, and noticed that he had kicked out one of the panels. If this evidence is to be credited, it tends to show that the deceased heard the alarm, but had unfortunately fastened himself in, or, in the excitement, had lost all command of his faculties. It is also shown that parties occupying rooms on the same floor with deceased, immediately contiguous, and across in the hall in opposite and diagonal directions, all received the alarm, and succeeded in making their escape. The building was provided with a front and rear stairway, but had no fire escapes. South of the Hotel Knox and immediately adjoining, was the banking house of the Third National Bank, which being only one story high, several of the guests leaped upon its roof from the burning hotel building. This mode of escape was accessible to deceased, since his window overlooked the roof, but it is not shown that he had knowledge of it. . . .

The fourth assignment is that the Court erred in excluding the ordinance of the city of Knoxville requiring the owners and keepers of hotels to erect fire escapes thereon. . . . We do not, however, decide the effect of the breach of an ordinance in fixing civil liability, nor do we adjudicate the proper construction of the ordinance offered in

evidence, since neither question is necessarily involved in this case, for the following reasons, namely: There is no proof in the record even tending to show that the deceased lost his life in consequence of the failure to construct fire escapes as provided by the city ordinance. . . .

After a very attentive reading of the record in this cause, we have failed to discover any causal connection between the death of plaintiff's intestate and the failure of defendants in error to erect fire escapes, as required by the ordinance. It is not shown that the deceased was at a window, or in any position where a fire escape would have afforded him any benefit whatever. There is evidence tending to show that deceased had locked himself in his room, and was heard beating on his door, trying to make his escape. It is shown that one of the windows of his room overlooked the Third National Bank Building, and that deceased could, and with entire safety to himself, have escaped by leaping to the roof of that building, as many others similarly situated successfully did escape. As already stated, it is not shown that deceased knew of this avenue of escape, and we cannot conceive how he would have been benefited by fire escapes under the circumstances surrounding him. We are therefore of opinion that if the contention of counsel for plaintiff in error in respect of the proper construction of this ordinance were correct, and that its breach would constitute actionable negligence, these questions are mere abstractions in this case, since no causal connection between the violation of the ordinance and the injuries sustained by the plaintiff is shown. . . .

*Affirmed.*

### 358. LAIDLAW v. SAGE

SUPREME COURT OF NEW YORK. 1893

73 Hun 125, 25 N. Y. Suppl. 955

APPEAL from Circuit Court of New York county. Action by William R. Laidlaw, Jr., against Russell Sage, for personal injuries. The complaint was dismissed at the trial, and plaintiff appeals. Reversed. Argued before VAN BRUNT, P. J., and FOLLETT and PARKER, JJ.

*Davis Work, Pincoffs & Jessup* (Noah Davis, of counsel), for appellant.

*John F. Dillon and Rush Taggart* (Edward C. James, of counsel), for respondent.

VAN BRUNT, P. J. This action was brought to recover damages because of certain alleged wrongful acts of the defendant. The answer admitted some of the acts, but denied that any wrong had been done by the defendant to the plaintiff. The facts appearing upon the trial seem to be substantially as follows: The plaintiff had for a number of years been accustomed to call upon the defendant at his office on business two or three times a week, and sometimes oftener. On the morning of the 4th of December, 1891, he went to call on the defend-



ant, at the request of his employer. Upon entering the office of Sage, he found Mr. Sage and a person having a little satchel in his hand (who was a stranger to him, but whose name was subsequently ascertained to be Norcross) standing by the entrance of the anteroom, talking. The plaintiff passed in without speaking to Mr. Sage, and entered the anteroom, to there await the termination of the conversation. He stood near the centre of a table, at the end of the room farthest from the door at which Mr. Sage was standing, which table stood next to a railing in which there was a gate opening into a small space between the railing and a window looking upon Rector Street, in which small space was a door opening into Mr. Sage's private office. While standing at the table, the plaintiff did not hear any of the conversation between the defendant and the other man. After he had stood there, facing the window, half a minute, or a minute at the outside, Mr. Sage came from behind, away from his visitor, but still looking at him, and placed his hand upon the plaintiff's shoulder without speaking to him. He then took his left hand down from the plaintiff's shoulder, and took the plaintiff's left hand in both of his, and drew the plaintiff gently towards him, and gently turned him around, and stood with one thigh resting upon the outer corner of the table. The plaintiff testified that the defendant did not use any force whatever on him, and that the only exercise of power on the part of Sage of which he was conscious at the time was that it was just sufficient to move him, but without any idea of force, or anything of the sort, and that he moved voluntarily, because he offered no resistance, and that he was not conscious that Sage was pulling him at the time. The result of this change of position was to bring the body of the plaintiff between the defendant and the visitor, the body of the plaintiff covering the body of Sage's body. After Sage had been in this position a second or two, he spoke to the visitor, and said, as the plaintiff testified, "If I trust you, why can't you trust me?" or, "if you can't trust me, I can't trust you." At that moment an explosion took place, and the plaintiff and Mr. Sage were thrown upon the floor; a person who was standing by the Rector Street window was blown through the window and killed; the visitor with whom Mr. Sage was talking was blown to pieces; and the rooms were a general wreck. It further appears from the evidence that the stranger, who stood in the doorway when the plaintiff entered, had handed to the defendant the following letter: "This carpet bag I hold in my hands contains ten pounds of dynamite, and, if I drop this bag on the floor, it will destroy this building in ruins, and kill every human being in it. I demand \$1,200,000, or I will drop it. Will you give it, — yes or no?" The plaintiff was severely injured by the explosion, and this action was brought to recover damages claimed to have been sustained by reason of the alleged wrongful act of the defendant in using the plaintiff's body to protect himself from the effects of the anticipated explosion; and the

question presented upon this appeal is whether this action can be maintained.

It is urged upon the part of the defendant that the plaintiff's case wholly failed to establish that the defendant's action was either wrongful, or that it was a proximate cause of the plaintiff's injury, or an efficient cause without which the injury would not have happened, and that Norcross being the sole cause of the injury, Sage's act was not a proximate cause of the accident or of the damage to the plaintiff; that it did not even contribute to the accident or the damage, and hence Sage is not liable; that it was not even proved to be one of several concurring acts that produced the explosion, which explosion was the only and sole cause of the plaintiff's damage; and that the plaintiff's testimony affirmatively establishes that his injuries were caused by the unlawful act of Norcross in exploding the dynamite, — an act with which the defendant was not in any way connected, and for which, therefore, he was not responsible. . . .

The defendant also cites the case of *Ring v. City of Cohoes*, 77 N. Y. 83; *Searles v. Railway Co.*, 101 N. Y. 661, 5 N. E. Rep. 66 [*post*, No. 359]; *Taylor v. City of Yonkers*, 105 N. Y. 203, 11 N. E. Rep. 642; *Ayres v. Village of Hammondsport*, 130 N. Y. 665, 29 N. E. Rep. 265; *Grant v. Railroad Co.*, 133 N. Y. 657, 31 N. E. Rep. 220; and other cases, — in support of the proposition that when several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes, but it cannot be attributed to a cause unless without its operation the accident would not have happened. These cases, however, seem to us to have no application to the case at bar. Those were cases in which the question arose as to whether the plaintiff could recover because of alleged negligence of the defendant, and the proof showed that there were two causes, from either one of which the accident might have occurred, in respect to one of which the defendants were chargeable with negligence, and in respect to the other they were not; and the Court held that a recovery could not be had unless it was *proved* that the injury resulted from the cause in respect to which the defendants were chargeable with negligence.

Our attention is also called to the language of Mr. Justice HOLMES, in his work on *The Common Law*, where it is laid down that the general principle of our law is that loss from accident must lie where it falls, and that this principle is not affected by the fact that a human being is the instrument of misfortune. And the language of Mr. Justice NELSON is cited where he says: "No case or principle can be found, or, if found, can be maintained, subjecting an individual to liability for an act done without fault on his part. . . ." But the facts of the case at bar do not necessarily place the defendant in the position of a person doing a lawful act, and thereby causing the plaintiff to be

injured. . . . The jury would have a right to infer from the evidence in this case that the defendant, being in great fear lest Norcross would carry out the threat contained in his written memorandum to him, and explode the dynamite which he had in his bag, placed the plaintiff between himself and the apprehended danger as the best possible screen which he had at hand. Now, if the defendant put his hand upon or touched the plaintiff, and *caused him to change his position*, with that intent, he was guilty of a wrongful act towards the plaintiff; and, if the plaintiff was injured by the happening of the anticipated catastrophe, then the burden is thrown upon the defendant of establishing that his wrongful act did not in the slightest degree contribute to any part of the injury which the plaintiff sustained by reason of the explosion. . . . Being the wrongdoer in attempting to make this improper use of the plaintiff's body, he must clear his skirts of any possible inference that some at least of the injuries of the plaintiff may have resulted from his wrongful act. . . .

We are of opinion, therefore, in view of the fact that from this evidence the jury might find that the defendant used this plaintiff as a shield against apprehended danger, of which he knew the plaintiff to be ignorant, that a dismissal of the complaint cannot be sustained. The judgment should be reversed, and a new trial ordered, with costs to appellant to abide event. All concur.

(On Appeal. 1899. 158 N. Y. 73, 101, 52 N. E. 679.)<sup>1</sup> MARTIN, J. When we apply to the undisputed facts of this case these rules relating to proximate cause, it becomes quite manifest that the judgment in this action cannot be upheld. All the injuries which the plaintiff sustained were caused directly and immediately by the act of Norcross in exploding the dynamite. That was clearly the proximate, and we think the only, cause of the plaintiff's injury. It was the only efficient cause, as, confessedly, without the explosion the plaintiff would not have been injured; and under no circumstances can it be properly said that the act of the defendant in changing the plaintiff's position a few inches to the left of where he previously stood caused the explosion or occasioned the catastrophe. Surely that was not an act without which the explosion would not have occurred; nor can it be held to have been the proximate cause of the explosion. The most that can be said is that it produced a situation which existed at the moment it occurred. Obviously, the explosion would have occurred if the defendant had moved the plaintiff in an opposite direction, or had not moved him at all. . . . There was no evidence in the case of any necessary relation of cause and effect between the act of which the plaintiff complains and the explosion which caused his injury. . . . The Court erred in not directing a verdict for the defendant on that ground.

<sup>1</sup> [This appeal followed an intermediate trial in which the case was allowed to go to the jury.]

**SUB-TITLE (II): PLURAL CAUSES****Topic 1. Plural Causes of a Harm Single and Inseparable****359. THOMPSON v. LOUISVILLE & NASHVILLE RAILROAD COMPANY****SUPREME COURT OF ALABAMA. 1890**• 91 *Ala.* 496, 8 *So.* 406

**APPEAL** from Circuit Court, Jefferson county; **JAMES B. HEAD**, Judge.

This action was brought by the appellant, Thompson, as administrator of J. R. Thomas, deceased, against the appellee, and sought to recover damages for an injury suffered by his intestate on account of the alleged negligence of the defendant, which resulted in his death. Among others, the Court gave, at the defendant's request, the following charge: "No. 17. If the evidence leaves the jury in doubt and uncertainty as to whether the accident or the poison caused the death of the plaintiff's intestate, and because of such doubt the evidence fails to produce in the minds of the jury a proper conviction or satisfaction that his death was caused by the injury he received at the time he fell from the car, and not from the poison, then you must find for the defendant"; to which the plaintiff duly excepted. There were verdict and judgment for the defendant, and the plaintiff brings this appeal.

*Smith & Lowe and Mason & Martin*, for appellant. *Hewitt, Walker & Porter*, for appellee.

**COLEMAN, J.** The suit is brought to recover damages for the injuries alleged to have been wrongfully inflicted by the defendant on J. R. Thomas, an employee, on the 22d day of September, 1889, and from which, it is charged, the death of said employee resulted on the 29th September, 1889. The section of the Code (§ 2591) under which this suit is brought provides that the personal representative may sue if such injury "results" in the death of the servant or employee. The section, so often construed by this Court, provides that the suit may be brought by the representative to recover damages for the injury, whereby the death was "caused." Code, § 2589. "Cause" is that which produces an effect. "Result" is the effect of one or more concurrent causes. The same principles of the law are alike applicable in either case. The testimony of skilful physicians tended to show that the injury inflicted was mortal, and the injured party would have died from the effects of the injury "in a short time." There was evidence also tending to show the wounds were not "necessarily mortal." The evidence showed that by mistake the wife of deceased, who was his

nurse, gave to him internally four or five grains of corrosive sublimate, which had been left by the physician to be used as a wash, and not to be given internally. It was proven that the poison would have caused the death of a well person, and it was in evidence that the poison was the immediate cause of the death. The testimony of the physicians further tended to show the wound was of such character "that it may have hastened the death"; "may have caused him to die sooner from the effects of the corrosive sublimate than if he had not received the wound"; that the corrosive sublimate administered to Thomas would have produced death "quicker," in a man in Thomas' condition from the wounds received by him, "than in a well man." Among others, the Court charged the jury that, under the evidence of this case, the death of plaintiff's intestate must have resulted either from the injury he received or from the poison he took; that the injury and the poison cannot both be the cause of his death; further, that his death could not be the result of the injury and at the same time the result of the poison; further, that if he died from the effects of the poison, then they must find for the defendant, although his death was accelerated by reason of the injury received, or if he died sooner from the effects of the poison than he would have died if he had not been injured.

1. It does not follow that, because a man cannot die but once, there cannot be two or more concurrent, co-operative, and efficient causes to effect the one killing. A person may be killed by "beating and starving." There may be contributing causes. 3 Greenleaf Evidence, § 141. If, as the testimony tended to show, the injury received was mortal, and caused decedent to "die sooner" or quicker from the effects of the poison than he would have died, had he not been injured, it is difficult to perceive how the poison can be regarded as the "sole" cause of his death at the time it occurred. If he would have lived longer without the injury than with, the injury necessarily contributed to and accelerated his death, and was a part of the cause, causing death at the time it occurred. It is not intended by this Court to assert the doctrine that, if a party inflict an injury not mortal, and, by the intervention of other causes, death results, the party inflicting the injury in all cases shall be held responsible for the death. The first cause may or may not be regarded as the proximate cause of a result according to the facts of the case. . . . But the [trial] Court ought not to have charged the jury, as a conclusion of law, that death did not and could not have resulted from both causes, the injury and the poison, in the face of the testimony of the physicians examined as witnesses to the effect that the death of the decedent was "accelerated" by the injury, or that the injury may have caused him to die "quicker" than he would have died without the injury. . . . We have been cited to no authority in a suit for the recovery of damages, where it was shown that, if the "result" was the necessary and inevitable effect of a first cause, and a new independent force intervened sufficient of

itself to produce the effect, and only hastened the result, the first cause was held to be too remote. In such cases both causes necessarily contribute to the result. . . .

2. The measure of proof required by the use of the words "any doubt" in charge No. 17 is too high, and, although followed by explanatory or qualifying words, the use of the word "proper" in the explanatory clause is misleading. A reasonable conviction is what the law requires. *Reversed and remanded.*

### 360. SEARLES v. MANHATTAN RAILWAY COMPANY

COURT OF APPEALS OF NEW YORK. 1886

101 N. Y. 661, 5 N. E. 66

THIS action was brought to recover damages for injuries alleged to have been caused by defendant's negligence. Plaintiff was riding upon a car on the street under defendant's elevated road, in the city of New York, when a hot cinder fell from a locomotive passing overhead, and struck him in the eye. The following is the memorandum of opinion:

There was sufficient evidence to show that the plaintiff's eye was injured by a cinder lodged therein; that the cinder came from a locomotive upon defendant's railway, and that the plaintiff was free from contributory negligence. But there was an utter failure of evidence to show that the accident occurred from any fault, negligence, or unskilfulness on the part of the defendant. The defendant had the right to operate its railway over the street by steam, and to generate steam by coal, and any damage necessarily caused by the careful and skilful exercise of its lawful rights could impose no obligation upon it. To maintain his action, therefore, the plaintiff was bound to give evidence legitimately tending to show that the damage to his eye was caused in consequence of some negligence or unskilfulness chargeable to the defendant. The undisputed evidence shows that all the appliances used upon the defendant's locomotives to prevent the escape of sparks and cinders were skilfully made and were the best known. There was no evidence that any such appliances were defective or out of order. On the contrary, the proof tended to show that they were in order. The mere proof of the escape of cinders was not sufficient, as the evidence showed that their escape could not be avoided and was inevitable.

According to the proof, cinders from one of the defendant's locomotives could come only from (1) the smoke-stack or (2) the ash-pan. (1) There is no claim that the defendant is liable for this accident if the cinder came from the smoke-stack. (2) But the claim is that it came from the ash-pan because it was out of repair. But there was no evidence that the ash-pan was out of repair, or that the cinder came



from it. When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must fail also if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of evidence. The jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the negligence and unskillfulness of the defendant is not sufficient.

The judgment should, therefore, be reversed, and a new trial ordered, costs to abide event.

*Edward S. Rapallo*, for appellant. *Lewis J. Morrison*, for respondent.

EARL, J., reads for reversal and new trial. All concur, except DANFORTH, J., dissenting, and RAPALLO, J., taking no part.<sup>1</sup>

*Judgment reversed.*

### 361. COREY v. HAVENER. SAME v. ADAMS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1902

182 Mass. 250, 65 N. E. 69

Two actions of tort by the same plaintiff against different defendants for injuries to the plaintiff and to his wagon caused by the alleged negligence of both defendants, each operating a separate gasoline motor tricycle at an illegal and dangerous rate of speed and frightening the plaintiff's horse. Writs dated December 22, 1900.

In the Superior Court the two cases were tried together before PIERCE, J. It appeared that the plaintiff, who was very deaf and could only hear by the use of an ear trumpet, was driving slowly in a wagon along Shrewsbury Street, a public street and main thoroughfare in Worcester; that the defendants came up from behind and

[<sup>1</sup> *Bernhard Windscheid*, "Lehrbuch des Pandekten-Rechts" (9th ed., by Kipp, 1906, p. 61), § 263, note 15. *Reparation for Damage*. The damage must be such as would not have occurred if the act in question had not been done. In the following cases, therefore, there is no liability. (a) The damage would have been caused by the act charged if the act had had its full effect, but has in fact been caused by another intervening act; *e. g.* the defendant mortally wounds an animal, but the animal is then struck and killed by lightning. . . . (b) The damage is attributable to the act charged, as its cause, but also to another person's act as a cause; *e. g.* the defendant is in default as to repairing a certain thing, but afterwards the thing is destroyed without his fault. . . . Here, however, if both acts are tortious, both are liable. . . . (c) The damage was caused by the act charged, but this act has merely forestalled the operation of another cause, which would equally have done the damage, had the first act not obviated that consequence; *e. g.* a shipper wrongfully loads goods on a ship different from the one directed; the former ship goes down at sea, also the latter.]

passed the plaintiff at a high rate of speed one on each side; that each defendant was mounted on a motor tricycle with a gasoline engine making a loud noise and emitting steam; some of the plaintiff's witnesses saying that the machines emitted steam and smoke making a cloud about the defendants as they rode. The plaintiff testified that his horse took fright when the defendants first passed but was under control and guidance until he overtook the defendants, and that running between them the horse shied and he then lost control. His wagon wheel struck another wagon going in the same direction, and the injuries to himself and his wagon occurred. The plaintiff and each of his witnesses was asked on cross-examination if he could tell which defendant or which vehicle caused the horse to take fright, and each witness was unable to tell.

The defendants requested the judge to instruct the jury, that the evidence showing that they were on two separate vehicles entirely independent of each other, and there being two different suits for the same injury, the burden was on the plaintiff to show which one of the defendants, if either, was to blame; and that, if it was not clearly shown which one of the defendants caused the accident, the plaintiff could not recover. . . . The defendants also requested the judge to instruct the jury, that there being two defendants and two separate suits, and the cause of action against each being for the same injury, if the jury found for the plaintiff they must assess the full damages and determine against which defendant, and that they could not assess full damages against both, as that would be giving double damages.

The judge refused to give either of these instructions. The jury found for the plaintiff in each case and in each case assessed the damages in the sum of \$700. The defendants alleged exceptions.

*G. A. Perkins*, for the defendants. *A. P. Rugg & H. H. Thayer*, for the plaintiff.

LATHROP, J. The only question which arises in these cases is whether the judge erred in refusing to give the instructions requested. . . .

1. The verdict of the jury has established the fact that both of the defendants were wrongdoers. It makes no difference that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each. If each contributed to the injury, that is enough to bind both. Whether each contributed was a question for the jury. *Boston & Albany Railroad v. Shanly*, 107 Mass. 568, 578, and cases cited.

It makes no difference that the defendants were sued severally and not jointly. If two or more wrongdoers contribute to the injury, they may be sued jointly or severally. *McAvoy v. Wright*, 137 Mass. 207. The first request for instructions was therefore rightly refused.

2. Nor was there any error in refusing to give the second request. If both defendants contributed to the accident, the jury could not

single out one as the person to blame. There being two actions, the plaintiff was entitled to judgment against each for the full amount. There is no injustice in this, for a satisfaction of one judgment is all that the plaintiff is entitled to. *Elliott v. Hayden*, 104 Mass. 180. *Savage v. Stevens*, 128 Mass. 254. *Luce v. Dexter*, 135 Mass. 23, 26. *McAvoy v. Wright*, 137 Mass. 207. *Galvin v. Parker*, 154 Mass. 346. *Worcester County v. Ashworth*, 160 Mass. 186, 189.

*Exceptions overruled.*

## Topic 2. Plural Causes of a Harm Plural or Separable (Joint Tortfeasors)<sup>1</sup>

362. ANON. (1492. Year-Book 6 H. VII, fol. 2, pl. 2.) Trespass d'assaut vers iiii, et de verberatione et vulneratione. Et l'un justifie naufrerant et les pleges per assaute del pleyntyfe mesme et le male que il avoyt fuyt de son assaut demesne et en son defence; et le pleyntyfe dyt de son torte demesne sauns tyel cause; et fueront a issue. Et lez auters pleade de ryen coupable. Et l'enquest dyent, et dyt fuyt par agarde del Courte que si le plee de cesty que justyfia soyt trove encounter luy, donques il serra charge de l'entyer damage, et ils n'enquereront ou ils luy naufrera ou nemye, pour ceo que c'est confesse par le justyfycacion. Mez de les auters il serra enquerant come bien ils fuerount, car ils poient faire assaut et ne luy naufrerer etc. Et donques, si il soit trove issint, les damages envers tous ceux en comen del assaut; et pour le naufrerer et reiner, envers cesty que justifia, etc.

<sup>1</sup> *T. Rutherforth*, "Institutes of Natural Law" (2d Amer. ed. 1832, p. 204. Book I, .c. XVII). *Reparation for Damage Done*. A number of men may so concur in doing damage as to be all of them principals. In this case they are obliged, all and each of them, to make it good, if the act is such an one as arises from each of them alone, though they happened to be together when it was done, and all contributed towards the doing it; that is, if the damage which they have all done by a joint act, would have been the same, though only one of them had been concerned in it. But, if in the whole damage which is done by them all, only one part arose from one of them, and another part from another of them; then each of them is obliged for no more than his own share of the damage: because the rest of it did not arise from him.

We may explain this rule farther by distinguishing between *indivisible* and *divisible* acts. Those are called *indivisible* acts, in which many persons may concur; but the whole act would have been the same, though only one of them had been concerned in it. So that if all of them can be come at, they are obliged to join in making reparation: or if only one of them can be come at, he alone is to make the whole reparation. Where the act is a *divisible* one, that is, where part of the damage is done by one of the persons concerned, and part by another; so that the part which was done by the one can be distinguished from the part which was done by the other, and without the concurrence of them all, the loss would not have been the same; in this case all of them together are obliged to make good the whole damage; but each of them alone, considered as a principal, is not obliged to make good more of it, than what arose from him.

## 363. SIR JOHN HEYDON'S CASE

KING'S BENCH. 1613

11 *Co. Rep.* 5

SIR JOHN HEYDON, Knight, brought an action of Trespass of Battery, and wounding (which in Truth was in a cruel and barbarous Manner) at Fekenham in Norfolk, against Froxmere Cocket, Thomas Cocket, and Jeffrey Cobbe; Froxmere Cocket appeared, against whom the plaintiff declared with simul cum, &c. And Froxmere Cocket pleaded Not Guilty, and thereupon Venire facias issued &c. And afterwards Thomas Cocket appeared, against whom the plaintiff also declared with Simul cum, &c. who pleaded also Not Guilty, upon which, another Venire facias issues. And both these issues came to Trial at the Assizes at Thetford in Norfolk, Anno 8 Jac. Regis, before the Chief Justice of the Commons Pleas. And in Truth the Issue against Froxmere Cocket was first tried, and the Jury assessed Two hundred Pound Damages; and at the same assizes the Issue against Thomas Cocket was tried, and de bene esse Damages were assessed to Fifty Pounds. And the cause which moved the Jury to extenuate the Damages against the others, was, That altho' they were Parties, and of one Quarrel, yet Froxmere Cocket was the most malicious and cruel, and his Hand gave the said barbarous and grievous Wounds. Jeffrey Cobbe appeared, and confessed the Action, and a Writ of Enquiry of Damages awarded upon the Roll, but none issued. And a great Question was moved and defended for divers Terms, how, and against whom, and for what Damages, Judgment should be entered. And after the last, upon Consideration had of the Precedents, and of our Books, it was resolved per totam Curiam, as follows:

1. When, in trespass against divers Defendants, they plead Not Guilty, or several pleas, and the jury find for the Plaintiff in all, the Jurors can't assess several damages against the Defendants; because all is one Trespass, and made joint by the Plaintiff by his Writ and Declaration; and altho' one of them is more malicious, and de facto doth more and greater Wrong than the others, yet all coming to do an unlawful Act, and of one Party, the Act of one is the Act of all of the same party being present. And therefore in such Case, if the Hand of one only gives a mortal Wound, whereupon Death ensues, it is Murder in all who are present and of the same Party, altho' the others did not intend to give a Wound so mortal, as appears in Mackellie's Case, 9 Part of the Reports, fol. 67 b.

2. But in Trespass against two, if the Jury find one Guilty at one Time and the other at another Time, there several Damages may be taxed.

## 364. HALSEY v. WOODRUFF

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1830

9 Pick. 555

TRESPASS against Halsey and Avery for entering Woodruff's close and pulling down a blacksmith's shop; with counts for carrying away the materials. The defendants plead severally the general issue. The jury find "that the said Avery is guilty in manner and form as the plaintiff has alleged, and assess damages against said Avery at two dollars, and the jury also find that said Halsey is guilty in manner, &c., and assess damages against said Halsey at seventy-five dollars." The plaintiff elected to take judgment against both defendants for the greater damages, and entered a *remittitur* as to the lesser damages.

The defendants sued out a writ of error, assigning for error, that although the jury which tried the cause returned a separate verdict of seventy-five dollars against Halsey and also a separate verdict of two dollars against Avery, the Court rendered a judgment against both for the sum of seventy-five dollars and costs.

*Dwight and Bishop*, for the plaintiffs in error. . . . *Porter, contra.* . . .

PER CURIAM. We think the judgment was rightly entered. The result of the authorities, which are numerous, is, that where a joint action is brought against two for a trespass done, and there is a judgment against both, it must be a judgment for joint damages. All the legal consequences of there being a joint judgment must necessarily follow; one of which is, that each is liable for all the damage which the plaintiff has sustained by such trespass, without regard to different degrees or shades of guilt. Heydon's Case cites many of the authorities, the effect of which is given in Tidd, that where the action is brought against several defendants and the jury assess several damages, the plaintiff may enter a *remittitur* as to the lesser damages and take judgment against all who are guilty of the joint trespass, for the greater damages.

And this is founded on a sufficient reason. Each defendant is liable for the whole damages of a joint trespass. A release to one discharges both, and the reason is, that the damage is joint. The plaintiff here alleges a joint trespass. The defendants plead severally, that they are not guilty — of what? of the joint trespass; and they are found guilty — of what? of the same joint trespass. Damages are assessed against one at seventy-five dollars; this therefore, by the finding of the jury, is the damage which the plaintiff has sustained, and the law draws the inference that both are liable for that sum. . . . On principle, as well as authority, the judgment entered in the case before us was correct.

*Judgment affirmed.*

365. PRIEST *v.* NICHOLS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1874

116 *Mass.* 401

TORT for injury to the plaintiff's goods by leakage from pipes alleged to be under control of the defendants. . . . Trial in the Superior Court before DEWEY, J., who allowed a bill of exceptions in substance as follows:

Evidence was offered by the plaintiffs that they occupied the floor and basement under the premises occupied by the defendants. There was an engine on the defendants' floor over the premises of the plaintiffs, put in and used by the defendants to run their manufacturing establishment, after their lease to the plaintiffs, and also used to carry an elevator, which was used principally by the defendants, and occasionally by the plaintiffs. There was also a waste pipe, which, passing from a water closet and two sinks of the defendants, ran down, inclosed in a wooden box, through the premises of the plaintiffs to the basement. At about four feet from the basement floor it made a right angle, and flowed into the sewer, and connected with this waste pipe was a sink and water closet of the plaintiffs. The damages alleged in the declaration were caused by the water flowing back from the sewer at high tides and flooding the basement, and thereby damaging the plaintiff's wool, then piled up on the floor, by a leak in the waste pipe at the angle in the plaintiffs' basement, and at a similar angle immediately over it on the premises of the defendants, from which the water-pipe leaked in upon the plaintiff's wool in a room above the basement, and by water leaking down from the defendants' boiler and engine upon the plaintiffs' wool in the same upper room.

The plaintiffs testified that about the middle of July, 1872, their floor was flooded by water backing in from the sewers, and damaging their wool, but were unable to state the precise amount of damage then caused or by any subsequent leaking. The plaintiffs also testified that from July, 1872, to November, 1872, water came down occasionally from the engine and boiler in the defendants' premises, and on one occasion water enough came down to wet the floor to a considerable extent, and that they were obliged to move some bags of wool. They were not able to say exactly how much wool was injured in this way, but stated the amount of the injury in their judgment. . . .

At the request of the defendants' counsel, all evidence of damage done by the tide backing in to the sewers and doing damage by flooding the basement was excluded. At the close of the plaintiffs' case upon the foregoing evidence, the defendants asked the judge to rule that the plaintiffs were not entitled to recover; but the judge declined to give this ruling. . . . The counsel for the defendants asked for the following instructions: . . . "6. In this action, where the damages alleged were caused by different causes, each of which causes more or



less damaged the plaintiffs' wool, if a portion of the damages was for causes for which the defendants were not liable, the burden of proof is upon the plaintiffs to show the damage done by causes for which the defendants were liable; and if they fail to offer testimony tending to show this, or to apportion the damages done by the different causes, they cannot recover."

The judge declined to give these instructions, and instructed the jury as follows: . . . "5. That when the damage was occasioned by different causes, from each of which there was more or less damage to the plaintiffs' wool, if a portion of the damage was from the causes for which the defendants were not liable, as from the tide-water, the burden of proof was on the plaintiffs to show damage to the wool from causes for which the defendants are liable, as distinguished from the other causes; and for this damage only could the plaintiffs recover. . . ."

The jury found for the plaintiffs, and the defendants alleged exceptions.

*T. Weston, Jr.*, for the defendants. *B. Dean*, for the plaintiffs, was not called upon.

ENDICOTT, J. There was evidence upon which this case could properly be submitted to the jury. . . . The rulings of the presiding judge were carefully stated, and are not open to exception.

*Exceptions overruled.*

### 366. WORCESTER COUNTY *v.* ASHWORTH

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893

160 *Mass.* 186, 35 *N. E.* 773

TORT, against Samuel J. Ashworth and Esther E. Ashworth, in two counts under the Pub. Sts. c. 102, § 106, as qualified by St. 1889, c. 454, to recover of the defendants, as the keepers of certain dogs alleged to have engaged in doing damage to sheep belonging to Darling Brothers on June 12 and 26, 1891, the sums of \$58 and \$35, respectively; which sums had, before the bringing of the action, been ordered to be paid as damages to Darling Brothers by the county commissioners of the county of Worcester. At the trial in the Superior Court, before DEWEY, J., without a jury, it was admitted by the defendants that the several sums had been ordered by the commissioners to be paid as alleged.

There was evidence tending to show that a dog belonging to and kept by Darling Brothers, together with three young dogs belonging to the defendant Samuel J. Ashworth, and claimed by the plaintiff to have been at that time kept by the defendants, who were husband and wife, were on June 12, 1891, engaged in doing damage alleged by the plaintiff to have been done; that soon afterwards Darling Brothers' dog was killed; and that no more sheep were killed after the killing of

such dog; although there was evidence tending to show that Ashworth's dogs were, on June 26, 1891, seen in the pasture of Darling Brothers worrying and injuring the sheep. The judge ruled that, notwithstanding the fact that Darling Brothers' dog was engaged in doing the damage, if the dogs kept by the defendants were also engaged in doing damage the plaintiff was entitled to recover the whole of the sums ordered to be paid to Darling Brothers by the commissioners. . . .

*C. S. Dodge*, for Samuel J. Ashworth. *G. S. Taft*, for the plaintiff.

KNOWLTON, J. In Pub. Sts. c. 102, § 106, is the following language: "Every owner or keeper of a dog engaged in doing damage to sheep, lambs, or other domestic animals, shall be liable in an action of tort to the county for all damage so done which the county commissioners thereof have ordered to be paid, as provided in this chapter."

The first question in the case is whether, under this section, an owner of a dog engaged in doing damage is liable for all the damages in the doing of which the dog is engaged, or only for that part done by his own dog. The natural construction of the language is that "all damages so done" means the damages which the dog was engaged in doing, not that part of the damages which he did alone. . . .

This is after the analogy of joint tortfeasors at common law. Moreover, there are strong reasons why the Legislature should have created such a liability in case of this kind. There is such danger of damage to sheep from dogs, and the difficulty of protecting the flocks is so great, that it has been thought necessary to adopt stringent measures for this purpose. It is a well known fact that two or more dogs which have a propensity for killing sheep often make their attacks together. The damage they do results from frightening and scattering sheep, as well as from killing or wounding them. In most cases where two dogs are together, it is practically impossible to tell what part of the damage is done by one dog and what by the other. It is therefore quite reasonable to make each owner of a dog which is concerned or engaged in doing damage liable for the whole amount which his dog was concerned in doing. Although there may be several suits and judgments, as in the case of claims against joint tortfeasors, there can be but one satisfaction. . . .

Under the circumstances of this case the ruling was right that the county was entitled to recover the whole sum.<sup>1</sup>

### 367. COREY v. HAVENER. SAME v. ADAMS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1902

182 *Mass.* 250, 65 *N. E.* 69

[Printed *ante*, as No. 361.]

<sup>1</sup> [Compare the ruling as to trespass by cattle of different owners, in *Wood v. Snider*, *post*, No. 496, point 5.]

## 368. THE "ALABAMA" AND THE "GAMECOCK"

SUPREME COURT OF THE UNITED STATES. 1875

92 U. S. 695

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case was argued by Mr. *Edwards Pierrepont* for the "Alabama," by Mr. *W. R. Beebe* for the "Gamecock," and by Mr. *John E. Parsons* for the libellant.

Mr. Justice BRADLEY delivered the opinion of the Court. . . .

On the question of blame, the conclusion is, that both the "Alabama" and the "Gamecock" were in fault, and contributed to the loss; and that the "Ninfa," which was in tow of the "Gamecock" and suffered the loss, was not in fault. On this finding arises the question of law which is of principal interest in the case; namely, against whom, and in what manner, should the damage be adjudged? The "Alabama" was a large steamer, and was bonded for \$100,000; whilst the "Gamecock" was a small tug, bonded at the stipulated value of \$10,000. The loss was found to be about \$80,000. The District Court rendered a decree against both for the whole, regarding them as liable in solido. The Circuit Court, on appeal, reversed this decree, and divided the loss between them, rendering a decree against each for one-half the amount. The Court adopted this division of liability in obedience to the supposed views of Dr. LUSHINGTON, in the case of *The Milan*, 1 Lush. 404, which was followed in the case of the steamboat "Atlas" both by the District and Circuit Courts of the Southern District of New York. 4 Ben. 27; 10 Blatch. 459. . . . It would seem to be just that the owner of the cargo, who is supposed to be free from fault, should recover the damage done thereto from those who caused it; and if he cannot recover from either of them such party's due share, he ought to be able to recover it from the other. The same reason for a division of the damage does not apply to him which applies to the owners of the ships. The safety of navigation requires that if they are both in fault, they should bear the damage equally, to make them more careful. And this consideration may well require, or at least justify, a primary award against each of a moiety only of the damage sustained by the cargo, for as between themselves that would be just. But if either is unable to pay his moiety of damage, there is no good reason why the owner of the cargo should not have a remedy over against the other. He ought not to suffer loss by the desire of the Court to do justice between the wrongdoers. In short, the moiety rule [allowing a division of loss when both are negligent] has been adopted for a better distribution of justice between mutual wrongdoers; and it ought not to be extended so far as to inflict positive loss on innocent parties.

In the cases which have been cited from Lushington and others, it does not appear that any difficulty arose from the inability of either of the condemned parties to pay their share of the loss. . . . The cases quoted, therefore, may have been well decided, and yet furnish no precedent for the case under consideration. . . . We think that the decree of the Circuit Court was erroneous, and that a decree ought to be made against the "Alabama" and the "Gamecock," and the respective stipulators, severally, each for one moiety of the entire damage, interest, and costs, so far as the stipulated value of said vessel shall extend; and any balance of such moiety, over and above such stipulated value of either vessel, or which the libellant shall be unable to collect or enforce, shall be paid by the other vessel or her stipulators to the extent of the stipulated value thereof beyond the moiety due from said vessel. . . .

Mr. Justice CLIFFORD dissented.

### Topic 3. Procedure in Actions against Joint Tortfeasors

#### 369. MITCHELL v. TARBUTT ET ALS.

KING'S BENCH. 1794

5 T. R. 649

THIS was an action on the case for negligence, wherein the declaration stated, That whereas one J. Jones and one G. Bolland, at the time of committing the grievance thereafter mentioned, were possessed of a certain ship called the "Albion," which was then proceeding on a voyage from Jamaica to Bristol, and that there were then on board the said ship 600 hds. of sugar belonging to the plaintiff; and that whereas the said G. Tarbutt, N. A., J. H., D. T., and J. E. (the defendants), were at the time when, &c., possessed of a ship called the "Amity Hall," whereof one G. Young was then master, then also sailing on the high seas, and the said G. Young, their servant in that behalf, then and there had the management of the said ship "Amity Hall"; yet, that the defendants, by their said servant, so negligently navigated their ship, that the said ship, by the negligence of their servant, with great force struck against the said ship of Jones and Bolland, then sailing with the plaintiff's goods on board, and so damaged the goods that they were wholly lost to the plaintiff. To this the defendants pleaded in abatement, that the grievance (if any) was committed by the defendants, and one A. Shakespear, C. Bryan, S. Orr, and J. Neuffville, jointly, and not by the defendants only. To which there was a general demurrer, and joinder.

*Giles*, in support of the demurrer, was stopped by the Court.

*Wood, contra.* If the declaration had charged a personal tort on the defendants themselves, the demurrer to the plea might have been sustained; because it might have been said to have been the separate tres-

pass of each of the partners. But the injury is expressly alleged to have happened by the act of their servant, in which case one of the parties cannot be answerable more than another. And that is the distinction between Trespass and Case: in the former each person to whom the act is referable is liable, but in Case all the parties who are answerable should be sued jointly; especially where, as in the present instance, the act complained of is not done by themselves personally. . . . And to that difference must be referred the distinction which was taken between actions arising ex contractu and ex delicto. But that such a plea in abatement may be pleaded even to actions on the case in tort, appears from a case as far back as the Year Books 7 H. 4, 8. . . .

LORD KENYON, C. J. With regard to the last case cited, there certainly is a distinction in the books between cases respecting real property and personal actions: where there is any dispute about the title to land, all the parties must be brought before the Court. But upon this question it is impossible to raise a doubt. I have seen the case of *Boson v. Sandford*,<sup>1</sup> in the different books in which it is reported; in all of which this doctrine is clearly established, that if the cause of action arise ex contractu, the plaintiff *must* sue all the contracting parties; but where it arises ex delicto, the plaintiff *may* sue all or any of the parties, upon each of whom individually a separate trespass attaches. . . . This being an action ex delicto, the trespass is several; and it is immaterial whether the tort were committed by the defendant or his servant, because the rule applies "qui facit per alium, facit per se."

*Judgment for the plaintiff.*

### 370. WALSH v. BISHOP

KING'S BENCH. 1632

*Cro. Car.* 39, 243

ERROR of a judgment in the Common Pleas, in trespass of battery against two. They plead several pleas, the one not guilty, the other a justification; whereupon several issues were joined, and the jury found both issues for the plaintiff, and assess several damages, but joint costs. Afterwards the plaintiff caused a nolle prosequi to be entered against the one, which was entered accordingly; and takes judgment against the other for the damages found against him, and the costs.

*Littleton* assigned error, because a nolle prosequi against the one before judgment entered is quasi a release to him, which shall enure to the other, and abate the writ for both; but if he had prayed judgment against the one, and had it, then he might enter a nolle prosequi against the other; and entry of a nolle prosequi against the one after judgment

<sup>1</sup> *Skin.* 278; *vide* 1 *Com. Dig.* tit. Abatement (F. 8), S. C.; *Carth.* 58; *Salk.* 440; 3 *Lev.* 258. *Vide* also 2 *Show.* 446; 1 *Show.* 28, 101.

shall not abate the writ, nor be a release to the other; and for that was cited 14 Edw. 4, pl. 6.

But Mr. *Grimston* answered, that this *nolle prosequi* is not a release in itself, but an acknowledgment that he will not proceed as against the one; which the plaintiff may well do in trespass, where the defendants sever themselves by pleading, and there be several verdicts against them: and so there be divers precedents where *nolle prosequi*'s are entered as well before judgment as after; and so it is the Old Book of Entries.

The Court thereupon would advise. . . .

This case was now argued again by *Littleton*, Recorder of London, for the plaintiff in the writ of error, and by *Henden*, Serjeant, for the defendant. The errors insisted upon were, . . .

Secondly, that the entry of a *nolle prosequi* before judgment is quasi a confession of his action to be false against one, or a release to him, which being before judgment is as it were a release to both.

But the COURT, absente JONES, conceived, that . . . it is not a confession that this writ is false, nor an absolute release to the one; but it is, as it were, an agreement that he will not proceed against the one; and his acknowledgment is an absolute bar as to him, and proceeding may be against the other. . . .

And divers precedents being shewed on both sides, that such judgments have been so entered, the judgment was affirmed. . . .

371. *NORDHAUS v. VANDALIA RAILROAD COMPANY*. (1909. 242 Ill. 166, 89 N. E. 974.) CARTWRIGHT, J.: . . . Appellee, J. W. Nordhaus, as administrator of Frank Zehak, brought this suit in the Circuit Court of St. Clair County against the Vandalia Railroad Company, appellant, and the St. Louis National Stockyards, to recover damages for the death of said Frank Zehak, alleged to have been caused by the negligence of the defendants. The defendants severally pleaded the general issue, and upon trial there was a verdict of guilty as to both. The Court granted motions of the defendants for a new trial, and upon a second trial a verdict was again returned and finding both defendants guilty and assessing the damages at \$1,500. The defendants again moved for a new trial, whereupon the plaintiff dismissed the suit as to the St. Louis National Stockyards, and the Court entered judgment against the plaintiff, in favor of that defendant, for its costs. . . .

The next complaint is that the Court erred in permitting appellee to dismiss the suit as to the St. Louis National Stockyards and entering judgment against appellant. It is argued that the verdict was a unit, and that the Court was bound either to enter judgment upon it as such or to set it aside as a whole. A judgment against two defendants is a unit, and cannot be reversed as to one and affirmed as to the other. . . . But while the action was joint, the liability was joint and several. Several persons acting independently but causing together a single injury may be sued either jointly or severally, and the injured party may, at his election, sue any of them separately or he may sue all or any number of them jointly. If he sues all, he may, at any time before judgment, dismiss as to either or any of the defendants and proceed as to the others.



372. CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS  
RAILWAY CO. v. HILLIGOSS

SUPREME COURT OF INDIANA. 1908

171 *Ind.* 417, 86 *N. E.* 485

APPEAL from Circuit Court, Madison County; J. F. McCLURE, Judge.

Action by James W. Hilligoss against the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

*Lovett & Slaymaker* and *C. E. Cowgill*, for appellant. *Kittinger & Diren*, for appellee.

HADLEY, J. Appellee sues to recover for injuries received in a collision between a freight-car, belonging to appellant, and an electric street-car, under his control, belonging to the Union Traction Company, on a grade crossing, in the city of Anderson, through the alleged negligence of the appellant. There are two paragraphs of complaint, each of which was held good on demurrer for insufficient facts. There are two answers, a general denial, and one affirmative, to which a demurrer for insufficient facts was sustained, and an exception reserved. Verdict for \$12,500, for which, over appellant's motion for a new trial, judgment was rendered. . . . Did the Court err in sustaining appellee's demurrer to the second paragraph of answer? . . .

It is further averred in the second paragraph of answer that the collision was caused by the joint acts of said traction company, through its motorman operating said street-car, and of the railroad company through its employees in moving a cut of cars over the crossing; and that if there was negligence on the part of the defendant, as alleged by the plaintiff, in moving its cut of cars over the crossing, nevertheless the plaintiff's injuries would not have occurred had it not been for the action of the traction company's employees in negligently running said street-car on to said crossing at the same time the defendant's cut of cars was in the act of crossing the same, as aforesaid; and so, the defendant says, "that, if the collision resulted in any particular through the negligence of its employees, it was through the joint act and the joint negligence of the employees of said two companies that said collision and the plaintiff's injuries occurred." It was then averred that on December 30, 1905, the plaintiff for a valuable consideration fully released the traction company from all liability arising from said collision, which release was in writing, and in the following words and figures:

"Whereas, on the 24th day of November, 1905, James W. Hilligoss, while in the employ of the Indiana Traction Company, as conductor, was injured about the head, arms, body, and otherwise injured when freight car collided with South Meridian Street car, in an accident which occurred on the lines of said

to earn it, has been held a sufficient consideration to support a release. . . . The facts pleaded in the answer show at least the semblance of a right of action in favor of appellee against the traction company. As we have seen, this is enough to uphold a release.

We think that the demurrer should have been overruled. There are numerous other questions reserved that we leave unconsidered, as they are not likely to arise again.

The judgment is reversed, with instructions to overrule the demurrer to the second paragraph of answer, and for further proceedings not inconsistent with this opinion.

373. CHICAGO & ALTON RAILWAY COMPANY *v.* AVERILL. (1906. 224 Ill. 516, 79 N. E. 654.) *Wilkin, J.*: A covenant not to sue a sole tortfeasor is considered in law a discharge and a bar to an action against him. But the rule is otherwise where there are two or more tortfeasors, and the covenant is with one of them not to sue him. In such case the covenant does not operate as a release of either the covenantee or the other tortfeasor; but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant, as a bar to an action against him. *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *West Chicago Street Railroad Co. v. Piper*, 165 Ill. 325, 46 N. E. 186. The covenant in question was not to sue, and therefore came clearly within the rule announced in the two cases above cited, and did not operate as a release to appellant.

### 374. MORTON'S CASE

QUEEN'S BENCH. 1584

*Cro. El.* 30

TRESPASS against Morton for entering into his house, and taking away his goods. The defendant pleadeth that the trespass was done by him and J. S., and that the plaintiff had brought trespass against J. S. and recovered against him and had execution and is satisfied, and demands judgment if he might impeach him, &c. And upon this it was demurred. — *Plowden* moved, that this was a good plea; for when a trespass is done by two, this is joint, and it is also several: so that if the party be satisfied by one, this is a discharge against the other. . . . In Rich. 2, 3, a difference is taken between a trespass by two, and a felony by two: for a felony by two is always several; and a pardon of one is no discharge of the other.

WRAY, C. J. conceived it reasonable, that the execution and satisfaction by one should discharge the other. GAWDY, J., contra: For the trespass is alway in itself several; and when the plaintiff hath recovered against one, and is satisfied for the damages he has done to him, this is nothing to the trespass done by the other. But a release to one is available to the other; for by the release he acknowledges himself satisfied. CLENCH, J. If one command three to do a tres-

pass, and they do it, and a recovery is had against him, and he being in execution doth satisfy the plaintiff, this is a good discharge of the others; for the commander was the principal trespasser, and the others did it but as his servants. Which GAWDY seemed to agree. Et adjournatur.

## 375. SHELDON v. KIBBE

SUPREME COURT OF ERRORS OF CONNECTICUT. 1819

3 Conn. 214

THIS was an action of assault and battery. In one of the counts, the injury complained of was alleged to have been committed by Orrin Kibbe, under the stimulation, and with the assistance of the defendant. In the bar of this action the defendant pleaded a former recovery, by the plaintiff, against Orrin Kibbe, for the same trespass. By virtue of an execution issued on that judgment, Orrin Kibbe was committed to prison; took the poor prisoner's oath; and was afterwards discharged, under the act for the relief of insolvent debtors, without having paid or satisfied the judgment. The questions of law, presented by this case, were reserved, by the Superior Court, for the advice of all the Judges.

*W. Perkins* and *Stearnes*, for the defendant. . . . That a recovery against one of two or more persons, for a trespass, committed by them jointly, is a bar to another action for the same trespass. . . . *Brown v. Wooton*, Cro. Jac. 73. The cause of action being reduced in rem judicatam, is merged in the judgment. *Wilkes v. Jackson*, 2 Hen. & Munf. 355. Reason and justice require, that a former recovery should be a bar to an action for the same cause. There is a material distinction between a joint trespass and a joint and several contract. It is pursuant to the understanding of the parties, that joint contractors shall not be discharged without satisfaction; but joint trespassers have made no such agreement. In trespass, the defendants may plead not guilty, severally; and a verdict may be given in favor of some, and against others; but law is otherwise in relation to joint contractors. . . .

*Goddard* and *C. Wiley*, for the plaintiff, contended . . . that a recovery against one of two or more joint trespassers, without satisfaction, is no bar to a recovery against another. . . .

HOSMER, Ch. J. This case presents two questions for the determination of the court. 1. Whether an unsatisfied judgment rendered against a joint trespasser, separately, is a bar to a suit against his co-trespasser. 2. If it is not, whether taking out execution and levying it on the body, has that effect.

1. It is universally admitted that, for a joint trespass, the person injured may sue all the trespassers, jointly, or each of them separately;

and that each is responsible for the act of all. There exists no question, that action may be depending against each trespasser, severally, at the same time, for the trespass committed by them jointly; and that the pendency of one is not pleadable in abatement of the other. Until the case of *Brown v. Wootton*, Cro. Jac. 73, the law seems to have been well settled, and required satisfaction as a bar in trespass. . . . In *Morton's case*, Cro. Eliz. 30, it was determined, that a judgment and execution against one joint trespasser, which had been satisfied, was a bar to a suit against one joint trespasser; although this was questioned by one of the judges. In the same year, and the same court, the case of *Lendall and Pinfold*, 1 Leon. 19, was decided. . . . The facts in the two cases reported by Leonard are expressed in terms very similar; and that the decision in the former of them was founded on the doctrine in *Littleton* concerning releases (§ 376). The reason of *Littleton's* text, that a release to one trespasser shall be a bar for others, is, because the release acknowledges the plaintiff to be satisfied for the wrong, *et unica tantum erit satisfactio*. *Claxton v. Swift*, 2 Show. 494, by Shower, *arguendo*. The case of *Brown v. Wootton*, Cro. Jac. 73, introduced a new principle, and decided, that a judgment *and* execution, in behalf of a person concerned in the same trespass, were a bar. The ground of the determination was this, "that the *cause of action* being against the diverse persons, for which damages uncertain are recoverable, and the plaintiff having *judgment* against one person for damages certain, that which was uncertain before is rendered in *rem judicatam*, and to certainty; which takes away the action against the others." The validity of the principle I very much question and shall hereafter discuss. "It was never pretended," said Shower in *Claxton v. Swift*, 2 Show. 494, "until the case of *Brown v. Wootton*, that a bare judgment should be a bar." Some decisions since the case just mentioned have followed it as a precedent, and particularly, *Wilkes v. Jackson*, reported in the 2 Hen. & Munf. Rep. 355. . . .

On principle, independent of cases, I am perfectly clear, that an unsatisfied judgment pleaded by a separate trespasser, is no bar. The justice of the plaintiff's demand in such case cannot be denied. . . . Every trespass, however, is joint and several in a different sense, that is, in reference to the mode of redress; and a suit may be instituted against all the trespassers, or either of them, at the election of the person injured. . . . Now what can be more absurd, than to authorize the pendency and proceeding of twenty separate actions against persons concerned in a joint trespass, and, after the accumulation of vast expense, to hold that the first judgment bars the other suits! Satisfaction of a judgment, equally with payment before action brought, must be attended with this effect; but if the bare existence of a judgment has this operation, justice and convenience, in opposition at law indisputably established, would imperiously demand, that joint trespasses should be the subject only of a joint suit.

It has been said, that a judgment against one merges and extinguishes the cause of action against all the trespassers. As against the person subjected to the judgment, this is readily admitted. No person shall be twice vexed for one and the same cause; and it would be insufferably unjust to sanction a suit against him who is already bound by a higher security. But with respect to the collateral effect of the judgment, it has been misconceived. "I have always understood," said Lord Ellenborough, in *Drake v. Mitchell*, 3 East, 258, "the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered, operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have." Of this description is the remedy which the law allows against one of several joint trespassers who have not been sued. . . . If a trespass is committed by A. and B. on the body of another, the acts are distinct; the stroke of A. in fact, not being the stroke of B.; and vice versa. But, by operation of law, these distinct acts are amalgamated, and, in all their parts, become the united act of both. So, a contract made by A. and B., and subscribed by each, is created by distinct acts, the assent and signing by one not being the assent and signing by the other; but by legal result, it is the inseparable act of both. The united mind, with which the contract was made, gives it unity; and the same unity proceeds from the united mind of joint trespassers. In both instances, the cause of action is one and indivisible, and the remedy is joint or several at the option of the plaintiff. Between the legal effect of a judgment in cases of such intimate resemblance, why should there be a difference? . . .

2. If the judgment is not a bar, and I am of that opinion, the next enquiry is, whether the taking out execution and levying it on the body, has that effect. . . . The principle I have assumed is, that a judgment against a trespasser must be satisfied, or it will not bar a suit brought against an associate in the trespass. The taking out execution is not satisfaction; nor is the levying it on the body. As it was said on *Blumfield's case*, 5 Coke, 87, "the execution of the body is no satisfaction, but a gage for the debt, and therefore, after the death, he shall resort to a new execution." . . .

On the whole, I am of the opinion, that the unsatisfied judgment against *Orrin Kibbe*, in which execution was taken out and levied on his body, is no bar to the plaintiff's action; and that he is entitled to judgment.

PETERS, BRAINARD, and BRISTOL, Js. were of the same opinion.

CHAPMAN, J. The question, in this case, is whether a recovery against one joint trespasser, who has been committed to gaol on an

execution granted thereon, and has taken the poor prisoner's oath, can be pleaded in bar, to another suit, against his co-trespasser. The principle to be settled, in this case, is, in my view of it, of the first importance. Litigation is one of those evils, which necessarily attend a civilized community; but the adoption of any principle (without necessity), which is calculated to increase it, must always be impolitic, always wrong. "*Interest Reipublicae ut finis sit litium.*" Hence the doctrine of consolidation of causes. Hence the Legislatures of the different States have made laws to diminish the number of law suits; and one has gone so far as to provide, that a suit brought will bar any claim which might have been included in such suit, whether it is or not.

It will be granted me, at the onset, that the principle adopted by my brethren, in this case, is not necessary to the attainment of justice, in any supposed case; since it is in the power of the plaintiff, in any action founded on tort, to include every person liable, in a single action, or as many of them as he pleases. To allow him to sue each separately, is to give him no advantage, unless it be advantageous to him to have the power of indulging his corrupt passions in vexing and harassing those who are in his power; a disposition to do which is too often seen in our courts of justice. Were the principle adopted by the Court applicable to actions of trespass only, it would be more tolerable; but when it is seen, that the principle is equally to ejectment, trover, malicious prosecution, as well as every other action founded on tort (for they are all in the same sense joint and several), it must be acknowledged that the decision of this case is of the last importance; for it settles a principle which put it into the power, of those who choose to use it, of multiplying law suits to almost any extent, to the great injury of individuals as well as of the community. In many cases founded on tort, the only question is the right of property; no personal blame being imputed to the defendant; and in many cases, the plaintiff is at liberty to sue in tort or contract, at his election. Surely, the public good does not require that there should be as many actions as there are parties. An officer, in attaching property, would often lay a foundation for a whole docket of causes: first, against himself; secondly against all the creditors, under whose direction he acted; and lastly, against all his assistants separately. If the levy should be a mistaken one, each must pay a bill of costs, and one the damages; and what, perhaps, is worse, the court might be employed a long time in trying the same cause against the different defendants with different juries (for there must be a new jury for the trial of every cause); and what is worst of all, the plaintiff will have it in his power, by this experiment, to ascertain which jury will give him the highest damages. That such a principle as this should exist in any code of laws, in any country, seems to be incredible.

But it is said, this is the common law of England. I fearlessly deny it; and were it so, I would not adopt it, highly as I think of their



common law. . . . In the case of *Brown v. Wootton*, Cro. Jac. 73, the very point now before the Court was made, and unanimously decided in favor of the defendant. That was an action of trover. The defendant pleaded a former recovery against one J. S. for the same goods; and the plea was holden good. . . . The same doctrine is supported by a great variety of cases: *Rawlinson v. Oriett & al.*, Carth. 96; *Sir Humphrey Ferres & al. v. Arden*, Cro. Eliz. 668; *Lendall and Pinfold's case*, 1 Leon. 19; *Lacon v. Barnard*, Cro. Car. 35. Indeed, no case can be found in the English books where there has been a judgment and execution against one tortfeasor, which could not be pleaded without satisfaction to a suit against another. The arguments on the part of the defendant turn wholly upon the supposed analogy between actions on joint and several contracts and those on torts. . . .

I think, the decision in this case is opposed both to principle and precedent.

*Judgment to be rendered for the plaintiff.*

### 376. PARMENTER *v.* BARSTOW

SUPREME COURT OF RHODE ISLAND. 1899

21 R. I. 410, 43 Atl. 1035

TRESPASS on the case for negligence. The facts are sufficiently stated in the opinion. Heard on demurrer to plea in bar of former judgment for same cause of action against a joint tortfeasor. Demurrer sustained.

STINESS, J. The plaintiff sued for damages caused by negligence of defendant's servants in cutting stone upon a sidewalk, pieces of which struck her eyes. The defendants plead a former judgment in favor of the plaintiff against Rouse B. Chace for the same cause of action and damage which is claimed in this suit. The plaintiff demurs to this plea, on the ground that the judgment against Chace does not bar a recovery in this action.

The defendants rely on *Hunt v. Bates*, 7 R. I. 217, and *Bennett v. Fifield*, 13 R. I. 139. *Hunt v. Bates* was an action of trespass against one who had caused property to be taken on attachment, as the property of a third party, and a judgment in a trover against the officer making the attachment was set up in bar. The judgment was held to be a bar to the action of trespass. The opinion was based wholly upon English cases, and, so far as they concerned torts, they were those of trover and trespass. *Broome v. Wootton*, Yelv. 67; Cro. Jac. 73; *Moore*, 762; *Adams v. Broughton*, Andrews, 18; *Buckland v. Johnson*, 15 C. B. (6 J. Scott) 145. See also *King v. Hoare*, 13 M. & W. 494. The principle of the decisions was that, by the judgment in the action of trover for the full value of the goods, the property in the goods was changed, by relation from the time of the conversion; and,

hence the plaintiff, having no further interest in the goods themselves, could not sue in trespass for taking them. Thus the judgment became a bar to a subsequent suit in trespass. Such a conclusion rests upon a reasonable ground, whatever may be said about the more modern doctrine that the title does not pass until satisfaction of the judgment; a question not now before us. If a judgment was regarded in law as equivalent to a payment, then a plaintiff could have no further action, because he would have received full satisfaction for the value of his property. From such cases the rule came to be stated that a judgment against one joint tortfeasor would bar an action against another. But, even in England, this was stating the rule too broadly. In *Lacon v. Barnard*, Cro. Car. 65, one was sued in trover who pleaded a former judgment against another in trespass. The plaintiff replied that damages were only recovered for the taking and detention, and not for conversion. The replication was held to be good upon the ground that as the plaintiff had not recovered the value of the sheep in the trespass suit, but only for their detention, the property had not passed from him. In that case the two actions were allowed to stand. Hence it appears that the English rule, traced to its foundation, was simply this: that when title was held to have passed by a judgment in trover, the judgment was a bar to a subsequent action against a joint trespasser. . . .

The rule which has grown out of cases of trover and trespass was applicable to *Hunt v. Bates*. Should it be the rule in all joint torts? We think not. The reason on which the rule is founded does not apply to other torts, as we have seen. Furthermore, as pointed out by Mr. Justice MILLER in *Lovejoy v. Murray*, 3 Wall. 1, the principle of transit in rem judicatam, the merging of the cause of action in a judgment which is of higher nature, does not apply, because this plaintiff has no judgment against this defendant. It relates, moreover, to a single cause of action, like a partnership contract or a joint note. Where there is but one cause of action there can be but one judgment. There is good reason to apply this principle to a taking of goods on an unlawful attachment, since that is one act and the joint act of the attaching plaintiff and the officer taking the goods. But as to the other torts, like assault, trespass, negligence, and libel, while several may join in the wrong, the acts are so far individual and distinct as to give several causes of action. As to *Hunt v. Bates*, therefore, we have no need to make question at this time. In *Cooley on Torts*, 2d ed. § 137, and in *Lovejoy v. Murray*, it is stated that the only two American cases which directly hold in favor of the bar of the former judgment are *Hunt v. Bates* and *Wilkes v. Jackson*, 2 H. & M. (Va.) 355. The rule in this country is that joint tortfeasors may be sued separately. We have seen that *Hunt v. Bates*, and, indeed, the English cases, only hold the contrary in cases of trover and trespass. As to other torts there is practical unanimity. Virginia stands alone

in holding the judgment to be a bar in all cases. This it did in *Wilkes v. Jackson*, which was an assault case. That case has recently been reviewed and affirmed in *Petticolas v. Richmond*, 95 Va. 456 (1897), which was trespass on the case for negligence. The Court rests wholly on the English cases and acquiescence for nearly a century in the rule of *Wilkes v. Jackson*.

The law of this country should be uniform as far as possible, and this would be a sufficient reason for following the prevailing rule in a mere matter of practice. By this rule joint tortfeasors may be sued separately, and we think that this is both reasonable and proper. We therefore sustain the demurrer to the plea.

*F. P. Owen*, for plaintiff.

*Cooke and Angell and Arnold Green*, for defendants.

### 377. MILLER v. HYDE

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894

161 *Mass.* 472, 37 *N. E.* 760

[Printed *ante*, as No. 319]<sup>1</sup>

<sup>1</sup> [TOPICS 1-3. PROBLEMS.]

The trains of two railroad companies collided while using the same track; the plaintiff was a passenger in one of them. May he sue both companies jointly? (1857, *Colegrove v. N. Y. & Harlem R. Co.*, and *N. Y. & New Haven R. Co.*, 6 *Duer*, 382.)

The defendant's hogs, horses, and cattle, as well as those of W. and of C., trespassed on the plaintiff's land at various and different times; but the plaintiff could not show the specific harm done by the respective animals. May he recover the full amount from the defendant? (1906, *Foster v. Bussey*, 132 *Ia.* 640, 109 *N. W.* 1105.)

The plaintiff was injured by a defect in a sidewalk, for which the abutting owner and the city were each liable under the law. May he sue them as joint tortfeasors? (1884, *Peoria v. Simpson*, 110 *Ill.* 295.)

A had in his store an elevator-door defectively constructed and carelessly managed. The plaintiff, while riding in it, was pushed over and injured by the negligent act of B, a fellow-passenger. May he sue A and B jointly? (1905, *Siegel-Cooper Co. v. Treka*, 218 *Ill.* 559, 75 *N. E.* 1053.)

An electric light company maintained in the street some wires defectively protected. A telephone company's wires overhung them, without proper protection. The telephone wires fell on the light wires, and the plaintiff was injured by coming in contact with the former and receiving the light current. May he sue the two companies jointly? (1903, *Economy L. & P. Co. v. Hiller*, 203 *Ill.* 518, 68 *N. E.* 72.)

An electric light company's apparatus, defectively insulated, charged the street with electricity. The city was culpable in not remedying the condition of the streets. The plaintiff was injured thereby. May he sue the city and the company jointly? (1904, *Mooney v. Edison El. Ill. Co.*, 185 *Mass.* 547, 70 *N. E.* 933.)

The defendant owned a colliery on the bank of a stream. He and various other riparian owners continued for several years to dump the coal-dirt from the collieries into the stream. The plaintiff's water-power down the stream was

thereby destroyed by the filling up of the dam-basin. The plaintiff could not prove how much damage was done by any one of the wrongdoers. Is each liable for the whole? (1868, *Little Schuylkill Nav. Co. v. Richards*, 57 Pa. 142.)

The plaintiff was injured in a collision between cars of the defendant and a steam railroad. On trial it appeared that, after bringing suit against both as joint tortfeasors, he received \$1000 from the steam railroad company and dismissed the suit against it. Was this a discharge of the street railway company also? (1910, *Wallner v. Chicago Consol. Tr. Co.*, 245 Ill. 148, 91 N. E. 1053.)

NOTES:

"Joint tortfeasors: release." (C. L. R., II, 565.)

"Joint tortfeasors: satisfaction." (C. L. R., III, 214.)

"Joint tortfeasors: test of joint liability." (C. L. R., IV, 367, 383.)

"Judgment against one and tender of amount: effect." (H. L. R., XII, 66.)

"Judgment against one and partial satisfaction: effect." (H. L. R., XII, 67.)

"Judgment against one without tender or satisfaction: effect." (H. L. R., XI, 556.)

"Release of one reserving rights against others." (H. L. R., XVI, 529.)

"Discharge of one joint tortfeasor with reservation of rights against others." (H. L. R., XXII, 458.)

"Joint wrongdoers; Distinction between joint tortfeasors and contributors to injury." (H. L. R., XXIII, 406.)

"Admiralty Torts; Damages recoverable from one of two vessels at fault." (H. L. R., XXIV, 150.)

"Joint tortfeasors; Distinction between a release and a covenant not to sue." (I. L. R., I, 549.)]

**TITLE B: ACTIVE CAUSATION****SUB-TITLE (I): GENERAL PRINCIPLE****Topic 1. Personal Passivity in General, as Negating Responsibility**

379. HENRY T. TERRY. *Leading Principles of Anglo-American Law*. (1884. C. 5, § 77, pp. 63-68.) The Double Character of an Act. It is agreed by all that an act has two elements, an internal determination of the will and an external manifestation of it. . . .

The Will of the Actor. Some determination of the will of the actor is necessary. If A takes hold of B's arm and with it strikes C, or pushes B so that he falls against C, there is no act of B's. So a person's birth or death is not his act, — even though the death be by suicide; it is then a consequence of his act, but not the very act itself. So if a man's horse runs away with him while he is riding and does damage, the rider is not liable, there being no act on his part. . . .

Instinctive Movements. There are some movements of the body as to which it is not always easy to say how far they are the result of the volition. In fact psychologists tell us that no hard and fast line can be drawn between volition and what is called the reflex action of the nervous system. But most of these movements are of no legal importance, because they go on in the interior of the body. The only case that is likely to raise any legal difficulty, is where a movement that belongs to a class which are capable of being produced by what is undoubtedly volition, takes place in peculiar circumstances where volition cannot by the testimony of consciousness be known to exist. For example, if a person, being suddenly struck at, dodges (as we say) "instinctively," or if a sleeper, whose leg is tickled, kicks; ought the movement to be considered as an act? Here a certain amount of confusion has crept in. . . . It would not be necessary to hold that a person would be liable for such "instinctive movements" as jumping aside to escape a certain blow or kicking in his sleep, if these resulted in direct and forcible damage to another's person or property, because even the authorities which maintain the strict view of liability in trespass admit that "inevitable accident" where the defendant is "wholly without blame" will excuse a trespass.

Involuntary Acts. Bodily movements caused by external force and the instinctive movements above mentioned are often called involuntary. But these are not proper legal meanings of the phrase. The former are certainly not acts at all; and the latter as such are either not acts at all or are voluntary acts. An involuntary act in law means an act done under coercion or compulsion. But these acts are as much the result of choice and volition as the freest of our acts. If A offers B one hundred dollars for his watch and B accepts the offer and delivers the watch to him, B compares in his own mind two possible things, namely, the having the money and the having the watch, and chooses the one which he likes the best. So if A presents a pistol at B's head and demands his watch under a threat of death, B's mental process is precisely the same. He compares the two desirable things, the having the watch and remaining alive, and chooses the one which he likes the best.

380. CHARLES VINER. *General Abridgment of Law and Equity*, "Trespass" (X). (1793. 2d ed., Vol. XX.) Note for a rule, that in all trespasses there must

be a voluntary act, and also a damage; otherwise trespass does not lie. . . . But where the wind blows my tree upon the land of my neighbor, I may take it, and this is no trespass; for this is the act of the wind, and not of me.

381. *GAUTRET v. EGERTON*. (1867, L. R. 2 C. P. 371.) *Willes, J.*: What duty does the law impose upon these defendants to keep their bridges in repair? If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is. If I dig a pit in it I may be liable for the consequences: but, if I do nothing, I am not. . . . No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty.

382. *BUCH v. AMORY MANUFACTURING COMPANY*. (1899. 69 N. H. 257, 44 Atl. 809.) *Carpenter, C. J.*: There is a wide difference, — a broad gulf, — both in reason and in law, between causing and preventing an injury; between doing, by negligence or otherwise, a wrong to one's neighbor, and preventing him from injuring himself; between protecting him against injury by another, and guarding him from injury that may accrue to him from the condition of the premises which he has unlawfully invaded. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law. Is a spectator liable if he sees an intelligent man or an unintelligent infant running into danger, and does not warn or forcibly restrain him? What difference does it make whether the danger is on another's land, or upon his own, in case the man or infant is not there by his express or implied invitation? If A sees an eight-year-old boy beginning to climb into his garden over a wall stuck with spikes, and does not warn him or drive him off, is he liable in damages if the boy meets with injury from the spikes? 1 Hurl. & N. 777. I see my neighbor's two-year-old babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter by the common law or under the statute (Pub. St. c. 278, § 8), because the child and I are strangers, and I am under no legal duty to protect him.<sup>1</sup>

### 383. *SMITH v. STONE*

KING'S BENCH. 1647

*Style, 65*

Smith brought an action of trespass against Stone, *pedibus ambulando*. The defendant pleads this special plea in justification, viz., that he was carried upon the land of the plaintiff by force and violence of

<sup>1</sup> CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS PRINCIPLE: *Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. V, § 78 (p. 63), § 85 (p. 67); c. XIII, §§ 453-457 (p. 449).

*Sheldon Amos*, "Systematic View of the Science of Jurisprudence," c. VI, § 7, p. 82.



others, and was not there voluntarily, which is the same trespass for which the plaintiff brings his action. The plaintiff demurs to this plea. In this case, ROLL, J., said, that it is the trespass of the party that carried the defendant upon the land, and not the trespass of the defendant: as he that drives my cattle into another man's land is the trespasser against him, and not I, who am owner of the cattle.

384. GIBBONS *v.* PEPPER

KING'S BENCH. 1695

1 *Ld. Raym.* 38

**TRESPASS; assault and battery.** The defendant pleads that he rode upon a horse in the king's highway, and that his horse, being affrighted, ran away with him, so that he could not stop the horse; that there were several persons standing in the way, among whom the plaintiff stood; and that he called to them to take care, but that, notwithstanding, the plaintiff did not go out of the way, but continued there; so that the defendant's horse ran over the plaintiff against the will of the defendant; *quæ est eadem transgressio*, etc. The plaintiff demurred.

And Serjeant *Darnall*, for the defendant, argued that if the defendant in his justification shows that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment shall be given for him. To prove which he cited *Weaver v. Ward*.

*Northey*, for the plaintiff, said, that in all these cases the defendant confessed a battery, which he afterwards justified; but in this case he justified a battery which is no battery.

Of which opinion was the whole Court. For if I ride upon a horse, and J. S. whips the horse so that he runs away with me and runs over any other person, he who whipped the horse is guilty of the battery, and not I. But if I by spurring was the cause of such accident, then I am guilty. In the same manner, if A takes the hand of B, and with it strikes C, A is the trespasser, and not B. And, *per Curiam*, the defendant might have given this justification in evidence, upon the general issue pleaded. And therefore judgment was given for the plaintiff.

385. LAIDLAW *v.* SAGE

COURT OF APPEALS OF NEW YORK. 1899

158 *N. Y.* 73, 52 *N. E.* 679[The facts are fully stated in No. 358, *ante*]

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff, entered upon the verdict of a jury. . . .

*Edward C. James, John F. Dillon, and Rush Taggart*, for appellant. . . . The plaintiff was not moved from a place of safety to a place of danger. He stood in the midst of the danger before he was moved. . . .

*Joseph H. Choate, Noah Davis, Adolph L. Pincoffs, and Henry Wyman Jessup*, for respondent. . . . The laying of hands upon the plaintiff by Mr. Sage for the purpose of shielding himself from an injury (which he alone knew was threatened), by changing the plaintiff's position so as to interpose plaintiff between himself and such danger, was an unlawful interference with plaintiff's person, and the carrying out of such intent by the actual removal of plaintiff without his consent renders defendant liable for the injury plaintiff suffered in consequence of the wrongful and unlawful act. . . .

MARTIN, J. This action was commenced May 26, 1892. Its purpose was to recover for personal injuries sustained by the plaintiff in consequence of an explosion which occurred in the defendant's office in the city of New York on the fourth day of December, 1891. . . . This case has been tried four times, and passed upon three times, by the intermediate appellate tribunal. . . . Upon the second trial the plaintiff has had a verdict.

The Court seems to have charged the jury in accordance with the principles laid down by the General Term upon the first appeal. Upon that trial, however, the defendant's counsel requested the Court to charge: "If the jury find from the evidence that the defendant did take the plaintiff and use him as a shield, but that this action was involuntary, or such as would instinctively result from a sudden and irresistible impulse in the presence of a terrible danger, he is not liable to the plaintiff for the consequences of it." That request the Court refused; but added: "I will charge it that the essence of the liability must be a voluntary act." Upon the second appeal, that question having been thus sharply presented, the General Term again reversed the judgment, upon the ground that the Court erred in refusing to charge that request.

Upon the last trial, which is now under review, the trial Court . . . charged that, if the defendant involuntarily put his hands upon the plaintiff in a moment of great excitement, confronted with immediate and serious danger, without meaning to interfere with him, he would not be responsible. But it submitted the question, whether the act of the defendant was deliberate and unintentional, to the jury, calling attention to the fact that the defendant testified that "he was in perfect possession of his senses, recollected everything that was done, that everything he did there was done intentionally," and then charged that if, under those circumstances, he voluntarily put out his hand and touched the plaintiff, a cause of action was made out, and the plaintiff was entitled to a verdict. . . .

1. That the duties and responsibilities of a person confronted with such danger are different and unlike those which follow his actions in

performing the ordinary duties of life under other conditions, is a well-established principle of law. The rule applicable to such a condition is stated in Moak's Underhill on Torts (p. 14) as follows: "The law presumes that an act or omission done or neglected under the influence of pressing danger, was done or neglected involuntarily. . . ." This principle of pressing danger, and an act or omission in its presence, was discussed in the squib case (*Scott v. Shepherd*, 2 W. Black. 894) and in the wine case (*Vandenburgh v. Truax*, 4 Denio, 464). That principle has been many times affirmed by the decisions of the courts of this State as well as others. Indeed, the trial Court recognized this doctrine in its charge.

2. But when we examine the defendant's evidence, we find that he testified that he never had his hands on the person of the plaintiff in any manner whatever until after the explosion, and that he did not at any time have any intent or design of interposing the body of the plaintiff between himself and the stranger. . . . The statement of the Court as to the admission of the defendant can hardly be said to be fair deduction from his evidence. Nor is the justice of eliminating from its statement to the jury the fact that the admissions he did make were accompanied by the evidence that he in no way touched the plaintiff and had no intention of doing so, quite appreciated. . . . The only witness whose testimony is relied upon to show any interference with the plaintiff by the defendant was the plaintiff himself. He not only had all the interest of a party to the action, but the undisputed proof disclosed that his memory has been very seriously impaired. . . . With this condition of the proof, it is quite difficult to say that there was any such evidence of the defendant's intentional interference with the plaintiff as would entitle him to recover in this action or have the question submitted to a jury. . . . Therefore, it would seem that the plaintiff was not entitled to even nominal damages, and that it was the duty of the Court to have directed a verdict for the defendant.

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386. ANONYMOUS. (1705. 2 Salk. 655.) Trover lies not against a carrier for negligence, as for losing a box; but it does for an actual wrong, as if he break it to take out the goods, or sell it: *per Curiam*, Pasch. 7 W. 3, B. R. And therefore denial is no evidence of a conversion, if the thing appears to have been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he denied to deliver it, it is good evidence of a conversion; *per TREVOR, C. J.*

### 387. ROSS *v.* JOHNSON & DOWSON

KING'S BENCH. 1772

5 Burr. 2825

AN action of trover was brought by Hugh Ross, Esq. against John Johnson and William Dowson, for certain goods mentioned in the dec-

laration. "Not guilty" was pleaded, and issue joined. The cause came on to be tried at Guildhall, before Lord MANSFIELD, at the sittings after Michaelmas term 1771: when the plaintiff was nonsuited, subject to the opinion of the Court on the following case.

The goods in question, being the property of the plaintiff, were delivered by the captain of a vessel, to the defendants as wharfingers for the use and upon the account of the plaintiff, to whom they were directed; but were stolen or lost out of their possession; and afterwards, before the commencement of this action, were demanded by the plaintiff of the defendants; to whom he tendered the wharfage for the same; but the goods were not delivered to him. The question for the opinion of the Court was, "Whether this action will lie." If the Court shall be of opinion "That this action will lie," then the nonsuit to be set aside; and a verdict entered for the plaintiff, for £92 damages and 40s. costs.

Mr. *Mansfield*, for the plaintiff, argued, that trover would lie. . . . A demand and non-delivery are evidence of a conversion; and are sufficient, unless the defendant can give some legal excuse to a wharfinger, who takes them for hire. *Isaack v. Clerk, Moor*, 841 [*ante*, No. 306]. . . .

Mr. *Walker*, contra, for the defendants, argued that this action of trover could be maintained. . . . A demand and refusal is only evidence of a conversion. And trover will not lie for mere negligence, for losing the goods, without any actual wrong. And so is 2 Salk. 655 on trover against a carrier, for losing a box.

Mr. *Mansfield* agreed, that where a lawful reason is shewn for not delivering the goods, the defendant is not to be considered as guilty of a conversion. But here is no lawful reason shewn, why they are not delivered: and therefore, the mere non-delivery does amount to a conversion. If they are, in fact, lost or stolen, what is that to the owner? It does not alter the obligations which the defendants are under to deliver them to the owner: nor can the owner know what is to become of them.

Lord MANSFIELD looked upon it as established, upon principles and authorities, that trover would not lie in the present case; but that it must be an action upon the case.

It is impossible, he said, to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against the wharfinger. But, in order to maintain trover, there must be an injurious conversion. This is not to be esteemed a refusal to deliver the goods. They *can't* deliver them: it is not in their power to do it. It is a bare omission.

Mr. Justice ASTON agreed that this being a bare omission, and no evidence of a conversion, trover would not lie; but the clear remedy was by action upon the case; and he cited 1 Ventris, 223, *Owen v. Lewyn*; where Hale said, "That if a carrier loseth goods committed to him a general action of trover doth not lie against him."

Mr. Justice WILLES and Mr. Justice ASHHURST concurring in opinion with his lordship and Mr. Justice Aston.

The Court ordered that the nonsuit should stand.

### 388. VAUGHAN v. MENLOVE

COMMON PLEAS. 1837.

3 *Bing. New Cases* 468

THE declaration alleged, in substance, that plaintiff was the owner of two cottages; that defendant owned land near to the said cottages, that defendant had a rick or stack of hay near the boundary of his land which was liable and likely to ignite, and thereby was dangerous to the plaintiff's cottages; that the defendant, well knowing the premises, wrongfully and negligently kept and continued the rick in the aforesaid dangerous condition; that the rick did ignite, and that plaintiff's cottages were burned by fire communicated from the rick or from certain buildings of defendant's which were set on fire by flames from the rick.

Defendant pleaded the general issue; and also several special pleas, denying negligence.

At the trial it appeared that the rick in question had been made by the defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire; that though there were conflicting opinions on the subject, yet during a period of five weeks the defendant was repeatedly warned of his peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed.

PATTERSON, J., before whom the cause was tried, told the jury that the question for them to consider was, whether the fire had been occasioned by gross negligence on the part of the defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.

A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained. . . .

*Talfourd*, Serjt., and *Whately*, showed cause. . . .

*R. V. Richards*, in support of the rule. . . .

TINDAL, C. J. I agree that this is a case "primae impressionis"; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of con-

tract, such as a bailment or the like, where the bailee is responsible in consequence of the remuneration he is to receive. But there is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequence of his own neglect. And though the defendant did not himself light the fire, yet mediately he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbor, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee. *Turber-vill v. Stamp*, 1 Salk. 13. But put the case of a chemist making experiments with ingredients, singly innocent, but when combined liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbor, can any one doubt that an action on the case would lie? . . .

The present rule must be discharged. . . .

*Rule discharged.*<sup>1</sup>

<sup>1</sup> [TOPIC I. PROBLEMS:

The defendant's servant borrowed the plaintiff's sled for his personal use and took it to the defendant's house. The sled not being returned when promised, the plaintiff requested the defendant to bring it back. The defendant declined to do so, and told the plaintiff to come and get it himself. Was this a conversion? (1864, *Farrar v. Rollins*, 37 Vt. 295.)

The plaintiff's goods were in the defendant's warehouse on storage. An officer without authority came to attach them on a writ against a former owner. The officer demanded access; the defendant opened the door of the compartment; and the officer then took away the goods. Is the defendant liable for the conversion? (1889, *Clegg v. Boston Storage W. Co.*, 149 Mass. 454.)

The defendant had a vicious dog, which he sold to M. Afterwards the dog came back and stayed in the defendant's possession, without M.'s consent. Is the defendant responsible for harm done by the dog? (1895, *Mitchell v. Chase*, — Me. —, 32 Atl. 866; compare *Boylan v. Everett*, 1899, 172 Mass. 453, 52 N. E. 541.)

The plaintiff went to a hotel to a dinner of a society. A policeman, by the defendant's order, stood at the door. The plaintiff proceeded to enter, but the policeman obstructed his entrance; and after pushing for a while in vain, the plaintiff retired. Is the defendant responsible for a battery? (1844, *Innes v. Wylie*, 1 C. & K. 257.)

The defendant, as surety on a note of H. S. for the purchase of Texas cattle, had a lien on the cattle; this lien gave him the right to have them sold on demand, but he never had custody of the cattle. The cattle communicated disease to the plaintiff's cattle; and a statute made any one owning or possessing such cattle liable for such damage. Is the defendant responsible? (1874, *Hatch v. Marsh*, 71 Ill. 370.)

NOTES:

"Instinctive acts: liability for." (H. L. R., VIII, 225; VII, 302.)

"Instinctive acts: definition of." (H. L. R., XIII, 599.)

"Damage to persons and chattels by animals: What amounts to keeping and harboring sufficient to impose liability." (H. L. R., XIX, 463.)]



**Topic 2. Personal Physical Passivity, with Instigation of Another Person's Activity**

389. ST. GERMAN. *Dialogues between a Doctor of Divinity and a Student in the Laws of England*. (B. I, c. IX, ed. 1575.) The law of England is that if a man command another to do a trespass, and he doth it, that the commander is a trespasser. And I am in doubt whether that it be only by a maxim of the law, or that it be by the laws of reason.

390. T. RUTHERFORTH. *Institutes of Natural Law*. (2d Amer. ed. 1832, p. 204. Book I, c. XVII). *Reparation for Damage Done*. Besides the person who immediately does the injury, others may be so far concerned in it, as to be under an obligation with him of making good the damages arising from it. As far as we concur in what another man does, so far the act is our own; and the effects of it are chargeable upon us, as well as upon him: if he is considered as the principal party, we, by our concurrence, make ourselves accessories in the injury. We may make ourselves accessories to what another man does in two ways, either by our acts, or by our omissions; and in either of these ways we may be accessories in a higher or a lower degree.

They who have authority over him that does the injury, and command the doing it; they who give their consent, when the injury could not have been done without such consent; they who assist the principal party in doing it; or they who protect and screen him after it is over, are, any of them, accessories to the injury in a higher degree, and make themselves so by their acts.

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391. SIR WILLIAM BLACKSTONE. *Commentaries on the Laws of England*. (1758-65. Book I, p. 429.) As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied; "nam qui facit per alium facit per se." Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it. . . . In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. . . . A wife, a friend, a relation, that use to transact business for a man, are quoad hoc his servants; and the principal must answer for their conduct; for the law implies that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. . . . [As to a servant's negligence], in these cases the damage must be done while he is actually employed in the master's service. . . .

**392. JOEL v. MORISON**

NISI PRIUS. 1834

6 C. & P. 501

FROM the evidence on the part of the plaintiff it appeared that he was in Bishopsgate Street, when he was knocked down by a cart and horse coming in the direction from Shoreditch, which were sworn to

have been driven by a person who was the servant of the defendant, another of his servants being in the cart with him. The injury was a fracture of the fibula.

On the part of the defendant, witnesses were called who swore that his cart was, for weeks before and after the time sworn to by the plaintiff's witnesses, only in the habit of being driven between Burton Crescent Mews and Finchley, and did not go into the city at all.

*Thesiger*, for the plaintiff, in reply, suggested that either the defendant's servants might in coming from Finchley have gone out of their way for their own purposes, or might have taken the cart at a time when it was not wanted for the purpose of the business, and have gone to pay a visit to some friend. He was observing that, under these circumstances, the defendant was liable for the acts of the servants.

PARKE, B. He is not liable if, as you suggest, these young men took the cart without leave. He is liable if they were going *extra viam* in going from Burton Crescent Mews to Finchley; but if they chose to go of their own accord to see a friend, when they were not on their master's business, he is not liable. . . . The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable. . . .

*Thesiger* and *S. Martin*, for the plaintiff.

*Platt*, for the defendant.

393. JOHN H. WIGMORE. *Responsibility for Tortious Acts; its History*. (1894. Harvard Law Review, VII, 405; reprinted in Select Essays in Anglo-American Legal History, III, 536.) . . . A review of this history of the idea of the master's and principal's liability throws some light on the validity of the principle in point of policy. As an existing rule, it cannot be objected to as the mere fossil remnant of a fiction. A learned writer has however averred that "common-sense is opposed to the fundamental theory of agency." This is not the place to offer to do what no one has yet succeeded in doing, — to phrase the feeling of justice which every one has in the more or less extended responsibility for agents' torts. But it is worth while noting that . . . the Command or Authority principle may prove to be, theoretically as well as historically, the true support of the rule of responsibility for agents' torts. Perhaps the nearest approach to theoretic adequacy is that of Lord Brougham, in *Duncan v. Findlater*, 6 Cl. & F. 894, 910: "I am liable for what is done for me and under my orders by the man I employ, . . . and the reason that I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it."<sup>1</sup> In other words, (1) if I command A to do act *x*, I ought to be liable for the natural consequences peculiar to that act taken in itself; (2) the

<sup>1</sup> Or this: "If, instead of driving the carriage with his own hands he employs a servant to drive it, the servant is but an instrument set in motion by the master." (Alderson, B., in *Hutchinson v. R. Co.*, 5 Exch. 350.)

same follows if  $x$  is a class, series, or group of acts; (3) if A does the act in a careless or otherwise wrongful way, different from that in which I expected him to do it, and not as I myself might have done it, my personal culpability is no longer clear; nevertheless, so far as the theoretical principle of Activity is necessary in every tort, it is here plainly satisfied.

394. CHARLES VINER. *A General Abridgment of Law and Equity*, "Trespass," Q. (2d ed., 1793, vol. XX.) If several come, and one does the trespass, and the others do nothing but come in aid, yet all are principal trespassers, and shall render damages, and shall be imprisoned. Brooke, "Trespass," pl. 232, cites 22 Ass. 43.

395. ROBINSON *v.* VAUGHTON. (1838. 8 C. & P. 255.) *Alderson*, B. If I give a man leave to go on a field over which I have no right, and he goes, that will not make me a trespasser. But if I desire him to go and do it, and then he does it, that is a doing of it by my authority, which is quite a different thing, and I should be liable; which was the case here.

### 396. HAMILTON *v.* HUNT

SUPREME COURT OF ILLINOIS. 1853

14 Ill. 472

THIS was an action of trespass to personal property, brought originally by the appellee against the appellant, before the justice of the peace of Marshall County, and appealed by Hamilton to the Circuit Court of said county, LELAND, Judge, where, at the April term, 1853, the cause was again tried and judgment rendered for the plaintiff below. The defendant below appealed to this Court. The facts sufficiently appear in the opinion of the Court.

*T. S. Dickey*, for appellant. *O. Peters*, for appellee.

CATON, J. The bill of exceptions shows so much of the evidence as is necessary to a proper understanding of the instruction which was refused by the Court, and upon which the case is brought here for review. It appears that the appellant and one Cochran sold a steer to Scott, the price of which was indorsed upon a note which he held against them. The steer was at the time running upon the prairie, and they agreed to point him out whenever Scott should send for him. While he was yet running at large, Scott sold the steer to Clark. Clark went after the steer and called Hamilton, who pointed out a red steer which he said he was sure was the one which Scott had bought, giving the ear-marks of the one sold. Clark then killed the steer, — when it was found that one of the ear-marks was wanting. Hamilton then went and examined some other cattle and soon returned, saying that he was mistaken, and that the steer that Scott had bought was among some other cattle. The steer which was killed was older and larger than the one sold. The steer purchased by Scott had been running on

a farm occupied by Hamilton & Cochran, and Cochran had been heard to call him his own, and talked of getting a mate for him.

For the plaintiff, the Court instructed the jury that if the plaintiff's steer was killed under the direction of the defendant, he was liable in this action of trespass. The defendant then asked the Court to instruct the jury, "That if the jury believe from the evidence that Clark killed the steer in controversy, and that Hamilton had nothing to do with the killing directly or indirectly, except that Clark inquired of Hamilton, 'what steer was sold to Scott,' and Hamilton by mistake pointed out the plaintiff's steer to Clark as the one that had been sold to Scott, that is not such a direction as is spoken of in the instructions given at the request of the plaintiff, and would not constitute a trespass by Hamilton. This instruction was refused, and the defendant excepted. . . .

Now this instruction might or might not be correct, depending upon circumstances which the jury might find to exist in the case. Were Hamilton a stranger to the transaction, and bound to assume and intending to assume no responsibility in relation to it, and casually inquired of by Clark to point out the steer because he was supposed to have information on the subject, and, being thus inquired of, had unfortunately made the mistake; it may be that that would not so connect him with the act of killing as to make him a joint trespasser with Clark. On the other hand, if he and Cochran had jointly sold the steer to Scott, who had sold him to Clark, and under that contract of sale was bound to point out the steer when called upon for that purpose, which seems to have been the case (from so much of the evidence as is contained in the bill of exceptions), then he had assumed the responsibility of a direct party to the transaction, which would make him liable for the mistake which he committed. The designation of the steer, under such circumstances, would be the act of delivery, and would constitute a direction to Clark to take the steer, and would make him responsible for the taking as much as if he had done it with his own hands. . . .

If this was the case which they found to be proved, then the instruction would undoubtedly have misled them, and it was properly refused by the Circuit Court.

The judgment must be affirmed.

*Judgment affirmed.*

### 397. BROWN v. PERKINS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861

1 AL. 89

TORT of breaking and entering the plaintiff's grocery shop and destroying various articles of trade and consumption. . . .

On exceptions heretofore taken in this case a new trial was granted,

and the case remitted to the Superior Court. At the second trial the plaintiff was called as a witness, and gave his testimony tending to show, that on the 8th of July, 1856, he was in possession of and occupied a close at Rockport on which his shop was situated, and that he was in the grocery, old junk, and iron business; that on said 8th of July a large crowd of men and women, principally women, came to the shop adjoining his shop, and entered it and destroyed a demijohn of alcohol; that the crowd then broke into his own shop, and destroyed several articles of personal property, and broke and injured his shop; that the defendants were among the crowd which entered his shop and that he saw the defendants coming out of the shop with the crowd which destroyed his property. . . .

The defendants called a large number of witnesses who gave evidence tending to show that neither of the defendants was near the door of the plaintiff's shop when it was broken open; that Mr. Perkins was on the opposite side of the street, thirty-five or forty feet from the door; and that Mrs. Perkins was in Lane's saloon; and that Mr. Perkins did not enter the plaintiff's shop that day. . . .

Upon this case the plaintiff's counsel asked for the following, amongst other instructions, to the jury:

"Fourthly: That persons are regarded in law as present, aiding, and assisting in the execution of a trespass, who are so near that, in case of resistance or opposition to the acts which are done or prepared to be done, they could aid and defend those who are actually doing them, or prevent and keep away those who might come to the assistance of the party against whom or whose interest the act to be done would operate injuriously; [also] all those present who countenance and approve the measures which are taken, or make no opposition or manifest no disapprobation of them; and this is more emphatically true, if those present and approving stand in such a relation as would naturally enable them to exercise any authority, control, or influence over the actors, as when the actors are wives or children, especially daughters, and the persons present are husbands or fathers of such actors. . . .

The presiding judge instructed the jury, in accordance with this request, with the exception of striking out the words "and this is more emphatically true." . . . The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

*J. W. Perry & C. Sewall*, for the plaintiff. 1. All those present at a riot, assenting to the breach of the peace and approving of the acts done, are equally liable, although they take no active part in the injury done to property. . . . 2. There is no distinction between those who go to do an unlawful act and those who go to see it done. . . .

*E. H. Darby & R. S. Rantoul*, for the defendants. . . . 5. Persons present at a riot and doing nothing, especially if not ordered to depart, are not held liable. . . .

BIGELOW, C. J. . . . 2. The evidence at the trial tended to show,

that, by a concerted action or conspiracy, many persons assembled together with a design to commit unlawful acts by trespassing on the premises and destroying the property of others whom they supposed to be engaged in an unlawful and obnoxious traffic; and that, in pursuance of this common design, they broke and entered the shop of the plaintiff, and there injured and destroyed various articles of personal property. It also appeared that both the defendants were present during the perpetration of these unlawful acts on the premises of the plaintiff. . . . Upon this point, however, the evidence was contradictory; the defendants contending that they were there as spectators only, innocent of any combination or conspiracy, and in no way participating in or encouraging the unlawful acts of others. This was the great contention between the parties at the trial. In this posture of the case, it was essential to a fair and impartial trial, and to the due protection of the rights of the plaintiff, that a precise and accurate instruction should be given to the jury, prescribing the rule of law by which a party who is present at the commission of a trespass, but not actively participating therein, may be held liable as a trespasser for aiding and abetting the unlawful act. In this particular the rulings at the trial were not sufficiently explicit. By omitting to give the instructions asked for by the plaintiff in his fourth prayer, and substituting in its stead another ruling, we think the Court left the case to the jury without a clear, intelligible, and exact statement of the rule of law adapted to the facts on proof and necessary to guide them in making a proper application of the testimony. The effect of the instruction given to the jury was to lead them to believe that the defendants could not be held liable as principals for aiding and assisting in the unlawful acts by countenancing and approving the measures which were taken, or by making no opposition or manifesting no disapprobation of them, *unless* they stood in such relation as would naturally enable them to exercise some authority, control, or influence over the actors; as where the actors are wives or children, especially daughters, and the persons present are husbands or fathers of such actors. . . . We do not, however, mean to say that we give our sanction to the fourth instruction asked for by the plaintiff as containing a just and correct statement of the law. The first clause is too broad and sweeping in its definition of what legally constitutes an aiding and an abetting of an unlawful act. It is not accurate to say that all those present at the commission of a trespass are liable as principals who make no opposition or manifest no disapprobation of the wrongful invasion of another's person or property. The true rule on that point is this: Any person who is present at the commission of a trespass, encouraging or exciting the same with words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal; and proof that a person is present at a trespass without disapproving



or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same. 3 Greenleaf, Evidence, § 41; Foster, 350; 1 Hale P. C. 438. On the other hand, it is to be borne in mind that mere presence at the commission of a trespass or other wrongful act does not render a person liable as a participator therein. If he is only a spectator, innocent of any unlawful intent, and does no act to countenance or approve those who are actors, he is not to be held liable on the ground that he happened to be a looker-on and did not use active endeavors to prevent the commission of the unlawful acts. 1 Hale P. C. 439; Roscoe Crim. Ev. (2d ed.) 201.        *Exceptions sustained.*

398. JOHNSON *v.* GLIDDEN

SUPREME COURT OF SOUTH DAKOTA. 1898

11 S. D. 237, 76 N. W. 933

APPEAL from Circuit court, Spink county. Hon. A. W. CAMPBELL, Judge.

Action by Charlotte Johnson against Arthur J. Glidden, for damages in consequence of the alleged negligent use of a gun by defendant's minor child. From a judgment on a verdict in favor of the plaintiff, and from an order overruling his motion for a new trial, defendant appeals. Affirmed. The facts are stated in the opinion.

*A. W. Burt*, for appellant. Neither parent nor child is answerable as such for the acts of the other. Comp. Laws, § 2620. A father is not liable for the wrongful acts of his minor son unless the acts are committed with the father's consent or in connection with the father's business. *Smith v. Davenport*, 24 Pac. 851. . . .

*H. G. Warnock*, for respondent.

HANEY, J. Plaintiff's cause of action is thus stated in her complaint: "(1) That Earnest Glidden is the son of said defendant, and was on the 17th day of August of the age of thirteen years, living at home with said father, and under his custody, care, and control. (2) That prior to said 17th day of August, 1895, said defendant carelessly and negligently purchased and gave to said Earnest Glidden a certain firearm, known as a gun, which said Earnest Glidden was in the habit of using in a careless and negligent manner, so as to endanger the life and property of persons about him, all of which was well known to this defendant, and who encouraged, countenanced, and consented to his carrying said gun and in so using it in said careless and negligent manner. (3) That on said 17th day of August, 1895, this plaintiff was watering a colt on her own premises, when said Earnest Glidden came along with his gun and, against the request of this plaintiff, carelessly and negligently fired said gun in front of said colt; that said

colt thereby became frightened and ran away, and this plaintiff, without any fault of her own, became entangled in a picket rope attached to said colt, and was dragged for a long distance over the prairie, and was severely injured, in that her flesh was badly bruised and lacerated, and her back was strained, so as she believes, to be permanently injured. (4) That by reason of said injuries she suffered great bodily pain, and was confined to her bed for a long time, and was and still is unable to do her housework, or any work, and is, as she believes, permanently injured and otherwise greatly injured, and was compelled to spend \$100 for medical attendance, nursing, and help about the house, to her damage of five thousand dollars." The allegations of the complaint are denied, except as to the first paragraph, and defendant alleges that the plaintiff was guilty of contributory negligence.

Does the complaint state a cause of action? It was not assailed until the trial began, and it must be liberally construed. Our Civil Code provides that "neither parent nor child is answerable, as such, for the act of the other." Compiled Laws, § 2620. It is a rule of the common law that "a father is not liable in damages for the torts of his child committed without his knowledge, consent, participation, or sanction, and not in the course of his employment of the child." Schouler, Domestic Relations, § 263. The allegations of the complaint connecting defendant with the injurious act of his minor child are these: (1) He purchased and gave him a gun; (2) the child used it negligently; (3) the father knew he was so using it; and (4) he encouraged, countenanced, and consented to such negligent use. It may be conceded that it is not negligence per se for a father to furnish his son, aged thirteen years, with a gun, or permit him to use one, if the boy uses it with ordinary care and the father is justified in presuming that it will be so used. But if he knows that his son is using the firearm in such a careless and negligent manner as to endanger the life and property of persons about him, it is certainly his duty to interpose his parental authority, and prevent, if possible, a course of conduct on the part of his child which is likely to produce injury to others. . . . If, as alleged, defendant's son was in the habit of using a gun given him by his father in a dangerous manner, and defendant knew of such use, it was his moral and legal duty to prevent a continuation of such conduct; and it is immaterial whether his knowledge was derived from seeing his son's acts of negligence, or from being informed of them by other persons. His culpability consisted in permitting his son to continue in a course of conduct which in its nature was likely to result in damage to those with whom his son came in contact. If he knew his child was using the gun recklessly, as an ordinary intelligent person he must have apprehended the natural consequences of such recklessness; and, as a good citizen, he should have made a reasonable effort to prevent such consequences. On the contrary it is alleged that he encouraged, countenanced, and consented to the manner in

which his son was carrying and using the gun. We think defendant's objection to the introduction of any evidence under the complaint was properly overruled.

It follows from what has been stated that the Court did not err in admitting evidence tending to prove that the son of defendant used the gun negligently on other occasions than that involved in this case. One of the material issues was whether he was in the habit of using the gun in a reckless manner, and the only way to establish such fact was by evidence showing how he acted when using it. Of course, it was necessary to show that defendant knew of his culpable conduct, but such knowledge could be established by other witnesses than those who testified concerning the acts of his son. . . .

There is sufficient evidence to establish all the elements of plaintiff's cause of action, provided defendant knew of the manner in which the gun was used by his son is that of the plaintiff, who says: "I told Mr. Glidden that he would (should) take care of his boy; that his boy had been down there and shot at the horses, and scared them loose; and he answered and said, 'Wherever there is a lake, the boy has a right to run.' I told him that the boy shot after the horses; that is what I told him at the time." This is denied by defendant, but must be accepted as true by the Court. If so, defendant was informed that his boy was conducting himself in a most reckless and unlawful manner. . . .

Finding no reversible error, the judgment of the Circuit Court is affirmed.

#### [TOPIC 2. PROBLEMS:

A reporter interviewed the defendant about a story reflecting on the plaintiff. The defendant said he had no objection to its being published. The story was that the plaintiff had tried by a bribe to get the defendant to burn the plaintiff's house, so as to obtain the insurance-money. Is the defendant responsible? (1897, *Hazy v. Waitke*, 23 Colo. 556, 48 Pac. 1048.)

A broke by night into the house where were the plaintiff and her daughters. B was a spectator, who afterwards expressed approval of the act. Is B responsible? (1895, *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 59.)

The defendant was lessor of land. The plaintiff erected a fence said to be an unlawful obstruction of a right of way. The plaintiff's lessee and others proposed to go and tear it down. The defendant told them that he would stand by them, no matter what it cost. They tore it down, but a scuffle ensued, and the fence-breaking parties committed a wrongful battery on the plaintiff. Is the defendant responsible for the battery? (1895, *Wagner v. Aulenbach*, 170 Pa. 495, 32 Atl. 1086.)

The defendant and others went to serenade a bridegroom, with a charivari party. The noise and insults led to violence; weapons were drawn, and G., a member of the party, accidentally shot the plaintiff. Is the defendant responsible? (1902, *Gilmore v. Fuller*, 198 Ill. 130, 65 N. E. 84.)

The defendant owned some land which was leased to the plaintiff. A stranger one day asked permission of the defendant to bury a dead horse on the land; the defendant assented. The horse had had an infectious disease; and the plaintiff's cows, while pasturing there afterwards, were made ill and died. Was the defendant responsible? (1901, *Fitzwater v. Fassett*, 199 Pa. 442, 49 Atl. 310.)]

**SUB-TITLE (II): EXCEPTIONS TO THE GENERAL PRINCIPLE****Topic 1. Defects and Nuisances on Premises****399. REGINA v. WATTS (OR WATSON)**

KING'S BENCH. 1704

1 *Salk.* 356; 2 *Ld. Raym.* 856

INDICTMENT for not repairing a house standing upon the highway, ruinous and like to fall down, which the defendant occupied and ought to repair *ratione tenuræ suæ*. The defendant pleaded Not guilty; and the jury found a special verdict, viz. That the defendant occupied, but was only tenant at will; and whether he was liable, was the question. Et per Curiam: The *ratione tenuræ* is only an idle allegation; for it is not only charged, but found, that the defendant was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance. And as the danger is the matter that concerns the public, the public are to look to the occupier, and not to the estate, which is not material in such case as to the public. . . .

**400. TARRY v. ASHTON**

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1876

*L. R.* 1 *Q. B. D.* 315

At the trial before QUAIN, J., at the sittings in London after Easter Term, 1875, it appeared that the plaintiff was walking along the Strand in front of the defendant's house on the afternoon of the 16th of November, 1874, when a large lamp, which was suspended from the front of the house and projected several feet across the pavement, and weighed 40 lbs. or 50 lbs., fell upon her and injured her severely. At the time of the accident a man named Weaver, in the employ of the defendant, was engaged blowing the water out of the gas pipes. He had raised a ladder against the lamp-iron or bracket from which the lamp hung, and the afternoon being wet and windy, on Weaver mounting the ladder it slipped, and he, to save himself from falling, caught hold of the lamp-iron; this shook the lamp, and its fastenings broke, and it fell on the plaintiff. In the August previous the defendant, having lately come into occupation as tenant of the house, and knowing the lamps, etc., to be of some age, employed Chappell, an experienced gasfitter, to examine them and put them in thorough repair. But on examination of the lamp after the accident, it appeared that the breakage was caused by the general decay under the cup and ball, which connected the lamp with the lamp-iron or bracket.

The jury found, that there was no negligence on the part of the defendant personally, nor on the part of Weaver; but there was negligence in Chappell, "the defendant's servant." That the lamp was out of repair through general decay, but not to the knowledge of the defendant. That the immediate cause of the fall of the lamp was the slipping of the ladder; but if the lamp had been in good repair the slipping of the ladder would not have caused the lamp to fall. And they assessed the damages at £40.

On these findings, a verdict was entered for the plaintiff for £40, with leave to move to enter a verdict for the defendant, or a nonsuit, if on the findings of the jury the judge ought to have nonsuited, or directed a verdict for the defendant. A rule having been obtained accordingly,

*A. Collins*, and *Poulter*, shewed cause. . . . [The argument of counsel deals with another point, and is printed *post* in No. 438.]

BLACKBURN, J. I desire to decide nothing beyond what the circumstances of the case require; and on the facts of the case, I am of opinion that the plaintiff is entitled to keep the verdict. It appears that the defendant came into occupation of a house with a lamp projecting from it over the public thoroughfare, which would do no harm so long as it was in good repair, but would become dangerous if allowed to get out of repair. It is therefore not a nuisance of itself. But if the defendant knowingly maintained it in a dangerous state he would then be indictable for the nuisance. This much is clearly decided by *Reg. v. Watson*,<sup>1</sup> for the defendant was there held liable for not repairing his house, which was on a highway and was ruinous and like to fall down, on the ground that as occupier he was bound to keep the house so as not to be a nuisance. . . . The occupier would be bound to know that things like this lamp will ultimately get out of order, and as occupier, there would be a duty cast upon him from time to time to investigate the state of the lamp. If he did investigate, and there were a latent defect which he could not discover, I doubt whether he would be liable; but if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered, then I think he would clearly be answerable for the consequences. . . . It was his duty to have the lamp set right; it was not set right.

The rule must be discharged.

#### 401. ATTORNEY-GENERAL *v.* HEATLEY

COURT OF APPEAL, CHANCERY DIVISION. 1897

*L. R.* [1897] 1 *Ch.* 560

APPEAL from *KEKEWICH, J.* This was an action by the Attorney-General at the relation of the united vestry of the parishes of St. Mar-

<sup>1</sup> 2 *Ld. Raym.* 856; 1 *Salk.* 356; [*ante*, No. 399.]

garet and St. John the Evangelist, Westminster, and the united vestry, as plaintiffs, for an injunction to restrain the defendants, Mr. Tod Heatley and Sir Henry Moore Brownrigg, from allowing a piece of land at the corner of St. Anne's Lane and Great Peter Street, Westminster, to be and to remain in such a state as to be a nuisance or injurious to health, and also to restrain the said defendants from allowing the said land to be used or let for fairs, shows, or in any other manner which would be likely to be or cause a nuisance, or to be injurious to health. . . . Up to 1894 the defendant Tod Heatley had an equitable interest in the piece of land; but in that year his interest came to an end, and Sir H. M. Brownrigg became the absolute owner of the property [and later the sole defendant in the case]. After the buildings had been pulled down, the site, which was about a quarter of an acre in extent, was inclosed by a hoarding [fence] six feet high. The neighbourhood is a densely populated one, and chiefly inhabited by the poorer classes, amongst whom are many costermongers. No new buildings have ever been erected on the land, and it appeared by the evidence on behalf of the plaintiffs that the hoarding had become dilapidated and had large gaps in it, that dead dogs and cats, vegetable refuse, fish, offal, rubbish, and all kinds of filth had been thrown or deposited upon the vacant ground; also that noisy shows attracting dirty and riotous crowds had been held upon it, and that squatters had used it for their caravans. According to the evidence, the condition of the land and the uses to which it was being put constituted a continuing nuisance injurious to the health of the inhabitants of the parish.

The defence of Sir H. M. Brownrigg was that, since the pulling down of the houses, a proper and sufficient hoarding had been provided and maintained round the vacant land, and that he had done all in his power to prevent persons from throwing filth and refuse over, and from breaking that hoarding, and from trespassing on the land; and that it was owing to deficient police protection and sanitary arrangements in the neighbourhood attributable to a great extent to the neglect of the vestry, that unruly and disorderly persons had been in the habit of doing the acts complained of. . . .

The action was tried before KEKEWICH, J. on November 24, 1896, when his Lordship dismissed the action as against Sir H. M. Brownrigg, but without costs, so far as it sought to restrain him from allowing the land to be and to remain in such a state, or to be used in such a manner, as to be a nuisance or injurious to health. The plaintiffs appealed against the dismissal of their claim. . . .

*Warrington, Q. C., and Morton Smith, for the appellants. . . .*

*Renshaw, Q. C., and Ingpen, for the respondents.* The nuisance in this case is not caused by any act, default, permission, or sufferance of Sir H. M. Brownrigg, who has done everything he could reasonably be called upon to do. It is caused entirely by the acts of third parties, over whom he has no control, done without his knowledge, and gen-



erally in the night. . . . This would be a serious burden which the Court ought not to throw upon the landowner. . . .

LINDLEY, L. J. Looking at the matter from the point of view of the public, that is to say, with reference to the duty of the defendant, and the right of the Attorney-General, as representing the public, the case appears to me to be one of the simplest possible description. The defendant is the owner and occupier, or possessor, of a vacant piece of land, and we are not embarrassed in this case by any of the questions which arise when the dispute is whether it is the duty of a reversioner or of a tenant to keep the premises in proper order. We have only got the owner of the vacant piece of land to deal with. Now is it, or is it not, a common law duty of the owner of a vacant piece of land to prevent that land from being a public nuisance?

It appears to me that it is. . . . If the owner of a piece of land does permit it to be in such a state, *e. g.* smothered or covered with filth, that it is a public nuisance, he commits an indictable offence. He has no defence whatever to an indictment for such a public nuisance. It is no defence to say, "I did not put the filth on but somebody else did." He must provide against this if he can. His business is to prevent his land from being a public nuisance. A very early illustration of that doctrine is to be found in the case of *Reg. v. Watts*.<sup>1</sup> . . . That principle has been always followed as far as I know in criminal law, and also on information by the Attorney-General as representing the public. I cannot for a moment entertain the slightest doubt that it is the common law duty of this gentleman to prevent that piece of land from continuing as a public nuisance. . . .

RIGBY, L. J. In this case, down to the present time, Sir Henry Brownrigg has denied his liability to abate the nuisance occurring on his property. It is also argued on his behalf that because the vestry deny their liability an injunction should not be granted against him. Upon those points, I think he is entirely in the wrong. There is a common law liability on the part of the owner or occupier of land to abate a nuisance arising thereupon; that is to say, whenever he becomes aware that there is a nuisance, the duty to abate it at once arises. . . . I cannot, in point of principle, distinguish a case of dangerous structure and a nuisance in the nature of injurious effluvia that come from the land. It seems to me, when you take the common law point of view, there is only the alternative of allowing the nuisance to go on indefinitely, or of making liable the one person who can abate it, whether the owner or occupier. So I have no doubt about the existence of that common law liability. . . .

<sup>1</sup> 1 Salk. 357 [*ante* No. 399.]

## 402. PENRUDDOCK'S CASE

COMMON PLEAS. 1598

5 Co. Rep. 100

IN a Quod permittat between Henry Clark, Plaintiff, and Edward Penruddock and Mary his wife, Defendants, which was adjudged in the Common Pleas, and removed by a Writ of Error into the King's Bench, Hill. 37 El., Rot. 387, the case was such:

John Cock, 2 Oct. anno 1 Mar., built on his Freehold an House in St. John's Street in the County of Middlesex, near the Curtilage of the House of Thomas Chichely; that domus illa superpendet (Anglice, doth hang over) magnam partem, videlicet 3 pedes, curtilagii praedicti, &c. And afterwards John Cock conveyed the House which he had built to Penruddock and his Wife; and Thomas Chichely (to whom the Nuisance was done) conveyed his House to the said Clark the now Plaintiff. And the Plaintiff in his Quod permittat (which he brought) prosternere domum praedictam, declared that the same House superpendet tres pedes curtilagii praedicti, sic quod aquae pluviales de eadem domo descendentes solum ejusdem curtilagii conterunt, ac magnopere ac indies magis magisque consumunt &c., devastant, ac ea ratione curtilagium praedictum quolibet pluviali tempore humectatum & inundatum existet, quod praedictae Henrico inhabitanti in eodem messuagio, nullum proficium & easiamentum de eodem curtilagio percipere prossit, ad nocumentum liberi tenementi praedicti, & in eisdem.

And the first Question was, If the Writ of Quod permittat lies in this Case for the Feoffee or not. And it was objected, that when a Wrong and Injury is done by levying of a Nuisance for which an Action lies, that if he who has the Freehold to which the Nuisance is done conveys it over, now this Wrong is Remediless; as if the Lord incroaches Rent for his Tenant, the Tenant cannot avoid this Wrong in an Avowry, but in an Assise, or a Cessavit, or a Ne injuste vexes, he may. But if the Tenant to whom the Wrong is done enfeoffs another, his Feoffee shall never avoid this Wrong. But it was answered and resolved, That the dropping of the Water in the Time of the Feoffee, is a new Wrong, so that the Permission of the Wrong by the Feoffor, or his Feoffee, to continue to the Prejudice of another, should be punished by the Feoffee of the House to which it is done. And if it be not reformed after Request made, the Quod permittat lies against the Feoffee, and he shall pay Damages, if he do not reform it. But without Request made, it doth not lie against the Feoffee. But against him who did the Wrong, it lies without any Request made, for the law doth not require any request to be made to him who doth the Wrong himself. . . . And with this Judgment, agrees a Judgment given by Sir Christ. Wray, Ch. Just. and the whole Court of King's Bench, Mich. 24 & 25 Eliz.<sup>1</sup>

<sup>1</sup> Rolf's Case, Cro. Eliz. 402, Moor 353.

403. MARTIN *v.* CHICAGO, ROCK ISLAND & PACIFIC  
RAILWAY COMPANY

SUPREME COURT OF KANSAS. 1909

81 *Kansas* 344, 105 *Pac.* 451

APPEAL from District Court, Harper County.

Action by William Martin against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

GRAVES, J. This action was commenced in the District Court of Harper county by William Martin against the Chicago, Rock Island & Pacific Railway Company to recover the value of a horse alleged to have been killed upon the right of way of that railroad in that county. The railroad, including its fencing, was constructed by the Choctaw & Northern Railroad Company. The road was subsequently sold to the Choctaw, Oklahoma & Gulf Railroad Company, and by it leased about April, 1905, to the defendant, since which time the defendant has operated the road under said lease. There was a stipulation in the lease binding the defendant to maintain and repair the road, including the right of way, fences, and all the other equipments and appurtenances pertaining to the road. When the railroad was originally constructed, which was several years before the injury of which plaintiff complains occurred, a deep excavation was made on and along the right of way extending almost to the adjoining property, leaving a high and precipitous embankment upon the right of way between the excavation and the outer line of the right of way. The roadbed was inclosed with a barbed-wire fence which was constructed at the place where the horse was killed upon the right of way, and in the excavation and so near to the embankment as to leave between the fence and the precipitous embankment a narrow passageway, too narrow in places for stock the size of horses or cattle to pass. The passageway was of unequal width, being in some places three feet or more, and gradually growing narrower to two feet and less in other places. The property adjoining this excavation along the right of way was used as a pasture, and was in the possession of the plaintiff, who occupied it as a tenant. His horse while running in this pasture wandered into this narrow passageway, and in attempting to force himself through was cut and lacerated by the barbed-wire fence until he bled to death. . . .

The real question upon which the defendant apparently relies, and which it seriously urges here, is that the place where the horse was killed is a nuisance; that it was constructed by the defendant's grantors; that the subsequent maintenance of this nuisance by the defendant with full knowledge of its dangerous character does not alone make it liable for damages occasioned thereby. It is insisted that, before the defendant

can be made liable, express notice of the existence of the nuisance and a request to abate it must be given. The petition does not aver such a notice and request, and it was demurred to for that reason, but the demurrer was overruled. The evidence did not establish such a notice, and request and a demurrer to that was overruled.

The Court instructed the jury, in substance, that the maintenance of the nuisance and knowledge of its dangerous character before the injury was sufficient to make the defendant liable. This instruction is said to be erroneous. The defendant cites a long line of eminent authorities in support of its contention, commencing, with *Penruddock's Case*, 5 Coke, 100, of which the Supreme Court of Michigan said: "It has antiquity on its side, and is therefore entitled to all the consideration and weight that time can give to an adjudication as a precedent for other courts to follow" — and followed it with *Caldwell v. Gale*, 11 Mich. 83; *Railroad v. Smith*, 64 Fed. 679, 12 C. C. A. 384, 27 L. R. A. 131; *Central Trust Co. v. Wabash Railway Co.* (C. C.), 57 Fed. 441; *Groff v. Ankenbrandt*, 124 Ill. 51, 15 N. E. 40, 7 Am. St. Rep. 342; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778. These are strong cases, but there are many which announce the contrary doctrine. . . .

In the case of *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396, one clause of the syllabus reads:

"A party who continues a nuisance, but is not the original creator of it, is entitled to notice that it is a nuisance, and a request must be made that it may be abated, before an action will lie for that purpose, unless it appear that he had knowledge of its hurtful character."

The reason given for the rule that notice and a request to abate must be given to one who becomes the owner of a nuisance which was constructed by another is that such a person may be ignorant of the character of the thing denominated a nuisance, and that a notice and request to abate would place him upon the same ground as the original wrongdoer. If he is not ignorant, the reason for giving notice fails and the rule disappears.

In this case the evidence shows that the knowledge of the defendant of the nuisance in question was equal to or better than that of the plaintiff. . . . Notice of and a request to abate the nuisance was unnecessary in this case. Actual knowledge of its existence was sufficient. . . .

The disposition of the main question presented by the railroad company disposes of the other questions presented, so that they need not be considered.

The judgment of the District Court is affirmed. All the Justices concurring.<sup>1</sup>

<sup>1</sup> [TOPIC 1. PROBLEMS:

The plaintiff was injured by the fall of an advertising signboard on a roof. The defendant was the licensee of the roof for the use of the board in advertising,

## Topic 2. Highways.

## 404. RUSSELL v. MEN DWELLING IN THE COUNTY OF DEVON

KING's BENCH. 1788

2 T. R. 667

THERE was an action upon the case against the men dwelling in the county of Devon, to recover satisfaction for an injury done to the waggon of the plaintiffs in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants, for themselves and the rest of the men dwelling in that county, appeared, and demurred generally.

*Chambre*, in support of the demurrer, insisted that by the laws of this kingdom, no civil action can be maintained against the inhabitants of a county at large for any injury sustained by an individual in consequence of a breach of their public duty. . . . It is a principle of law, that no man shall be responsible for any injury unless occasioned by his own act or default. If it be argued that this mode of suing is founded on the analogy it bears to actions on the statute of hue and cry, and actions on the 9 G. 1, c. 22, § 7, to recover damages sustained by fire; the answer is that the Legislature has given a remedy in those particular instances; and when an act of Parliament renders any description of men liable to an action, the Courts of law devise

and had contracted to keep it in repair, but had not erected it. Was he responsible? (1898, *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E. 763.)

The defendant mine-owner sunk a shaft, which intercepted water, which would otherwise have flowed to the plaintiff's mine. The intercepted water afterwards flowed by other passages to the plaintiff's mine. Is the defendant responsible? (1877, *West Cumberland Co. v. Kenyon*, L. R. 6 Ch. D. 773.)

The plaintiff was injured by the fall of snow from the roof of a building. Is the occupier liable? (1894, *Lee v. McLaughlin*, 86 Me. 410, 30 Atl. 65.)

The defendant was lessee of a building, which stood on an artificial mound. The dampness from the mound, and the seepage from a stable forming part of the premises, caused the foundation walls of the plaintiff's adjacent building to rot. Is the defendant responsible? (1876, *Broder v. Saillard*, L. R. 2 Ch. D. 692.)

On the defendant's land was a pond, formed by the overflow from a creek. On the subsidence of the waters, the heat of the sun produced gases noxious to the health of the neighbors. The defendant did nothing to produce the noxious gases, but he was able to prevent them by draining or filling the pond artificially. Is he responsible? (1897, *Roberts v. Harrison*, 101 Ga. 773, 28 S. E. 995.)

The plaintiff was employed in the defendant's shop, and was injured by falling on ice collected on a stairway going down from the second floor. The defendant was tenant of the second floor, and the third-floor tenant had also the use of the stairway; the landlord retained general control over the passageways of the building. Is the defendant responsible? (1910, *Hawkes v. Shoe Co.*, — Mass. —, 92 N. E. 1017.)]

some means by which they may be sued. But the statutes of hue and cry furnish an argument to shew that the present action cannot be maintained. The obligation to make hue and cry subsisted at common law; 2 Inst. 172; or at least by the statute of Westminster 1st, 3 Ed., 1, c. 9; which was prior to the statute of Winton, 13 Ed. 1, st. 2, c. 6, by which the inhabitants of a hundred were subjected to an action.<sup>1</sup> But if the hundred had been liable to a civil action by the common law or the statute of Westminster, which raised the duty, the statute of Winton would have been nugatory. But it was only on the ground of the hundred's not being liable before that time that the Legislature made them responsible in a civil action. The consequence of permitting these sort of actions to be maintained deserves the serious attention of the Court, since it must necessarily lead to a multiplicity of actions. . . .

*Gibbs*, contra. The general principle is, that where one person receives an injury by any other person or persons omitting to do what by law he or they are bound to do, he may maintain an action on the case to recover satisfaction for the damage he has received in consequence of that omission. In the present case the county were bound to repair this bridge; they omitted to do so; and the plaintiffs received a particular injury by that omission. . . . It has been said that great injustice might have been done to those who are not inhabitants of the county at the time that this injury was sustained, by making them responsible for the injury of their predecessor; but that objection would apply with equal force to the action on the statutes of hue and cry as to this. . . .

Lord KENYON, C. J. If this experiment had succeeded, it would have been productive of an infinity of actions. . . . The question here is, Whether this body of men, who are sued in the present action, are a corporation, or qua a corporation, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the Legislature for that purpose. But it has been said that this action ought to be maintained by borrowing the rules of analogy from the statutes of hue and cry; but I think that those statutes prove the very reverse. The reason of the statute of Winton was this: As the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction, till the statute gave that remedy; and most undoubtedly no such action could have been maintained against them before that time. Therefore when the case called for a remedy, the Legislature interposed; but they only gave the remedy in that particular case, and did not give it in any other case in which the neglect of the hundred had produced any injury to individuals. And

<sup>1</sup> [For this rule, see Nos. 414, 415, *post*.]



when they gave the action, they virtually gave the means of maintaining that action; they converted the hundred into a corporation for that purpose. But it does not follow that, in this case, where the Legislature has not given the remedy, this action can be maintained. . . . Therefore I think that this experiment ought not to be encouraged; there is no law for supporting the action; and there is a precedent against it in Brooke: though even without that authority I should be of opinion that this action cannot be maintained.

ASHHURST, J. It is a strong presumption that that which never has been done cannot by law be done at all. . . . However there is no foundation on which this action can be supported; and if it had been intended, the Legislature would have interfered and given a remedy, as they did in the case of hue and cry. Thus this case stands on principle: but I think the case cited from Brooke's Abridgment is a direct authority to shew that no such action can be maintained. . . . BULLER, J., and GROSE, J., assented.

*Judgment for the defendants.*

#### 405. LYME REGIS v. HENLEY

HOUSE OF LORDS. 1834

1 Bing. N. C. 222, 2 Cl. & F. 331, 37 Rev. Rep. 125

THIS action was brought by Henley, the plaintiff below, against the defendants below, for the non-performance of certain repairs directed by their charter, whereby special damage had been incurred from the sea. . . . The cause came on to be tried before LITTLEDALE, J., at the spring assizes for the county of Dorset, in 1828, when the jury found a verdict for the plaintiff below, on the first count of the declaration, with £100 damages, and were discharged from giving any verdict upon the other counts. . . . The defendants below thereupon brought a writ of error in the Court of King's Bench, where the judgment of the Court of Common Pleas was affirmed. See 3 B. & Adol. 77.

Upon that judgment the present writ was brought; on the ground,

1. That no liability, by reason of tenure, was created by the charter of Charles I, nor is any alleged in the pleading: *Rex v. Kerrison*, 1 M. & S. 435.

2. That there is no authority for the liability here claimed; the cases cited by the Court of King's Bench, in giving judgment in this case, relating to liabilities by reason of prescription: *Paine v. Patrich*, Carth. 191; of tenure: 12 Hen. 7, fol. 18; or of acts of parliament: *Rex v. Inhabitants of Kent*, 13 East, 220; *Rex v. Inhabitants of Lindsey*, 14 East, 317; *Rex v. Stoughton*, 2 Saund. 157; and not to any liability arising from acceptance of a grant from the king. . . .

For the plaintiff below, it was contended, that every breach of

public duty or neglect of what the party is bound to perform, working wrong or loss to another, is injurious and actionable: *Sutton v. Johnstone*, 1 T. R. 493; *Russell v. Men of Devon*, 2 T. R. 667. . . . By the charter granted to the defendants below, the king wills that the plaintiffs shall repair the sea walls; they accept the charter, and by their acceptance the words of the king enure as a covenant by the defendants below: *Bret's case*, Cro. Jac. 399. They neglect their duty, by which the plaintiff below sustains serious loss, and this gives him a right of action against them. . . .

The opinion of the judges was now delivered by

PARK, J. The question proposed by your Lordships for the opinion of the judges is as follows:

The declaration in an action on the case against a corporation states, that before committing the grievances by the defendants, the king, by his letters patent duly sealed, did give, grant, and confirm to the corporation and their successors, the borough or town of Lyme Regis, . . . willing that the corporation . . . all and singular of the building, banks, sea-shores, and all other mounds and ditches within the said borough, . . . or situate between the said borough and the sea, and also the said building called the pier-quay, or the cob, at their own costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient. . . . It then proceeds to state . . . that a building, bank, or sea-shore within the borough, . . . were a protection and safeguard, and still of right ought to be so, to the plaintiff's messuage and land aforesaid, and then hindered the sea from flowing upon and over that messuage and land. . . . A breach is then assigned that the corporation wrongfully permitted the said buildings, banks, sea-shores, and mounds, to be out of repair, for want of due, proper, and necessary repairing of the same, by means of which the plaintiff's house and land was inundated and injured. After a verdict upon a plea of not guilty, is this declaration good, and does it disclose a sufficient cause of action by the plaintiff against the corporation?

In order to make this declaration good, it must appear, first, that the corporation are under a legal obligation to repair the place in question; secondly, that such obligation is matter of so general and public concern that an indictment would lie against the corporation for non-repair; thirdly, that the place in question is out of repair; and lastly, that the plaintiff has sustained some peculiar damage beyond the rest of the king's subjects by such want of repair. The third and last requisites are admitted to be averred in this declaration, and with sufficient words, at least after verdict. The doubt in this case arises on the first and second requisites.

1. With regard to the first, it is argued that the corporation have not by acceptance of the charter stated in the declaration incurred any legal obligation whatever as to the repair of the place in question.

. . . Looking at the words of the charter, as stated in this declaration, we are of the opinion that it does cast upon the corporation an obligation to repair, which they, by accepting the charter, have adopted. . . .

2. The second requisite is, in truth, that upon which this case wholly turns, viz., that the obligation must be of so general and public concern that an indictment will lie for the breach of it. . . . The next question which arises is, whether the keeping up the sea defences of the town or borough is matter of general and public concern. . . . Here we think that the allegations of the declaration, as applied to the subject-matter, do by reasonable intendment show that the buildings, banks, mounds, and ditches in question were part of the defences and safeguards of the town and borough against the encroachments of the sea, and particularly of that part of the town and borough in which the plaintiff's property is situated. The declaration, therefore, shows a charter casting an obligation on the corporation to do repairs of general and public concern. . . .

It is however, further urged, that whatever engagement the corporation may be under as between them and the crown, so as to render them liable either to a forfeiture of their charter, or any other proceeding by the crown, yet that no stranger can take advantage of such engagement and maintain an action. It is admitted that if their liability arose by prescription, they would be indictable, and also an action would lie for special damage, as in *The Mayor, &c. of Lynn v. Turner*, Cowp. 86; *Churchman v. Tunstal*, Hardr. 162; *Payne v. Partridge*, Show. 255, Carth. 191, and many other authorities. . . . If then the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between A and B, nor even of a charter granted by the king, where no matter of general and public concern is involved; but where that is the case, and the king, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals pecuniarily injured, by action. . . .

*Judgment affirmed.*

#### 406. BLOOMINGTON v. BAY

SUPREME COURT OF ILLINOIS. 1867

42 Ill. 503

WRIT of error to the Circuit Court of McLean County; the Hon. JOHN M. SCOTT, Judge, presiding. The facts sufficiently appear in the opinion of the Court.

Messrs. *Williams & Burr*, for the plaintiff in error.

Messrs. *Tipton & Benjamin*, for the defendant in error.

Mr. Justice BREESE delivered the opinion of the Court.

This was an action on the case brought in the McLean Circuit Court, by James M. Bay against the city of Bloomington, to recover damages for an injury alleged to have been occasioned to the plaintiff, by a defective sidewalk in that city. The declaration contains five counts, the first alleging that the city, at the time when, etc., and previous thereto, was incorporated, and as such city had the right, under its charter, to build or cause to be built, sidewalks along its streets, to keep the same in repair, etc., and that it did, prior to the 5th day of January, 1866, under and by virtue of its charter, take possession of it, and control over, the sidewalk on the east side of East Street, between Washington and Front Streets, and that on the 9th day of January, 1866, a plank, a part of such sidewalk, was so loosely lying as to make it dangerous for persons to pass along and upon such sidewalk, and avers that the defendant, well knowing, etc., permitted it to remain so, and that on that day plaintiff was passing along such sidewalk with ordinary care, and was then and there necessarily and unavoidably thrown down by the raising of the loose plank above mentioned, and avers that his left wrist was put out of joint, and the large bone fractured, of which he became sick, lame, etc. . . . The cause was tried by a jury, and a verdict rendered for the plaintiff for four hundred and twenty-five dollars. . . . The cause is brought here by writ of error.

The counsel for the plaintiff in error insist there is no such liability upon the corporation, unless it is created by express statute, or under its charter, or from immemorial custom, and if any exist in this case, it must arise under the charter of the city. It is insisted that the city charter places this liability upon the lot owners abutting the sidewalks. The charter on this subject gives to the city authorities power to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, lanes, and alleys, and to require the owners of any lot or piece of ground to lay a good and substantial sidewalk along any street or alley passing such lot or piece of ground, in such manner as the council may provide. Laws of 1861, page 110, § 7. From this it results (so the plaintiff's counsel contend), that the liability is not on the city, but upon the owner of the lot, and if a party injured has an action against any one, it must be against such owner, and not against the city. They insist that the utmost liability imposed upon the city is, if a sidewalk be necessary, to order the owner of the lot abutting on it to make it, and if he fail so to do or to keep it in repair when made, to compel him to do so by some legal proceeding. . . .

1. The charter of the city of Bloomington, giving control over the streets to the authorities of that city, also imposed upon them the duty of keeping them in repair, and, as sidewalks are a part of the street, a like duty is imposed to keep them in repair. The fact, that

the city authorities could impose the duty of constructing sidewalks upon the lot owner, cannot relieve them from their liability in case a sidewalk (no matter by whom constructed) is suffered to be and remain out of repair and dangerous to use. The charter of the city of Bloomington gives the authorities of the city plenary power over this whole subject. It is a subject in which the public interests are deeply concerned, and full power having been bestowed, its execution can be insisted on as a duty, in the neglect of which the city should be responsible for a resulting injury. The case of *Browning v. The City of Springfield*, 17 Ill. 143, is decided on this principle, and so is the case of *Scammon v. The City of Chicago*, 25 id. 424, and that of *Clayburgh v. The Same*, id. 535. The case of the *City of Chicago v. Robins*, 2 Black, 418 (Sup. Court, U. S.), is to the same effect. The rule is well settled, where a plain duty is neglected and one is injured by such neglect, the party upon whom the duty is imposed is liable for the damages sustained.

2. But it is insisted by the counsel for the plaintiff in error that there is no proof in the case that the city built, or even repaired, this sidewalk, and the presumption of law is, that the owner of the lot built it, and the evidence shows that he repaired it. It was in proof that the city council, on the 27th of March, 1852, passed an ordinance for constructing this sidewalk, and that it was, soon after, built. It having been built, by whom is immaterial, and it being a part of the street, it was the duty of the city to keep it in repair, it being under their exclusive control. If it was built by the owner of the lot abutting on it, justice requires that it should not be permitted by the city to suffer it to go to decay and ruin, when it was in their power, by the exercise of a reasonable degree of diligence, to have prevented it and preserved it for the safe passage of all those whose necessities required its use. The duty still remained with the city to keep this sidewalk in a safe condition for use. . . .

For the reasons given, the judgment of the Circuit Court must be affirmed.

*Judgment affirmed.*

407. BYRON K. ELLIOTT and WILLIAM F. ELLIOTT. *A Treatise on the Law of Roads and Streets*. (2d ed., 1900, § 611.) In England the parishes are charged with the repair and maintenance of all roads lying within their limits, unless by custom or prescription the burden is thrown upon particular persons. So in Canada; but in neither country are they held liable to a civil action in damages. . . . In the United States, townships and counties usually have control over suburban highways, and are often required by statute to repair their roads. . . . In most of the States, cities are given extensive powers, either by charter or by general statute, over the streets within their limits, and are held to corresponding duties and liabilities. By many of the Courts, the duty to maintain and repair streets is held to be *implied* where the city is given exclusive control over streets and has power to raise means for that purpose, and this seems to be the most reasonable ground upon which the liability can be placed. It is held by some Courts, however, that no liability for failure to keep streets in repair

exists, unless it is *expressly* so provided by statute. Such is the established law as to towns in the New England States; the New England statutes generally provide that the streets shall be kept in good and sufficient repair or safe and convenient, and that the town or city shall be liable to persons injured by reason of any defect or want of repair. Where the duty to repair is expressly cast upon a municipal corporation and it is provided with means to perform such duty, it is, according to the prevailing doctrine, liable to any one injured (without fault on his part) by its neglect to perform such duty, regardless of the want of any statute expressly imposing such liability. . . .

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#### 408. GODDARD, PETITIONER

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1835

16 Pick. 504

COMPLAINT to the Police Court, in the name of the Commonwealth, against Goddard, as the occupant of a house and lot of land situate on Kingston Street, in the city of Boston (and not in that part of the city called South Boston) for neglecting and refusing to remove the snow from the sidewalk in Kingston Street, adjacent to his land; the defendant was sentenced to pay a fine and costs, and he appealed. . . .

SHAW, C. J., delivered the opinion of the Court. No question is made of the facts in this case; but it is conceded that the petitioner did not clear the sidewalk in front of his land, in the manner required by the by-law of the city, and he justifies this on the ground that the law itself is invalid and of no binding force. . . .

Another and perhaps the most important objection, is, that the by-law is one imposing a tax or duty upon the citizens, and is a violation of the Constitution in this, that it is partial and unequal, and contravenes that fundamental maxim of our social system, that all burdens and taxes laid on the people for the public good shall be equal.

But the Court are all of opinion, that the by-law in question is not obnoxious to this objection. . . .

It imposes a duty on a large class of persons, the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. It is said to be unequal, because it singles out a particular class of citizens, to wit, the owners and occupiers of real estate, and imposes the duty exclusively upon them. If this were an arbitrary selection of a class of citizens, without reference to their peculiar fitness and ability to perform the duty, the objection would have great weight, as for instance, if the expense of clearing the streets of snow were imposed upon the mechanics or merchants, or any other distinct class of citizens, between whose convenience and accommodation, and the labor to be done, there is no natural relation. But suppose there is a class of citizens who will



themselves commonly derive a benefit from the performance of some public duty, we can see no inequality in requiring that all those who will derive such benefit shall by a general and equal law be required to do it. . . . Although the sidewalk is a part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it and benefit from it, distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit, often in accommodating his cellar-door and steps, a passage for fuel, and the passage to and from his own house to the street. To some purposes therefore it is denominated *his* sidewalk. For his own accommodation he would have an interest in clearing the snow from his own door. The owners and occupiers of house-lots and other real estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community. . . .

The Court are all of opinion, that as a by-law, the regulation in question was a reasonable one, that it was not repugnant to the Constitution or laws of the Commonwealth, and that the conviction was right.

*Petition dismissed.*

#### 409. CHICAGO v. O'BRIEN

SUPREME COURT OF ILLINOIS. 1884

111 Ill. 532

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Criminal Court of Cook County; the Hon. George GARDNER, Judge, presiding. This was an action by the city of Chicago, against Thomas O'Brien, for a violation of the ordinance hereinafter set out. The judgment of the Circuit Court of Cook County was in favor of O'Brien, and that judgment was affirmed in the Appellate Court for the First District. The cause was, by agreement of parties, submitted to the Court, without the intervention of a jury, upon the following agreed state of facts:

That the said defendant was, at the time hereinafter mentioned, the occupant of the premises known as No. 203 Centre Avenue, which said premises were and are within the corporate limits of the said city of Chicago; that the said O'Brien, on, to wit, the 18th of February, 1884, and for a long time previous thereto, allowed the snow which had fallen, and the ice formed therefrom on a portion of the sidewalk hereinafter mentioned, to accumulate upon the sidewalk in front of said premises to the depth of from six to ten inches, and neglected and refused, and still neglects and refuses, to clear or cause the same to be cleared from said sidewalk, and where the snow had so congealed that it could not be removed without injury to the said sidewalk, the said O'Brien neglected

and refused, and still neglects and refuses, to strew the same with ashes or sand; that prior to the said 18th day of February, 1884, the city council of the city of Chicago had duly passed, and the same had been duly and properly approved and published, according to law and the statute in such case made and provided, the following ordinance (Municipal Code, § 1955), to wit:

“Every owner or occupant of any house or other building, and the owner or proprietor, lessee or persons entitled to the possession of any vacant lot, and every person having the charge of any church, jail, or public hall or public building in this city, shall during the winter and during the time snow shall continue on the ground, by nine o'clock in the morning, when necessary, clear the sidewalk and gutters in front of such house or other building, and in front of such lot, from snow and ice, and keep them conveniently free therefrom during the day; . . . and every person neglecting to comply with this section, shall incur a penalty of five dollars for each neglect or refusal.”

And it is further agreed that said sidewalk is a part of one of the public streets or highways of said city.

Mr. *Geo. Mills Rogers*, and Mr. *M. R. M. Wallace*, for the appellant. The ordinance can be most properly upheld under the general police powers vested in the city. . . .

Messrs. *C. C. & C. L. Bonney*, and Mr. *Lyman M. Paine*, for the appellee. The claim that the ordinance rests on the police power, is in conflict with the decisions of this Court. . . .

Mr. Chief Justice SCHOLFIELD delivered the opinion of the Court.

It is conceded by counsel for appellant that this Court, in *Gridley v. City of Bloomington*, 88 Ill. 554, decided the only question involved in this case (namely, the validity of the ordinance under which the suit is prosecuted) against appellant; but they contend that decision is based upon incorrect grounds, and should therefore be overruled. They contend that the ordinance is but a proper police regulation, and that, as such, it should be sustained. . . .

Even the police power, comprehensive as it is, has some limitations. It cannot be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be, for the time, to the public health, safety, etc. And upon like principle, a purely public burden cannot be laid upon a private individual, except as authorized in cases to exercise the right of eminent domain, or by virtue of proper proceedings to enforce special assessments or special taxation. The drainage of malarial swamps would surely largely contribute to promote the public health; but could it be contended that therefore the burden of such drainage may be laid upon some single person to be arbitrarily selected, or upon those who happen to own the adjacent dry land, in disregard of the principles applicable to special assessments and special taxation? Undoubtedly, the allowing of ice and snow to remain upon a sidewalk may be declared a nuisance, but it must be a public nuisance, and one,

too, not caused by the act of the adjacent property holder, but solely by the action of the elements. No one questions the right of the municipality to prevent such use of property and such action of the citizen as may be injurious to the public; but the adjacent lot owner has no ownership or control of the adjacent street, and this ordinance seeks to control the action of no one while on the street. The lot owner is held responsible solely and simply for the accident of owning property near the nuisance. He may have no more actual control of the street, or necessity to use it, than if his property were miles away; still he is held responsible for a result he could not control, and to the production of which he did not even theoretically contribute. The gist of the whole argument is merely that it is convenient to hold him responsible. It is not perceived why it would not be equally convenient to hold him responsible for the entire police government of so much of the street. . . .

We are satisfied with the entire correctness of the ruling in *Gridley v. City of Bloomington*, *supra*, and being so satisfied, the judgment below must be affirmed. *Judgment affirmed.*

DICKEY, SHELDON, and CRAIG, JJ., dissenting.

#### 410. TOUTLOFF v. GREEN BAY

SUPREME COURT OF WISCONSIN. 1895

91 Wis. 490, 65 N. W. 168

APPEAL from an order of the Circuit Court for Brown county: S. D. HASTINGS, Jr., Circuit Judge. Affirmed. This action was brought to recover damages for injuries suffered by a fall upon a defective sidewalk, upon one of the streets of the defendant city, in front of the lot of one Froncee. The sidewalk was charged to have become out of repair. Froncee was named as a co-defendant in the summons and complaint, but was never served. The defendant city, by answer, alleged that Froncee, the owner, and one Schroeder, the occupant, of the lot aforesaid, were charged with the duty of keeping the sidewalk in question in repair, and were primarily liable for the plaintiff's injury, if she was injured; and, upon the answer and an affidavit showing such ownership and occupancy, moved for a stay of proceedings until said Froncee and Schroeder should be made parties to the action and served with process. The motion was denied, and the city appealed.

For the appellant, there was a brief signed by *Carlton Merrill*, city attorney, and *Ellis & Merrill*, counsel, and oral argument by E. H. *Ellis*.

For the respondent, there was a brief by *Cady & Huntington*, and oral argument by *F. C. Cady*.

WINSLOW, J. The question in this case is whether, under the charter

of the city of Green Bay, the owner of a lot in that city is liable to a passer-by for injuries resulting from a fall occasioned by a defective and worn-out sidewalk in front of such lot.

1. The question is whether the lot owner is liable for mere failure to repair, not whether he is liable for active negligence in placing an obstruction or making an excavation in the street or sidewalk. Therefore, the cases which have been decided in this Court, sustaining the liability of lot owners or others for injuries caused by obstructions or excavations made by them in the streets, can have little or no application here. Such are the cases of *McFarlane v. Milwaukee*, 51 Wis. 691; *Raymond v. Sheboygan*, 70 Wis. 318; *Papworth v. Milwaukee*, 64 Wis. 389; *Kollock v. Madison*, 84 Wis. 458. The liability in these cases is founded upon acts or affirmative negligence, and is a common-law liability, existing independent of any statute. There is no common-law liability here, because it is settled in this State that it is not the duty of the lot owner, at common law, to keep the street or sidewalk in repair. *Cooper v. Waterloo*, 88 Wis. 433.

2. If there be any liability, therefore, in this case, it must be by reason of some statute. . . . It is not claimed that there is any other State law which creates a liability, but that it is created by the charter of the city of Green Bay (Laws of 1882, ch. 169). This contention necessitates a critical examination of that charter. Starting with the general undoubted proposition that every city in the State is charged with the duty of keeping its streets and sidewalks in repair, and is responsible for negligence in discharge of that duty, we turn to the charter in question, and find very full authority given to the city to enable it to discharge this duty at the expense of the lot owners. . . .

Counsel for the city contend, and with force, that by these charter provisions it is made the duty of the lot owner to keep the sidewalk in repair, that this duty is imposed for the benefit of every person who has occasion to use the walk, and that failure to perform that duty is negligence for which the passer-by who is injured thereby may have his action. If the premises are correct, the conclusion follows. It was early decided by this Court that, where a law imposes a specific duty upon one person for the benefit of others, an action will lie in favor of one for whose benefit the duty was imposed, in case of neglect to perform the duty and resulting damage. *McCall v. Chamberlain*, 13 Wis. 637. This principle was reaffirmed at the present term. *Smith v. Milwaukee B. & T. Exchange*, 91 Wis. 360. Therefore, when it is provided in this charter that it shall be the duty of the lot owner to keep the sidewalk in front of his premises in repair, the question is whether this is a duty which is imposed for the benefit of the passer-by or for the benefit of the city in its corporate capacity.

In its terms, the clause in question seems very like the ordinance requiring the builder of a new building adjoining a street to roof the sidewalk, which was before this court in the *Smith Case*, last cited,

and which was held to impose a duty for the benefit of the passer-by. We are convinced, however, that such is not the proper construction of the provisions of the charter now before us, and shall briefly give our reasons. It has long been the policy of our law to place upon municipal corporations the responsibility of keeping the streets and sidewalks in safe condition for travel. It is unquestionably a wise policy, for it insures uniformity in plan and execution, and places the responsibility in the hands of a power amply able to sustain it, to employ all the agents that may be necessary to discharge its duty carefully and well, and to answer for any neglect of its duty. The citizen knows, and has the right to know, that if the public way is not safe and he is injured, he has a certain remedy against the corporation whose duty it is to keep it safe. Thus he is fully and certainly protected. A separate liability to him on the part of the property owner, by whose lot he happens to be passing when he is injured, furnishes him no additional protection. He does not want it. In fact, he would rather not have it. It is an embarrassment rather than an advantage, especially under a law requiring the exhausting of the remedy against the lot owner before resorting to the city. On the other hand, it is a very distinct and substantial benefit to the city, in its corporate capacity, to be furnished with the means to carry out its duty of keeping the highways safe; and this, it seems to us, is the object of the provisions under consideration. It is simply a declaration of the duty which the lot owner owes to the corporation, namely, the duty, under control and supervision of the corporation, either to make repairs or at his option to reimburse the city for the repairs which it has made adjoining his property. . . .

After full and able argument of the important question here involved, we are unanimous in the opinion that, under such charter provisions as those before us, there is no liability on the part of the lot owner to the passer-by for injuries resulting from mere lack of repair of the adjacent sidewalk.

By the Court — Order affirmed.<sup>1</sup>

<sup>1</sup> [TOPIC 2. PROBLEMS:

Is a city liable for death caused by its failure to check the noxious vapors arising from its sewers? (1899, *Hughes v. Auburn*, 161 N. Y. 96, 55 N. E. 389.)

The defendant owned a building abutting on the street; he built a sidewalk in which a cellar-hole was left. The cover-plate slipped out, and the plaintiff fell in and was injured. Is the defendant responsible? (1892, *McDonald v. Logi*, 143 Ill. 487.)

The plaintiff was injured by slipping on ice on the sidewalk and falling. His declaration averred that the defendant corporation, an abutting owner, "negligently allowed water collected upon its premises by its own act to escape to the sidewalk." Was this declaration good? (1902, *Benard v. Bobbin Co.*, 23 R. I. 581, 51 Atl. 209.)

The defendant city constructed a highway. By statute the city was bound to keep the highway in repair for travellers. The highway fell out of repair, by reason of ruts, etc., and the rainwater thus flowed from it on to the land of the

### Topic 3. Sundry Statutory Responsibilities

411. Sir EDWARD COKE. *Second Part of the Institutes of the Laws of England*. (1642. Fol. 55.) *Magna Charta*. . . . Every Act of Parliament made against any injury, mischief, or grievance doth either expressly or impliedly give a remedy to the party wronged or grieved: as in many of the Chapters of this Charter appeareth: . . . And it is provided, and declared by the Statute of 36 E. 3, that if any man feeleth himself grieved, contrary to any article in any Statute, he shall have present remedy in Chancery (that is, by original Writ) by force of the said Articles and Statutes.

412 Sir JOHN COMYNS. *Digest of the Laws of England*. "Action upon Statute" (F). (1762, 1st Amer. ed., vol. I, p. 453.)  
[Printed *post*, as No. 529.]

### 413. ATKINSON *v.* NEWCASTLE AND GATESHEAD WATERWORKS CO.

EXCHEQUER. 1871

*L. R. 6 Exch. 404*

DECLARATION: That by 26 Vict. c. xxxiv. (incorporating the Waterworks Clauses Act, 1847), the defendants were incorporated with certain powers of taking land and supplying and maintaining waterworks; that the plaintiff was at the time, &c., the owner and occupier of a dwelling-house, timber-yard, and saw-mills, situate within the limits prescribed by the first-mentioned Act for the supply of water by the defendants, and was under the provisions of the said Act and the Waterworks Clauses Act, 1847, entitled, for reward to be paid by him to the defendants in that behalf, to a supply of water by the defendants, and had complied with all the provisions of the said Acts in order to entitle him to such supply for domestic and other purposes; That before, &c., the defendants had laid down certain pipes near to the said dwelling-house, &c., of the plaintiff for the purpose of supplying water according to the said Acts, and had fixed to such

plaintiff, an abutting owner, and did damage. Is the defendant responsible? (1880, *Smith v. Tripp*, 13 R. I. 153.)

The plaintiff fell through a hatchway door in the sidewalk abutting on the defendant's premises; the door being defective. The defendant pleaded that the plaintiff had sued the city for the injury, and judgment had been given for the city; the defendant having been notified by the city of the former suit and having aided in its defence. Is that judgment a bar? (1869, *Severin v. Eddy*, 52 Ill. 189.)

#### NOTES:

"Highways: obstruction: Liability of abutter." (C. L. R., VII, 208.)

"Highways: obstruction: Liability of town." (C. L. R., VII, 290.)



pipes certain fire-plugs;<sup>1</sup> That nevertheless the defendants, neglecting their duty in that behalf, did not at all times, and especially at the time of breaking out on the said dwelling-house, &c., of the plaintiff of the fire thereafter mentioned, keep charged with water their said pipes to which fire-plugs had been and were then so fixed as aforesaid, under such pressure as by the said first-mentioned Act and the Waterworks Clauses Act, 1847, was required, although the defendants were not prevented from so doing by frost, unusual drought, or other unavoidable cause or accident, or by doing necessary repairs. That during the time the said pipes, with the said fire-plugs affixed thereto, were so laid as aforesaid, a fire broke out in the timber-yard and saw-mills of the plaintiff, and by reason of the defendants not having kept charged the said last-mentioned pipes under such pressure as aforesaid, a proper supply of water could not be procured for the purpose of extinguishing the said fire, and in consequence thereof the timber-yard and saw-mills were burnt down, and the plaintiff was and is greatly damaged. Demurrer and joinder.

*Holker*, Q. C. (*Herschell* with him), in support of the demurrer. The plaintiff seems to make the defendants liable upon the statutory duty imposed by § 42 of the Waterworks Clauses Act, 1847. But the true inference from § 43 of that Act is that the Legislature, having given a penalty for the breach of any of the duties enumerated in it, including the one in question, and having also given a compensation of 40s. a day to any person who might suffer an injury by the non-supply of water for which he would have to pay, intended by these provisions to state the whole liability of the defendants, and did not mean that compensation should be paid by them in any other case. . . . The use of the water for extinguishing fire being gratuitous, the only remedy which the Legislature has provided for a person who suffers damage from fire by reason of the pipes in connection with the fire-plugs not being kept duly charged, is the penalty of £10. . . .

*Quain*, Q. C. (*G. Bruce* and *Shield* with him), *contra*, was not called upon.

KELLY, C. B. This case appears to me altogether free from doubt. The Act of Parliament imposes upon this company the general duty of providing water to meet the wants of the people of Newcastle; and among other duties there is specifically imposed upon them that of keeping the water in the pipes connected with the fire-plugs (to be

<sup>1</sup> By § 38 of the Act, "The undertakers, at the request of the town commissioners, shall fix proper fire-plugs in the main and other pipes belonging to them," in the manner mentioned in the section, "for the supply of water for extinguishing any fire which may break out within the limits of the special Act." By § 42, "The undertakers shall at all times keep charged with water, under such pressure as aforesaid, all their pipes to which fire-plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs, and shall allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same."

placed by them in certain positions) at such a level as will enable the water to go to the top storey of the highest houses within the district. They have failed in the performance of this duty; the plaintiff brings this action for injury which he has sustained by reason of that failure, and the question is whether he can maintain it.

It is contended that he cannot, because the Act imposes penalties for non-performance of the duty. I will not go further into the authorities or the principles of law applicable to the question than to refer to the case of *Couch v. Steel*, 3 El. & Bl. 402, where the judgment of Lord Campbell (which was the judgment of the Court) really comprises the whole law on the subject. He says:

"The general rule is, that 'whenever a man has a temporal loss or damage by wrong of another, he may have an action on the case to be repaired in damages' (Comyns' Digest, Tit. Action on the Case, A). The statute of Westminster Second, c. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute: see Coke's 2d Institute, p. 486, and in Comyn's Digest, Tit. Action upon Statute, F, it is laid down that 'in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' . . ."

It has been argued that the damage is too remote; but what kind of damage can be more a proximate consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved? On these grounds I am of the opinion that the plaintiff is entitled to the judgment of the Court. . . .

BRAMWELL, B. I agree with the Lord Chief Baron. I think the case is decided by the authority of *Couch v. Steel*. But it is material to say, that I should have come to the same conclusion without it. The statute has imposed upon the defendants, by § 42, the duty of keeping their pipes, in which fire-plugs are fixed, charged with water under a certain pressure, and they are to allow all persons at all times to take and use this water for extinguishing fire without paying compensation. They have undertaken this duty, and have consented that it should be put on them, in consideration, I suppose, of the benefits they derive from the powers conferred on them by the statute. Now, when a duty is imposed on a person, it always supposes a correlative right in some one, either in the public or in the individual. . . . Is, then, this duty created in such a way as to confer the correlative right upon the public or on the individual? It is manifest that it is created in such a way as to confer the right, not upon any section of the public, but upon the individual. The public at large are not interested in extinguishing fires in the houses of individuals, but the individual is. Therefore it seems to me to follow that, unless some compensation is given to him for the violation of his right, he is entitled to maintain an action at common law. . . .

*Judgment for the plaintiff.*

414. Sir WILLIAM BLACKSTONE. *Commentaries*. (1763. IV, 293.) 4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is upon a hue and cry raised upon a felony committed. An hue (from "huer," to shout) and cry, "hutesium et clamor," is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another.<sup>1</sup> It is also mentioned by statute Westminster the First, 3 Edw. I, c. 9, and 4 Edw. I, de officio coronatoris. But the principal statute, relative to this matter, is that of Winchester, 13 Edw. I, c. 1 & 4, which directs that from thenceforth every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff. And that such hue and cry may more effectually be made, the hundred is bound by the same statute, c. 3, to answer for all robberies therein committed, unless they take the felon; which is the foundation against action against the hundred,<sup>2</sup> in case of any loss by robbery. By Statute 27 Eliz., c. 13, no hue and cry is sufficient, unless made with both horsemen and footmen; and by Statute 8 Geo. II, c. 16, the constable or like officer, refusing or neglecting to make hue and cry, forfeits £5. And the whole vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felon be committed therein and the felon escapes. An institution which had long prevailed in many of the eastern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the last century; which is said to have effectually delivered that vast territory from the plague of robbers, by making in some places the villages, in others the officers of justice, responsible for all the robberies committed within their respective districts.<sup>3</sup>

#### 415. ALLEGHENY COUNTY *v.* GIBSON

SUPREME COURT OF PENNSYLVANIA. 1879

90 Pa. 397

MAY 29th and 30th, 1879. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, WOODWARD, and TRUNKEY, JJ. STERRETT, J., withdrew before the argument. Error to the Court of Common Pleas of Beaver County. Of October and November Term, 1878, No. 163. This case was certified to in the Middle District from the Western District. It was originally brought in Allegheny County, but the venue was afterwards changed to Beaver County.

Trespass on the case by John Gibson's Son & Co., of Philadelphia, against the county of Allegheny, for the loss of sixty barrels of whiskey destroyed by the mob during the labor riots, which occurred in said county in July, 1877. At the trial, before HICE, P. J., it appeared

<sup>1</sup> Bracton, De Legibus, I, 3, tr. 2, c. 1, § 1; Mirror of Justice, c. 2, § 6.

<sup>2</sup> See vol. III, p. 160.

<sup>3</sup> Mod. Univ. Hist., VI, 383, VII, 156.

that the whiskey was shipped at Cincinnati on the 16th of July, 1877, to be carried to Philadelphia, over the Pittsburgh, Cincinnati & St. Louis Railroad and the Pennsylvania Railroad; that it arrived in Pittsburgh on the morning of the 19th of July; that on the evening of that day the sheriff of the county of Allegheny was notified by the officers of the Pennsylvania Railroad Company, that a number of men had forcibly taken possession of a portion of the railroad company's property, and the freight of shippers, and were obstructing the passage of trains. These officers also requested the sheriff to go in person and disperse the mob. He sent for some of his deputies and proceeded to the scene of the disturbance. Upon his arrival he found several hundred men in possession of the company's road, whom, as sheriff of the county, he ordered to disperse. This, in language of the sheriff, "they positively refused to do," and said "they were going to hold that road, and that they were going to wade in blood to their waists." This effort proving unavailing, the sheriff returned to his home, and on the way sent a telegram to the governor, asking for troops to quell the riot. An order was sent to the general commanding at Pittsburgh, to assist the sheriff with the troops. On Friday and Saturday efforts were again made by the sheriff to have the mob disperse, but on neither occasion was he accompanied with a posse or military force, his efforts to procure a posse having been unsuccessful. On the afternoon of Saturday he accompanied the portion of the State military force, which had arrived from Philadelphia, to 28th Street, where the mob was in possession of the railroad. Here the sheriff again addressed the rioters and commanded them to disperse. His efforts were again unavailing, and the military were then brought up and attempted to force back the mob in possession of the road. The rioters assaulted the soldiery with stones, clubs and pistol shots, and the latter then fired on the mob and a number of persons were killed and wounded. In a few hours the mob was largely augmented in numbers, and during the evening and night, and the following morning, the property of the railroad company, including its shops, elevator and hotel, and the trains upon the road, were all destroyed by fire kindled by the mob, who surrounded the property and trains, and would allow no interference to extinguish it. In the fire thus enkindled the whiskey in suit was burned. This action was brought against the county, under the provisions of the Act of May 31st, 1841, Pamph. L. 416, extended to Allegheny County, by the Act of March 20th, 1849, Pamph. L. 184. . . .

The following assignments of error will show the various questions in the case and the manner in which they were raised in the court below: . . .

4. In refusing to allow the defendants to prove, as contained in their fourth offer: That the said outbreak, by reason of its nature and extent, was beyond the power of the local authorities to antici-

pate or subdue. The purpose of this part of the offer being to show that the outbreak and violence which resulted in the destruction of the plaintiff's goods, did not constitute a mob or riot within the contemplation of the statute declared on. . . .

*S. H. Geyer, George Shiras, Jr., George W. Biddle, and Daniel Agnew*, for the plaintiff in error. . . . The framers of the Act of 1841 . . . did not mean by the words "any mob or riot," a vast combination of men, outside as well as inside of the county. Where an insurrection is, by reason of its nature and extent, beyond the power of the local authorities to anticipate or subdue, a county cannot be held liable for the loss of property destroyed during and in consequence of it. . . .

*D. T. Watson, M. W. Acheson, and Thomas M. Marshall*, for defendants in error. . . . The inability of the county authorities to quell the mob cannot limit the liability of the county. . . .

Mr. Justice PAXSON delivered the opinion of the Court, October 6th, 1879.

This was one of the cases brought against the county of Allegheny to recover damages for property destroyed by the mob during the riots of 1877. The particular property which is the subject of this suit consisted of sixty barrels of whiskey, belonging to the plaintiffs below. It was wholly destroyed, and its value is not disputed. A verdict and judgment were had in favor of the plaintiffs, and the defendants have removed the record to this court for review. The questions it presents are of grave importance.

The plaintiffs have no common-law remedy. They must recover, if at all, by virtue of Act of May 31st, 1841, Pamph. L. 416, which provides, that

"in all cases where any dwelling-house or other building or property, real or personal, has been, or shall be destroyed within the county of Philadelphia, in consequence of any mob or riot, it shall be lawful for the person or persons interested in and owning said property to bring suit against said county where said property was situated and being for the recovery of such damages as he or they sustained by reason of the destruction thereof, and the amount which shall be recovered in said action shall be paid out of the county treasury, on warrants drawn by the commissioners thereof, who are hereby required to draw the same as soon as said damages are finally fixed and ascertained."

The provisions of this Act were extended to the county of Allegheny by the Act of March 20th, 1849, Pamph. L. 184. A somewhat similar act had been in force in Philadelphia since 1836; see Pamph. L. 711, § 36. We are charged with no duty of vindicating the wisdom of this legislation. It is proper to say, however, that the principle embodied in the Act is not new. As early as 1285, the Parliament of England, by Statute of Winton, or Winchester, 1 Stat. 13 Edw. I, p. 2, ch. 3 (see 1 Hawkins, Pleas of the Crown, ch. 68, § 11), provided a remedy against the hundred, county, &c., in which a robbery should take place, for the damages caused thereby, to be recovered by the

party robbed in any action against any one or more of the inhabitants. This statute was re-enacted by 28 Edw. III, ch. 2. Subsequently the Statute 27 Eliz., ch. 13, § 2, provided for the assessment of the damages against all the inhabitants of the hundred after a recovery against one or more. Next we have the famous Riot Act of 1 George I, ch. 5, § 1-7, which was passed by reason of the tumult attendant upon the accession of that king to the throne, and which made it a felony, without benefit of clergy, for any persons unlawfully to assemble and demolish any church or dwelling-house. The sixth section of the same Act provided that in case such church or dwelling-house shall be destroyed, the inhabitants of the hundred in which it was situated should be liable for its value. This was followed by the Act of George II, ch. 10, § 1, and the laws upon this subject were consolidated, in 1827, by 7 & 8 George IV, ch. 31. It will thus be seen that we have imported the principle of the Act of 1841 from that country, from whence we derive the great body of our common law. That it was not transplanted at an earlier date is perhaps due to the fact that new countries, sparsely settled, do not early develop riotous tendencies. . . .

It was further objected that, "where an insurrection is by reason of its nature and extent beyond the power of the local authorities to anticipate or subdue, a county cannot be held liable for the loss of property destroyed during and in consequence of it." This proposition is a crystallization of the offers of evidence contained in the fourth and fifth assignments of error. To which may be added the point, pressed upon the argument, that after the appearance of the military of the State upon the scene, in obedience to the order of the executive authority the responsibility of the county of Allegheny ceased. The word "insurrection," in this connection, is not applicable. The meaning of it is: "A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state; a rebellion; a revolt:" Worcester. There was nothing of the kind here. It was a mob, and nothing more. It has never been held that the responsibility of a city or county for the violence of a mob depends upon its size or formidable character, or that the failure of the civil authorities to suppress it, or that their calling upon the military authorities for aid relieved them from liability.

History furnishes three notable instances which go far to establish the contrary view. The first one to which I refer was the "No Popery" riots of London, in June, 1780. This was the most extensive riot of which we have any record. For several days, the mob, numbering sixty thousand persons, had complete control of London. The authorities were paralyzed. The immediate cause of the tumult was the presentation of a petition by Lord George Gordon to Parliament for the repeal of Sir George's Saville's Act for the relief of Catholics. The riot commenced on June 2d, and continued until June 8th. It was



not confined to the city of London, but spread throughout the kingdom. The whole city was in a state of anarchy. On the evening of June 6th, thirty-six different fires were raging, caused by the mob. The famous prisons of the Fleet and King's Bench were fired, and the prisoners released; all the public buildings threatened; many private houses sacked, that of the chief magistrate of the highest criminal court in the kingdom, Lord Mansfield, whose furniture, pictures, books, and papers were burned. More than four hundred and fifty persons were killed. It was only by the vigorous use of the military power that the mob was finally subdued. The Courts of England held that the loss fell within the statute, and the respective hundreds were liable. . . .

The Act of 1841 is both a remedial and penal statute. It is remedial, so far as it provides for compensation to the person whose property has been destroyed, and penal, so far as it throws the burden of that compensation upon the municipality within whose borders the destruction took place. It is but an extension of the ancient English law, which made the inhabitants of the respective hundreds responsible for robberies committed therein. Formerly, as we have seen, a person robbed had his remedy against any inhabitant of the hundred; that is to say, the inhabitants were jointly and severally liable. Then the law was so changed, that damages recovered against an individual could be assessed against all the inhabitants, so as to compel contribution. Afterwards it was still further modified so as to give the right of action against the hundred. The principle upon which this legislation rested was that every political subdivision of the State should be responsible for the public peace and the preservation of private property; and that this end could be best subserved by making each individual member of the community surety for the good behavior of his neighbor and for that of each stranger temporarily sojourning among them. The effect was to make each citizen a detective, and on the alert to prevent as well as to detect and punish crime. There was no exception in favor of robberies committed by overwhelming numbers, and by such a show of force as to overawe and overpower the limited constabulary of the hundred, or such as were committed by strangers. In either case the hundred was liable to the person robbed, however difficult or impossible it might be for the inhabitants to anticipate or prevent it. It was evidently a police regulation, based upon grounds of public policy, and enforced without regard to the hardships of particular cases. Our Act of 1841 is also a police regulation, and rests upon like grounds of policy. . . .

It may seem a harsh rule to hold a community responsible for the effects of mob violence, which apparently, at least, they had no power to prevent; yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing, and had no means of arresting. In both cases it is a police regulation. It is

based upon the theory, that with proper vigilance the act might and ought to have been prevented. That this is true with mobs, as a general rule, is well known. A mob is always cowardly, and usually of slow growth. It increases in size and courage just in proportion as the authorities evince hesitation or timidity. That this hesitation is often the result of indifference, if not of open sympathy, is unfortunately too true. It is rare that a mob is without a large body of sympathizers at its commencement. This is because its fury is generally directed against an unpopular object. In populous communities, especially in large cities, there are always antagonisms of race, religion, politics, or social condition, which enable the demagogue to fan the fires of popular discontent, and incite the disorderly to acts of violence. It is because of this sympathetic feeling that mobs are often enabled to get the mastery, the fact being overlooked that a mob, when once aroused and maddened by success, becomes, like a wild beast, dangerous alike to friend and foe. There is nothing upon the face of this record to show that the Pittsburgh riots of 1877 were an exception to this rule. We see no evidence of any serious attempt upon the part of the local authorities to suppress it at the time of its commencement. A feeble attempt was made by the sheriff, resulting in the enrolment of some half-dozen deputies. But there was no proclamation calling the body of the county to come to his assistance, in preserving the public peace. No one doubts at this day that if a proper effort had been made at the proper time, the mob could have been held in check. No one doubts that it would have been, had the citizens of the county realized that they were responsible for the loss. But this Act of Assembly, folded away among the pamphlet laws, was probably forgotten or overlooked, even by those who knew of its existence. In the end, the mob that had defied the military power was put down in the main by the civil authorities, after the citizens had been aroused by a sense of common danger. The law will not tolerate the spectacle of a great city looking on with indifference, while property to the value of millions is being destroyed by a mob. To prevent just such occurrences was one of the objects of the Act of 1841. The fact that the State, when called upon, rendered its assistance, and sent a portion of its military to the scene, did not absolve the county from its implied obligation to preserve the peace, nor from its responsibility for a neglect of that duty. Were it otherwise, it might be to the interest of a municipality to increase the size of the mob. . . .

The learned judge was right in rejecting the offers of evidence embraced in the second, third, and fourth specifications. It is manifest that if received they would not have amounted to a defence.

Upon all the points presented, the law is against the county. The judgment, therefore, must be affirmed.<sup>1</sup>

<sup>1</sup> [TOPIC 3. PROBLEMS:

A city ordinance required hotel-keepers to provide fire-escapes. The defendant's hotel was not provided with them. A fire broke out, and the plaintiff's

**Topic 4. Sundry Special Responsibilities**

**416. HILL v. METROPOLITAN ASYLUM DISTRICT**

HOUSE OF LORDS. 1881

*L. R. 6 App. Cas. 193*

[Printed *ante*, as No. 28.]

**417. PITTSFIELD COTTONWEAR MANUFACTURING COMPANY v. PITTSFIELD SHOE COMPANY**

SUPREME COURT OF NEW HAMPSHIRE. 1902

*71 N. H. 522, 53 Atl. 807*

EXCEPTIONS from Superior Court; STONE, Judge.

Action by the Pittsfield Cottonwear Manufacturing Company against the Pittsfield Shoe Company. There was an order overruling a demurrer to the declaration, and defendants except. Exceptions overruled.

Case for negligence. The declaration states the following facts: The plaintiffs occupy a part of the lower floor of a mill building, called the "Drake & Sanborn Mill," consisting of a basement, three stories, and an attic. The remainder of the mill was in the possession of the Drake & Sanborn Shoe Company, though the attic was in fact unoccupied. The plaintiff's occupancy was under rental from the Drake & Sanborn Company, and began April 1, 1900. The defendants occupied another mill building, distant about 150 feet from the Drake & Sanborn building. Between the two mill buildings was a boiler house, containing boilers and an engine designed to furnish heat and power to the two mills. The boilers were connected by piping with the different floors of each

intestate, a guest in the hotel, was burned to death. If his life was lost in consequence of the lack of fire-escapes, is the defendant responsible? (1898, *Weeks v. McNulty*, 101 Tenn. 495, 48 S. W. 809.)

NOTES:

"Liability of water company to property owner." (A. L. Reg., LVIII, 555.)

"Liability to stranger for non-performance or negligent performance of contract: Failure to supply water in case of fire." (H. L. R., XX, 242.)

"Liability of water company for fire losses." (M. L. R., IV, 540.)

[ESSAYS:

*Edson R. Sunderland*, "Liability of Water Companies for Fire Losses." (M. L. R., III, 442.)

*Albert M. Kales*, "Liability of Water Companies for Fire Losses; Another View." (M. L. R., III, 501.)

*Arthur L. Corbin*, "Liability of Water Companies for Losses by Fire." (Y. L. J., XIX, 425.)]

mill, so that each mill could be supplied with steam and heated. The system was so constructed that the steam could be admitted to or shut off from either mill, and each floor of each mill building, as desired. The Drake & Sanborn mill was supplied, as a protection against fire, with an automatic sprinkler service, consisting of a system of pipes kept constantly filled with water under pressure. To keep the water in the pipes from freezing, bursting the pipes, and escaping and subjecting the machinery and stock in the mill to injury by water, it was necessary the buildings should be warmed at all times in cold weather. December 1, 1897, the defendants entered into a contract with the Drake & Sanborn Company to operate the boilers and furnish sufficient steam at all times to the heating pipes in the Drake & Sanborn mill to so warm the building that the water in the sprinkler pipes would not freeze. Under this contract the defendants had exclusive charge and control of the boiler house and the management of the heating plant therein contained. Upon the night of January 19-20, 1901, while this contract was in force and the defendants had the management of the boiler house and boilers, they carelessly permitted the fire to go out so that no steam was supplied for heat to the Drake & Sanborn mill, in consequence of which a sprinkler pipe in the attic of the mill froze and burst, and the escaping water flowed down through the mill into the lower story, and injured the plaintiffs' goods which were there stored. There were no means of heating the Drake & Sanborn mill except by steam from this boiler house. The plaintiffs knew of the defendants' contract with the Drake & Sanborn Company, and relied upon their faithful performance of it. Upon the foregoing facts the declaration alleges that it was the duty of the defendants to exercise reasonable care and prudence in the management of the boiler house and in the maintenance of a proper fire under the boilers, and to furnish sufficient steam to heat the Drake & Sanborn mill and to prevent the freezing of the water in the pipes therein, and that if the defendants had exercised such care the pipes would not have frozen and burst, and the plaintiffs would not have been damaged. The defendants' demurrer was overruled at the October term, 1901, of the Superior Court, subject to exception.

*Sargent, Niles, & Morrill*, for the plaintiffs.

*Albin & Shurtleff*, for the defendants. This is an action of tort, and it cannot be maintained unless the defendants have violated some duty which they owed to the plaintiffs. . . . A legal duty is created in only three ways: (1) by the common law, (2) by statute, and (3) by contract. The character of the duties arising from common law are various but limited, while the persons to whom the duty is owed are unlimited; and any one injured by the violation of such duties may sue therefor. Of this class, public duties and the duty of refraining from the maintenance of a public nuisance are the principal and most common. Duties arising from statutes are limited in character and as to persons by the intent of the Legislature. Duties arising from

contract are limited in the same respects by the intent of the parties to the contract. . . . The distinction between these [last two] cases does not seem to make them different in principle. In each class the defendants had certain duties under a contract or statute; they did not perform them, and injury resulted to the plaintiffs, who were not contracting parties; and in all of the cases the injury resulted directly from the violation of the duty. In all these cases there is a common characteristic; the negligence was of *omission*, and not of commission. The defendants merely neglected to do something which, but for a contract or statute, they would have been perfectly free to neglect. That characteristic is also found in the case at bar. . . . A person responsible for certain conditions on account of which, if due care is not exercised, injury may result, is bound to exercise such care; but a person not responsible for such conditions has no legal duty to *prevent* injury. A is legally and rightfully cutting down a tree, and, as it is about to fall, B runs in where the tree falls upon him; A negligently fails to warn B, or support the tree and keep it from falling, which he could easily have done; A is responsible for the injury to B. A is standing near a tree which is about to fall, but through no agency of his; B runs in where the tree falls upon him, but A carelessly fails to warn B, or to do anything to prevent the tree from falling, although he could have done so without danger to himself; A is not liable for an injury resulting to B. The act of negligence in both cases is exactly the same, yet in one case A is liable and in the other he is not. What is the distinction? Simply this: In the first instance A was responsible for the condition of things from which, on account of want of due care, the injury resulted; in the second case he was not responsible, and as a consequence owed no duty toward B to prevent his injury.

It is in a broad sense that we use the word "omission," as distinguished from "commission." The defendants omitted from the very beginning, as did A in the second illustration. . . . In no case has the defendant been held liable for negligence unless in the first instance responsible for the dangers of the situation. . . . In all the cases cited in the defendants' brief, as well as in the plaintiffs', the party held liable had control and possession of the very force or thing that caused the injury, thus being responsible for the dangerous situation; while in every case where the defendant did not have such control and possession, and so was not responsible for the dangerous situation, he was not liable, however gross or seemingly proximate his carelessness. . . . The defendants were not responsible for the dangerous situation. They were not responsible for the cold night, nor for the pipes, nor for the plaintiffs' occupancy. These were the combined elements that brought about the injury, and over none of them had the defendants any control. As the defendants were not responsible for the dangerous situation, they owed no common-law duty to prevent injury therefrom.

PARSONS, C. J. . . . It has been said that, in ascertaining the "con-

tent of the law," "legal duties come before legal rights" (Holmes, Com. Law, 219); but in the administration of the law there must be found a correlative existence of rights and duties. If there is no wrong without a remedy, there can be no invasion of a legal right for which the law affords a remedy, unless there exists at the same time a legal duty upon some one to prevent or abstain from such invasion. The wrong to the plaintiffs being the incursion of water upon their premises, the next inquiry, in a philosophical search for a remedy, is: Upon whom does the law, upon these facts, impose the duty of preventing the invasion by water from which the plaintiffs suffered?

In the attic of the Drake & Sanborn mill, for a lawful purpose, — protection against fire, — water was so confined and maintained that there was probability of injury to others if it escaped. Upon the parties responsible for the collection and maintenance of this water the law imposes the duty of exercising care to prevent its escape. The care and control of the premises upon which the dangerous condition existed having been surrendered by the owners to others, the responsibility for the failure to exercise such care and control rests with the guilty parties, and not with the owners. *Carter v. Berlin Mills*, 58 N. H. 52, 42 Am. Rep. 572. In this situation, the only duty of the Drake & Sanborn Company toward the plaintiffs — the only right which the plaintiffs could insist upon against them — was the exercise of care to prevent injury to them. . . . Their right to damages for their injury is not dependent upon the fact of lack of care in heating. Any carelessness by which the water escaped upon them to their injury would have sustained their action. . . .

It is alleged in the plaintiffs' declaration that it was the duty of the defendants to exercise care and prudence in the operation of the boilers, and to furnish sufficient steam to heat the Drake & Sanborn mill, and to prevent the freezing of the water in the pipes therein. As the duty, the breach of which constitutes actionable negligence, is one imposed by law, the mere allegation of the duty is insufficient to establish it. The question remains whether upon the facts stated the law imposes the duty. 1 Ch. Pl. 370; *Seymour v. Maddox*, 16 Q. B. 326; *Kennedy v. Morgan*, 57 Vt. 46; *Safe Co. v. Ward*, 46 N. J. Law, 19, 23.

It is alleged that at the time of the injury complained of the defendants were under contract with the Drake & Sanborn Company to furnish sufficient steam to heat their mill; but this allegation does not make out a cause of action in favor of these plaintiffs against the present defendants. It discloses a duty on the part of the defendants to heat the building; but this duty was to the Drake & Sanborn Company, and to no one else. Nothing is better settled than that an action will not lie in favor of any third party for a breach of duty so created. *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Longmeid v. Holliday*, 6 Exch. 761; *Heaven v. Pender*, 11 Q. B. Div. 503. The plaintiffs concede in argument that no recovery can



be had upon any duty imposed by force of the contract, and that the recovery, if had, must be based upon a duty imposed by law under the circumstances, without reference to the contract. . . . It may safely be said that in no case has recovery been permitted where the action, though in form for tort, was in substance merely for a breach of the warranty in the contract of the defendant with a third person. *Murch v. Railroad Corp.*, 29 N. H. 9, 34, 61 Am. Dec. 631; *Patterson v. Colebrook*, Id. 94, 102. The action has been deemed maintainable only when the act complained of could be seen to be the breach of a legal duty owed from the defendant to the person injured, without any reference to the warranties of the contract. The plaintiffs, therefore, cannot recover upon the ground that the defendants failed to do as they agreed with the Drake & Sanborn Company. . . .

The claim presented by the declaration is not merely for furnishing an insufficient supply of steam, but it is for the negligent and unskillful management of machinery designed to protect all of the occupants of the building from the danger from which the plaintiffs suffered. It is also alleged that the exercise of ordinary care in the management of the boilers would have prevented the injury, and that the defendants were at the time in the sole and exclusive possession of the heating machinery, and were operating it. "The duty to *do* no wrong is a legal duty. The duty to *protect against* wrong is, generally speaking and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law." *Buch v. Manufacturing Co.*, 69 N. H. 257, 261, 44 Atl. 809, 811, 76 Am. St. Rep. 163. The mere possession, therefore, of the means by which harm could be averted from the plaintiffs imposed upon the defendants no legal obligation to protect them. Possession merely of the boiler house and machinery did not impose upon the defendants any legal obligations to put the heating devices in operation.

But the declaration goes further, and alleges that the defendants were in fact operating the machinery, and the negligence relied upon is the want of skill and care in what the defendants were assuming to do. Assuming to operate the machinery for the purpose for which it was designed, — to protect all the occupants of the building, including the plaintiffs, — the law imposes upon the defendants, by force of such assumption, the obligation to exercise ordinary care and skill in doing what they attempted to do. *Edwards v. Lamb*, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160; *Gill v. Middleton*, 105 Mass. 477, 479, 7 Am. Rep. 548; *Baird v. Daly*, 57 N. Y. 236, 240, 241, 15 Am. Rep. 488. This obligation arises, not from the contract, but from the action undertaken. There is a privity, not of contract, but of duty. It may be conceded that no liability would attach if the defendants, in violation of their contract, had ceased to manage the boilers. The charge is of negligent management while still in control; the duty violated is the obligation to exercise care so long as they retained control. Upon the facts stated in the declaration, the case is as if the defendants had

assumed to hold closed a valve which, closed, prevented the flow of water into the plaintiffs' premises. Knowing that if the water escaped harm would result to others, the duty would rest upon them — at least, toward all for whose protection the device they assumed to operate was designed — to exercise care in what they did. They could not carelessly abandon their voluntarily assumed duty.

In the present case, upon the facts alleged, the defendants were holding back the water by supplying heat. While under no obligation, so far as the plaintiffs were concerned, to furnish heat or hold back the water, they could not suddenly cease from their self-appointed task without care as to what might happen from such action. . . .

The ground of the defendants' liability to others is explained upon the analogy of the liability of a servant to third parties. As a general rule, a servant or agent who has contracted to perform a duty owed by his master or employer is liable only to his employer for mere failure to perform such duties, and is not liable to third parties. *Wilson v. Rich*, 5 N. H. 455; *Hill v. Caverly*, 7 N. H. 215, 26 Am. Dec. 735; *Denny v. Manhattan Co.*, 2 Denio, 115; *Id.*, 5 Denio, 639; *Murray v. Usher*, 117 N. Y. 542, 546, 547, 23 N. E. 564; *Lane v. Cotton*, 12 Mod. 473, 478; 1 Ch. Pl. 75; Story, Ag. §§ 308, 309; 1 Shear. & R. Neg. § 243. The principle is the same as in the cases cited as to the construction of a machine under contract with a third party. The liability cannot arise out of the engagements of the contract, but only from such duty as the law implies from the use and possession of the tools and appliances of the master. So long as the servant does nothing, his contract creates no liability to third persons, but the moment he enters upon the work the obligation of care arises. He cannot create a dangerous situation, and suddenly abandon the work without care for the danger of others. He is bound to the same obligation of care in stopping the machine as in starting it. *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Id.*, 137 Mass. 1. . . .

The defendants' knowledge of the plaintiffs' situation and the character of the probable damage to their property by water may be important upon the question whether the defendants acted with ordinary care under all the circumstances as they knew or ought to have known them. If the plaintiffs consider an amendment of the declaration as suggested advisable, application for leave to make such amendment can be made to the Superior Court.

Exception overruled. All concurred.<sup>1</sup>

<sup>1</sup> [TOPIC 4. PROBLEMS:

The defendant was master of a ship. The health officers boarded it at the port and placed about in various parts of the ship a fumigating substance, which was poisonous to drink. The poison-pans were placed in the passengers' wash-basins and drinking-cups. After the health officers left, the ship's steward failed to remove a poison-pan left in the plaintiff's utensils. On the return of the passengers to their rooms, the plaintiff's child drank of the poison and died. Is the defendant responsible? (1876, *Kennedy v. Ryall*, 67 N. Y. 380.)

The plaintiff's intestate fell from the rear platform of the defendant's train

when in motion, at night. The next train ran over him. The employees of the first train were not negligent as to his fall, nor those of the second train as to running over him; but the former did not stop the train to search for him, nor wire the next train to look out for him. Is the defendant responsible? (1892, *Railroad Co. v. Kassen*, 49 Oh. 230, 31 N. E. 282.)

The defendant owned certain fair grounds, and leased a lot to W. for a shooting-gallery. The gallery's target arrangements being unsafe, a stray bullet struck the plaintiff who was standing on the railroad platform outside a fence at the back of the gallery. Is the defendant responsible? (1902, *Thornton v. Maine State Agric. Soc.*, 97 Me. 108, 53 Atl. 979.)

The defendant owned and managed a saloon and pool-room. M. and others, guests there, became disorderly. After a quarter of an hour of continuous brawl, during which the defendant was present and aware, M. and the others violently rushed about the room in their fight. The plaintiff was quietly playing in a game of pool. One of the fighters struck him a terrible blow in one eye, destroying it, and impairing the sight of the other eye. Is the defendant responsible? (1909, *Moone v. Smith*, 135 Ga. —, 65 S. E. 712.)

A railroad company, in pursuance of a contract to care for its sick employees, took charge of an employee afflicted with smallpox, and hired a nurse and watchman to care for him, through whose negligence he escaped while delirious, and communicated the contagion to the plaintiff. Is the defendant responsible? (1902, *Missouri K. & T. R. Co. v. Wood*, 95 Tex. 223, 66 S. W. 449, 68 id. 802.)

The defendant kept a bathing-resort. The plaintiff's intestate entered and went swimming. His life was lost for lack of bathing-guards to patrol the water and rescue in case of danger. Is the defendant responsible? (1905, *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 83 Pac. 686.)

The plaintiff lent to the defendant his safe with combination lock. The defendant on demand returned it, but locked it with a secret combination known only to himself, so that the safe was useless to the plaintiff, and the defendant refused to disclose the combination. May the plaintiff recover damages? (1862, *Neff v. Webster*, 15 Wis. 311.)

The plaintiff was a miner employed by the C. J. Co., and with other workmen paid \$1 a month for medical attendance, which was paid to the defendant physician through the office of the C. J. Co. The plaintiff's child fell into the fire and was burned. The plaintiff called upon the defendant for his services. The defendant refused to come, and the child died. The plaintiff, on bringing suit, was required to elect whether he would sue in tort or in contract; he elected the former; and amended his petition so as to sue as administrator of the child. May he recover? (1910, *Randolph's Adm'r v. Snyder*, 139 Ky. —, 129 S. W. 562.)

The plaintiff's house caught fire from a shed of the defendant's in which tramps had kindled a fire. The shed was a light wooden structure, alongside of the defendant's track and the plaintiff's house; and it could have been dragged away by a cable attached to an engine. The defendant's engine was on the track with steam up, and the plaintiff requested the defendant to drag the house away before the fire spread. The defendant declined, and the plaintiff's house then caught fire. Is the defendant responsible? (1907, *Beckham v. Seaboard A. L. R. Co.*, 127 Ga. 550, 56 S. E. 638.)

#### NOTES:

"Liability for escape of smallpox patient and infection of third persons." (H. L. R., XVI, 133.)

#### ESSAYS:

*Francis H. Bohlen*, "The Basis of Affirmative Obligations in the Law of Tort." (A. L. Reg. 44 N. S., 53 O. S., 209, 273, 337.)

*Francis H. Bohlen*, "The Moral Duty to aid others as a Basis of Tort Liability." (A. L. Reg., 47 N. S., 56 O. S., 217, 316.)]

**TITLE C: CULPABLE CAUSATION****SUB-TITLE (I): GENERAL PRINCIPLES****Topio 1. Intent and Negligence, in General**

420. JOHN AUSTIN. (4th ed., Campbell; Lect. XXIV, vol. I, pp. 433, 434, 440, 474.) The bodily movements which immediately follow our desires of them are acts (properly so called). But every act is followed by consequences; and is also attended by concomitants, which are styled its circumstances. To desire the act is to will it. To expect any of its consequences is to intend those consequences. . . .

The agent may not intend a consequence of his act. In other words, when the agent wills the act, he may not contemplate that given event as a certain or contingent consequence of the act which he wills. For example: My yard or garden is divided from a road by a high paling. I am shooting with a pistol at a mark chalked upon this paling. A passenger then on the road, but whom the fence intercepts from my sight, is wounded by one of the shots. For the shot pierces the paling; passes to the road; and hits the passenger. Now, when I aim at the mark, and pull the trigger, I may not intend to hurt the passenger. I may not contemplate the hurt of a passenger as a contingent consequence of the act. For though the hurt of a passenger be a probable consequence, I may not think of it, or advert to it, as a consequence. Or, though I may advert to it as a possible consequence, I may think that the fence will intercept the shot and prevent it from passing to the road. Or the road may be one which is seldom travelled, and I may think that the presence of a passenger at that place and time extremely improbable. On any of these suppositions, I am clear of intending the harm; though (as I shall show hereafter) I may be guilty of heedlessness or rashness. . . . Though he expect them not, they [the consequences of a man's acts] are rationally imputed to him, provided he would have expected them if he *had* thought of them and of his duty. Where he does the act without adverting to those consequences, he is clear of intending these consequences: but he produces them by his heedlessness. . . .

Intention, negligence, heedlessness, or rashness is an essentially component part of injury or wrong; of guilt or imputability; of breach or violation of duty or obligation. Whether the act, forbearance, or omission constitute an injury or wrong, or whether the party be placed by it in the predicament of guilt or imputability, partly depends upon his consciousness with regard to it or its consequences, at and before the time of the act, forbearance, or omission. Unless the party intended, or was negligent, heedless, or rash, the act, forbearance, or omission is not an injury or wrong.

421. OLIVER WENDELL HOLMES, JR. *The Common Law*. (1881, pp. 131-163, in part.) It remains to be seen whether thus fraudulent, malicious, intentional, and negligent wrongs can be brought into a philosophically continuous series. . . . Foresight is a possible common denominator of wrongs at the two extremes of malice and negligence. . . . When a man foresees that harm will result from his conduct, the principle which exonerates him from accident no longer applies, and he is liable. But as has been shown, he is bound to foresee whatever a prudent and intelligent man would have foreseen, and therefore he is liable for conduct from which such a man would have foreseen that harm

was liable to follow. Accordingly, it would be possible to state all cases of negligence in terms of imputed or presumed foresight. . . .<sup>1</sup>

Taking knowledge, then, as the true starting-point, the next question is how to determine the circumstances necessary to be known in any given case in order to make a man liable for the consequences for his act. They must be such as would have led a prudent man to perceive danger, although not necessarily to foresee the specific harm. But this is a vague test. How is it decided what those circumstances are? The answer must be by experience. . . . I therefore repeat, that experience is the test by which it is decided whether the degree of danger attending given conduct under certain known circumstances is sufficient to throw the risk upon the party pursuing it. For instance, experience shows that a good many guns supposed to be unloaded go off and hurt people. The ordinarily intelligent and prudent member of the community would foresee the possibility of danger from pointing a gun which he had not inspected into a crowd, and pulling the trigger, although it was said to be unloaded. . . . The question what a prudent man would do under given circumstances is then equivalent to the question what are the teachings of experience as to the dangerous character of this or that conduct under these or those circumstances; and as the teachings of experience are matters of fact, it is easy to see why the jury should be consulted with regard to them. . . . The cases in which a man is treated as the responsible cause of a given harm, on the one hand, extend beyond those in which his conduct was chosen in actual contemplation of that result, and in which, therefore, he may be said to have chosen to cause that harm; and on the other hand, they do not extend to all instances where the damages would not have happened but for some remote election on his part. . . . The question in each case is whether the actual choice, or, in other words, the actually contemplated result, was near enough to the remoter result complained of to throw the peril of it upon the actor. . . .

The philosophical analysis of every wrong begins by determining what the defendant has actually chosen, that is to say, what his voluntary act or conduct has been, and what consequences he has actually contemplated as flowing from them, and then goes on to determine what dangers attended either the conduct under the known circumstances, or its contemplated consequences under the contemplated circumstances. . . . The defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct.

422. JOHN W. SALMOND. *Jurisprudence, or the Theory of the Law*. (2d ed., 1907, § 140.) When I consciously expose another to the risk of wrongful harm, but without any desire to harm him, and harm actually ensues, it is inflicted not wilfully (since it was not intended), nor inadvertently (since it was foreseen as possible or even probable), but nevertheless negligently. . . . Negligence, therefore, essentially consists in the mental attitude of undue indifference with respect to one's conduct and its consequences.

This being so, the distinction between intention and negligence becomes clear. The wilful wrongdoer desires the harmful consequences, and therefore does the act in order that they might ensue. The negligent wrongdoer is careless (if not wholly, yet unduly) whether they ensue or not, and therefore does

<sup>1</sup> [L. C. J. ELLENBOROUGH, in *Townsend v. Wathen* (1808), 9 East 277, 280. "Every man must be taken to contemplate the probable consequences of what he does."]



the act notwithstanding the risk they may ensue. The wilful wrongdoer is liable because he desires to do the harm; the negligent wrongdoer is liable because he does not sufficiently desire to avoid it. He who will excuse himself on the ground that he meant no evil is still open to the reply: "Perhaps you did not, but at all events you might have avoided it, if you had sufficiently desired to do so; and you are held liable not because you desired the mischief, but because you were careless and indifferent whether it ensued or not."

Negligence, as so defined, is rightly treated as a form of "mens rea," standing side by side with wrongful intention as a formal ground of responsibility.

**Topic 2. Tests of Negligence; Limits of Responsibility (Proximate Cause, Probable Consequences, Reasonableness, etc.)**

423. THOMAS AQUINAS (1225-1274). *Summa Theologica*. Pars prima, Questio XIV, Art. XIII (2d Rom. ed., 1894, vol. I, p. 141). "Quidquid est causa causae ut causae, est causa causati." Omnis conditionalis, cujus antecedens est necessarium absolute, consequens est necessarium absolute. . . .

*Sed contra*. . . . Ad primum, ergo dicendum, quod, licet causa suprema sit necessaria, tamen effectus potest esse contingens propter causam proximam contingentem. Sicut germinatio plantae est contingens propter causam proximam contingentem, licet motus solis, qui est causa prima, sit necessarius. . . . Nec tamen sequitur, ut quidam dicunt, quod consequens sit necessarium absolute quia antecedens est causa remota consequentis, quod propter causam proximam contingens est. Sed hoc nihil est; esset enim conditionalis falsa, cujus antecedens esset causa remota necessaria et consequens effectus contingens; ut puta, si dicerem: Si sol movetur, herba germinabit.

*Ibid*. Pars prima, secundae partis, Quaestio XX, Art. V (2d Rom. ed., vol. II, p. 177). "Utrum eventus sequens aliquid addat de Bonitate, vel Malitia ad exteriorem actum." Videtur, quod eventus sequens addat ad bonitatem vel malitiam actus. . . . *Sed contra*, Eventus sequens non facit actum malum, qui erat bonus, nec bonum, qui erat malus: puta si aliquis det eleemosynam pauperi, qua ille abutatur ad peccatum, nihil deperit ei, qui eleemosynam facit.

Respondeo dicendum, quod eventus sequens aut est praecogitatus, aut non, si est praecogitatus, manifestum est, quod addit ad bonitatem vel malitiam actus: cum enim aliquis cogitat, quod ex opere suo multa mala possunt sequi, nec propter hoc dimittit, ex hoc apparet voluntas ejus esse magis inordinata. Si autem eventus sequens non sit praecogitatus, tunc distinguendum est; quia, si per se sequitur ex tali actu, et ut in pluribus, secundum hoc eventus sequens addit ad bonitatem, vel malitiam actus. Si vero per accidens, et ut in paucioribus, tunc eventus sequens non addit ad bonitatem vel ad malitiam actus; non enim datur judicium de re aliqua secundum illud quod est per accidens, sed solum secundum illud quod est per se.

*Ibid*. Pars prima, secundae partis, Quaestio LXXIX, Art. I (2d Rom. ed., 1894, vol. II, p. 572). 3. Praeterea. Quidquid est causa causae, est causa effectus: sed Deus est causa liberi arbitrii, quod est causa peccati; ergo Deus est causa peccati. . . . *Sed contra*. . . . Ad tertium, dicendum, quod effectus causae mediae procedans ab ea, secundum quod subditur ordini causae primae, reducitur etiam in causam primam: sed si procedat a causa media, secundum quod exit ordinem causae primae, non reducitur in causam primam: sicut si minister faciat aliquid contra mandatum domini, hoc non reducitur in dominum, sicut in causam; et similiter peccatum, quod liberum arbitrium committit contra praeceptum Dei, non reducitur in Deum, sicut in causam.



BARTOLUS DE ALFANIS (1314–1357). *Commentaria* (ed. 1562, Lib. IV, p. 103, Secunda super Infortiato). *De Auro et Argento legato*. Causa intelligitur de proxima et immediata, et etiam de remota et mediata hoc dicitur. Ego intelligo istud verum de causa mediata non multum. . . . Causa enim multum remota est magis occasio quam causa.

JACOBUS CUJACIUS (1522–1590). *Recitationes Solemnes*. (Opera, ed. 1658, vol. V, p. 171). *Codex*, lib. II, tit. XXXI, lex 3. Quid vero vocat causam proximam actionis? Causa proxima actionis est, quae est peculiaris & propria actionis, Aristoteles lib. 8. *Metaphysicorum cap. 4*. tractans de prima causa: *δεῖ δὲ τὰ ἐγγύτατα αἰτία λέγειν. τίς ἢ ὕλη; μὴ πῦρ ἢ γῆ, ἀλλὰ τὴν ἰδίαν*. id est: *Siquis quaesierit quae sit materia hominis, debet adferre proximam causam, non dicere materiam esse ignem, materiam esse terram: nam quae est propria, ea est proxima. . . .* Sic etiamsi rem vindicationis huius causa quidem propria est legatum, ergo proxima causa communis est dominium; ergo haec est remota causa.

J. E. J. MUELLER. *Promptuarium Juris Novum* (1733, vol. II, p. 428). *Damnum*. 6. Non tantum, qui damnum ipse intulit, sed et is, qui occasionem damni praestitit, non tantum immediatam et proximam, sed et mediatam et remotam, de illo resarciendo tenetur. 7. Quicumque occasionem praestat, ille damnum fecisse videtur et ad illud resarciendum tenetur, modo exinde sive in mediate et proxime, sive mediate damnum sequatur, ita vt causa per se ad damnum producendum apta et ordinata sit. . . . 15. Condemnatus ad damnum datum resarciendum illud resarcire non tenetur, quod non immediate ex facto ipsius, sed causa mere extrinseca et occasionali provenit.

J. J. BURLAMAQUI. *Principles of Natural and Politic Law* (Transl. Nugent. 3d ed. 1784. Vol. I, pp. 238, 241; Part I, c. III). *Principle of Imputability*. Imputation is properly therefore a judgment by which we declare, that a person being the author or moral cause of an action commanded or forbidden by the laws, the good or bad effects that result from this action, ought to be actually attributed to him; that he is consequently answerable for them, and as such is worthy of praise or blame, of recompence or punishment. . . . When we impute an action to a person, we render him, as has been already observed, answerable for the good or bad consequences of what he has done. From thence it follows, that in order to make a just imputation, there must be some necessary or accidental connection between the thing done or omitted, and the good or bad consequences of the action or omission; and besides, the agent must have had some knowledge of this connection, or at least he must have been able to have a probable foresight of the effects of his action. Otherwise the imputation cannot take place, as will appear by a few examples. A gunsmith sells arms to a man who has the appearance of a sensible, sedate person, and does not seem to have any bad design; and yet this man goes instantly to make an unjust attack on another person, and kills him. Here the gunsmith is not at all chargeable, having done nothing but what he had a right to do; and besides, he neither could nor ought to have foreseen what happened. But if a person carelessly leaves a pair of pistols charged on a table, in a place exposed to everybody, and a child insensible of the danger happens to wound or kill himself; the former is certainly answerable for the misfortune: by reason that it was a clear and immediate consequence of what he has done, and he could and ought to have foreseen it.<sup>1</sup>

[<sup>1</sup> The contrast of "proximate" and "remote" cause, as used by Aquinas, appears frequently elsewhere in the civilian jurists of A. D. 1300–1600; e. g.

424. SIR FRANCIS BACON. *De Augmentis Scientiarum*. (1623. Works, ed. Spedding, II, 267.) Book III, cap. IV. *Necesse est, ut vera differentia harum sumatur ex natura causarum quas inquirunt. Itaque absque aliqua obscuritate aut circuitione, Physica est quae inquit de Efficiente et Materia; Metaphysica quae de Forma et Fine.* (Note by Mr. Ellis.) The classification of causes here referred to is Aristotle's. . . . In order to apprehend its nature, it is necessary to take the word "cause" in a wider signification than is ordinarily done. The "efficient" cause is that which acts; the "material" cause, that which is acted on; as when the fire melts wax, the former is the efficient, the latter the material cause of the effect produced. The "formal" cause is that which in the case of any object determines it to be that which it is, and is thus the cause of its various properties. . . . The "final" cause is that for the sake of which any effect takes place, whether the agent is or is not intelligent.

SIR FRANCIS BACON. *Maxims of the Law*. (1596. Works, Spedding's ed., XIV, 189.) Regula I: "In jure non remota causa, sed proxima spectatur." It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree. . . . This rule faileth in covinous acts, which though they be conveyed through many degrees and reaches, yet the law taketh heed to the corrupt beginning, and counteth all as one corrupt act. . . . In like manner, this rule holdeth not in criminal acts, except they have full interruption; because when the intention is matter of substance and that which the law doth principally behold, there the first motive will be principally regarded, and not the last impulsion.

425. *GILMAN v. NOYES*. (1856. 57 N. H. 627, 631; an action for the value of sheep killed by bears, the sheep having escaped from the pasture when the defendant let down the bars, and the bears having killed the sheep after they wandered away.) *Ladd, J.*: The verdict here settles (1) that the bars were left down by the defendant; (2) that the sheep escaped in consequence thereof; (3) that they would not otherwise have been killed. Was the defendant's act the proximate cause of the damage? . . . That one of them would not have happened but for the happening of some other, anterior in point of time, doubtless goes somewhat in the direction of establishing the relation of cause and effect between the two. But no rule of law as to remoteness can, as it seems to me, be based upon that one circumstance of relation alone, because the same thing may very likely be true with respect to many other antecedent events at the same time. The human powers are not sufficient to trace any event to all its causes, or to say that anything which happens would have happened just as it did but for the happening of myriads of other things more or less remote and apparently independent. The maxim of the schoolmen, "*causa causantis, causa est causati*," may be true, but it obviously leads into a labyrinth of refined and

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*Bartolus* (Secunda super Digesta Vetera, II, 11); *id.* (Prima *ibid.*, I, 235); *Zasius* (Veteris Lecturae, de edendo, p. 258, ed. 1538). But in all these sources, and in those above quoted except Mueller and Burlamaqui, in the 1700's, it was applied to the "*causa*," or ground or consideration, of a conveyance or contract, and not to a "*damnum*," or tortious consequence. In the classic Roman law, the phrase was never used; *e. g.* Dig. VIII, 2, 30, 3 (a case under the Lex Aquilia), and Voet, Commentaries, ad loc. cit.; Vocabularium Jurisprudentiae Romanae, Vol. I, s. v. "*Causa*." In the modern Continental law, the idea is well understood, but not the phrase; *e. g.* Dernburg, Pandekten, Vol. II, § 45.]

bewildering speculation whither the law cannot attempt to follow. This case furnishes an illustration. The jury say the sheep would not have been killed by bears but for their escape, and would not have escaped but for the bars being left down. But it is equally certain, without any finding of the jury, that they would not have been killed by bears if the bears had not been there to do the deed; and how many antecedent facts the presence of the bears may involve, each one of which bore a causative relation to the principal fact sufficiently intimate so that it may be said the latter would not have occurred but for the occurrence of the former, no man can say. Suppose the bears had been chased by a hunter, at any indefinite time before, whereby a direction was given to their wanderings which brought them into the neighborhood at this particular time; suppose they were repulsed the night before in an attack upon the bee-hives of some farmer in a distant settlement, and, to escape the stings of their vindictive pursuers, fled, with nothing but chance to direct their course, towards the spot where they met the sheep; suppose they were frightened that morning from their repast in a neighboring cornfield, and so brought to the place of the fatal encounter just at that particular point of time. Obviously, the number of events in the history not only of those individual bears, but of their progenitors clear back to the pair that, in instinctive obedience to the divine command, went in unto Noah in the ark, of which it may be said that but for this the sheep would not have been killed, is simply without limit. So the conduct of the sheep, both before and after their escape, opens a field for speculation equally profound and equally fruitless. It is easy to imagine a vast variety of circumstances, without which they would not have made their escape just at the time they did though the bars were down, or, having escaped, would not have taken the direction to bring them into the way of the bears just in season to be destroyed, as they were. Such a sea of speculation has neither shores nor bottom, and no such test can be adopted in drawing the uncertain line between consequences that are actionable and those which are not.

Some aid in dealing with this question of remoteness in particular cases is furnished by Lord Bacon's rule, "*In jure causa proxima, non remota spectatur*," and other formulas of a like description, because they suggest some boundaries, though indistinct, to a wilderness that otherwise and perhaps in the nature of things, has no limit.

426. *FLEMING v. BECK*. (1864. 48 Pa. 309, 313.) *Agnew, J.*: In strict logic it may be said that he who is the cause of loss should be answerable for *all* the losses which flow from his causation. But in the practical workings of society, the law finds, in this as in a great variety of other matters, that the rule of logic is impracticable and unjust. The general conduct and the reflections of mankind are not founded upon nice casuistry. Things are thought and acted upon rather in a general way, than upon long, laborious, extended, and trained investigation. Among the masses of mankind, conclusions are generally the results of hasty and partial reflection. Their undertakings, therefore, must be construed in a view of these facts; otherwise they would often be run into a chain of consequence wholly foreign to their intentions. In the ordinary callings and business of life, failures are frequent. Few, indeed, always come up to a proper standard of performance, — whether in relation to time, quality, degree, or kind. To visit upon them all the consequences of failure would set society upon edge, and fill the courts with useless and injurious litigation. It is impossible to compensate for all losses, and the law therefore aims at a just

discrimination, which will impose upon the party causing them, the proportion of them that a proper view of his acts and the attending circumstances would dictate.

427. *ATCHISON, TOPEKA, & SANTA FE R. CO. v. STANFORD*. (1874. 12 Kans. 354, 375; an action for damage done by a fire which was started by sparks in two different places and spread nearly four miles over the prairie.) *Valentine, J.*: [The question] is whether or not the injury to the plaintiff is not too remote to constitute the basis of a cause of action. The plaintiff in error claims, under the maxim, "*causa proxima, non remota, spectatur*," that it is . . . In the popular and ordinary sense the fire, however far it may go, is one continuous fire, — the same fire, — and is the proximate cause of all the injuries it may produce in its destructive march, whether it go one rod, or four miles.

This may not be strictly the case in the philosophical sense. A spark drops and sets fire to the grass, an inch in circumference; this to another inch; this to another, and so on, *ad infinitum*. The spark is the cause of the burning of the first inch, the first inch of the second, the second of the third, and so on, *ad infinitum*. The spark falling within a rod of the railroad track is not, philosophically speaking, the proximate cause of the burning of the hay-rick thirty rods distant. It is the proximate cause of the burning of the first inch of grass only, and the remote cause of the burning of the hay-rick. . . . But this sense of proximate and remote causes and effects is not the one adopted and used by the Courts. The Courts use the terms in a broader and more comprehensive sense. The Courts really use the terms in their ordinary and popular sense. . . . In law proximate and remote causes and effects do not have reference to time, nor distance, nor merely to a succession of events, or to a succession of causes and effects. A wrongdoer is not merely responsible for the first result of his wrongful act, but he is also responsible for every succeeding injurious result which could have been foreseen, by the exercise of reasonable diligence, as the reasonable, natural, and probable consequence of his wrongful act. He is responsible for any number of injurious results consecutively produced by impulsion, one upon another, and constituting distinct and separate events, provided they all necessarily follow from the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first, and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause. But whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequence must be deemed to be too remote to constitute the basis of a cause of action.

428. *WINCHEL v. GOODYEAR*. (1905. 126 Wis. 271, 105 N. W. 824, 827). *WINSLOW, J.*: The misconception which I fear is that they [*i. e.* certain cases cited] may be regarded as holding that there may be in the legal sense a first or an initial cause which is not the proximate cause; *i. e.*, that there may be a first or initial cause, setting in motion a subsequent chain of events resulting finally in the injury, which is not the responsible cause, but that some subsequent event may come into the chain and become the proximate or responsible cause. This idea is erroneous. I do not think it can be reasonably gathered from

the opinions in the two cases named, but I fear that there may be such an impression produced.

"First cause," "initial cause," "efficient cause," and "proximate cause," all mean the same thing in the law of negligence. They mean the cause acting first and immediately producing the injury, or setting other causes in motion, all constituting a natural and continuous chain of events each having a close causal connection with its immediate predecessor; the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, and the person responsible for the first event having reasonable ground to expect at the moment of his act or default that a personal injury to some person might probably result therefrom. There may be pre-existing conditions or events without which the final injury could not have happened, such as the momentary shying of a horse on a defective highway, the inadvertent and non-negligent misstep of a traveler into a dangerous excavation close to the sidewalk. . . . But none of these is to be deemed a cause of the final injury, any more than the mere presence of the injured person on the scene of the accident. They are not links, either initial or otherwise, in the legal chain of responsible causation, and should not be referred to as such, even though in ordinary non-legal parlance they might broadly be termed causes. They are mere circumstances or conditions either existing, or to be expected in the natural order of things to occur at any time.

429. HENRY T. TERRY. *Leading Principles of Anglo-American Law*. (1882, C. VIII, § 196, pp. 181, 189.) § 196. Reasonableness Depends upon the Party's Situation. When a person is called upon to make a reasonable choice this means one that is reasonable for him in his situation. It is true that the final decision whether or not the conduct was reasonable rests with the jury deciding *ex post facto*, and the party himself at the time of his act or omission must make at his peril the best guess that he can what a jury in case of any dispute will think about it. Yet the fact which the jury are to decide is whether his conduct was reasonable *for him in the circumstances* in which he was placed. There is no such thing as reasonableness *per se* independently of those facts. Moreover — and this is the most important proposition relating to this part of our subject — the facts which make up the situation are subjective and not objective facts. It is not the facts as they really exist in the outside world by which the reasonableness of a person's conduct must be tested, but, subject to certain qualifications, the facts as they appear to him. It is unreasonable, for example, to drive a heavily loaded wagon over a bridge that the person knows to be rotten and wholly unsafe; but if the bridge was apparently sound and was not known or believed to be otherwise, the very same act under precisely the same objective conditions might be perfectly reasonable. So one who has possession of a can of nitro-glycerine must in reasonableness use extreme care to prevent an explosion; but very different and objectively much more hazardous conduct would be equally reasonable, if he had been told and believed that the can contained condensed milk. . . .

§ 204. The Standard-Man Test. The principle above described is usually expressed by saying that the test of reasonableness, or "due care" the want of which is "negligence," is the conduct of a reasonable and prudent man in the party's situation. The knowledge and skill which the party actually has or which can be imputed to him make up the situation, while the other mental and moral qualities mentioned are not a part of the situation but are required to be



such as a reasonable and prudent man has; so that conduct which would be actually unreasonable on the part of a person in fact having such qualities in the situation is legally unreasonable for any given normal person.

The common expression is not strictly accurate, as the foregoing analysis shows, but it is often nearly enough so to use in charges to the jury, where all that is required is such a statement of the law as will lead them to a practically correct decision of the particular case in hand. Moreover its convenient brevity and its concreteness render it well calculated to make a clear impression upon the mind. For convenience, I shall hereafter refer to the collection of mental and moral attributes referred to in this as those of "standard man," and shall speak of duties which depend upon this criterion as "standard-man duties." A standard man is not an ideally perfect man, but an average one, a fair example of the community, — just such a person in fact as each juror is supposed to be. It is because the jurors are supposed to have themselves the qualities of a standard man that the question of reasonableness is left to them. They are able to say from their own minds without any evidence from outside how such a man would think and act in any given situation.<sup>1</sup>

### 430. RIGBY *v.* HEWITT

EXCHEQUER OF PLEAS. 1850

5 *Exch.* 240

CASE for negligence, for driving the defendant's omnibus, whereby it came in contact with another omnibus on which the plaintiff was sitting, and the plaintiff was thrown off and injured. Plea, Not guilty.

At the trial, before ROLFE, B., at the last Liverpool Assizes, it appeared that the plaintiff was a passenger outside an omnibus which, just before the accident, had started from Market Street, Manchester, at the same time as the defendant's omnibus. The drivers were competing for passengers, each endeavouring to get first; and while the

<sup>1</sup> [TOPIC 1. ESSAYS:

*Francis H. Bohlen*, "The Probable or the Natural Consequence as the Test of Liability in Negligence." (A. L. Reg., XL, 79, 148.)

*Prescott F. Hall*, "Some Observations on the Doctrine of Proximate Cause." (H. L. R., XV, 541.)

*Joseph W. Bingham*, "Some Suggestions concerning Legal Cause at Common Law." (C. L. R., IX, 16, 136.)

*Edward Jenks*, "Negligence and Deceit in the Law of Torts." (L. Q. R., XXVI, 159.)

CHAPTERS ON THE JURAL NATURE AND ETHICAL BASIS OF THIS PRINCIPLE:

*Thomas E. Holland*, "Elements of Jurisprudence," 9th ed., c. VIII, par. III, p. 99.

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. VIII, §§ 181-186 (p. 165), §§ 195-217 (p. 181); c. XV, § 533 (p. 547), § 538 (p. 555), §§ 542-551 (p. 558), § 563 (p. 580).

*Oliver Wendell Holmes, Jr.*, "The Common Law," Lectures III, IV.

*Charles S. M. Phillipps*, "Jurisprudence," B. I, c. III, § 148, p. 165.

*John W. Salmond*, "Jurisprudence," 2d ed., § 129, § 133, § 140.]



omnibuses were going at great speed, in trying to avoid a cart which was in the way, the wheel of the defendant's omnibus came in contact with a projecting step of the omnibus on which the plaintiff was riding, which caused the latter to swing towards the kerbstone. The speed with which it was going rendered it impossible for the driver to pull up, and the seat on which the plaintiff sat struck a lamp-post, and he was thrown off. The learned judge told the jury, that the plaintiff was not disentitled to recover merely because the omnibus on which he sat was driven at a furious rate; and that, if the jury thought that the collision took place from the negligence of the driver of the defendant's omnibus, and that the other omnibus was not in fault in not endeavouring to avoid the accident, then the defendant was liable. The jury having found a verdict for the plaintiff, with £50 damages,

*Bliss* moved for a new trial, on the ground of misdirection (April 18). . . .

POLLOCK, C. B., now said: This was an action tried before my Brother ROLFE, at Liverpool, when there was a verdict for the plaintiff, damages £50. . . . My Brother ROLFE directed the jury to ascertain whether the mischief arose from the negligence of the driver of the defendant's omnibus, and the jury found that the collision did arise from that negligence. Mr. *Bliss* moved for a new trial, on the ground that my Brother ROLFE had not directed the jury, that, if the mischief was in part occasioned by the misconduct of the person driving the omnibus on which the plaintiff was, the defendant would not be responsible. . . . We are all of opinion that there ought to be no rule, and that there is no fault to be found with the direction of my Brother ROLFE. The rest of the Court are entirely of opinion, that, generally speaking, where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for *all* the consequences of that injury. On the present occasion I entirely concur with the Court that there ought to be no rule, and that the direction was perfectly right. I am, however, disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for *all* the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct; and I think that, in the situation of these parties, any distinction which I might be disposed to draw in an extreme case does not arise in the one which is now before the Court. We are all of opinion that, in this case, there should be no rule.

*Rule refused.*

## 431. SHARP v. POWELL

COMMON PLEAS. 1872

L. R. 7 C. P. 253

THE defendant's servant (in breach of the Police Act, 2 & 3 Vict. c. 47, § 54) washed a van in a public street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water poured over a portion of the causeway, which was ill paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. . . . For the plaintiff it was contended that the defendant was responsible for the injury, as being the consequence of his wrongful act, viz., causing his van to be washed in a public highway in breach of an Act of Parliament. For the defendant, it was contended that the damage was too remote, and not the natural, necessary, or probable consequence of the defendant's act. The learned judge nonsuited the plaintiff, reserving leave to him to move to enter a verdict for £25, if the Court (who were to be at liberty to draw inferences of fact) should be of opinion that the damage was not too remote: all powers of amendment being also reserved.

A rule nisi having been obtained,

April 22. *H. James*, Q. C., and *Lanyon*, shewed cause. The ruling of the learned judge was correct. . . . In general a man is only liable for such consequences of his tortious or negligent act as might reasonably be anticipated as its result. . . . In *Mayne on Damages*, p. 15, the general principle is given in these words:

"The first, and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act: it will assume this character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act, or, in cases of contract, if it appears to have been contemplated by both parties. Where neither of these elements exists, the damage is said to be too remote."

[BOVILL, C. J. Was there any evidence that the defendant knew of the stoppage of the drain?] None whatever. . . .

BOVILL, C. J. No doubt, one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom. But, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shewn that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some

exciting cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action. In the present case, the learned judge has reserved power to us to draw inferences from the facts; and the proper inference to be drawn from the evidence seems to me that, if the drain had not been stopped, and the road had been in a proper state of repair, the water which the defendant's servant caused to flow into the gutter or channel would have passed away without doing any mischief to any one. Can it, then, be said to have been the ordinary and probable consequence of the defendant's act that the water should have frozen over so large a portion of the street as to occasion a dangerous nuisance? I think not. . . .

GROVE, J. I am entirely of the same opinion. I think the act of the defendants was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression, the "natural" consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant: "probable" would perhaps be a better expression. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted. But there must be some limit to the liability of a man for the consequences of a wrongful act; and it does not by any means follow that, though the act of allowing the water to flow over the street in the first instance was wrongful, the defendant is liable for a stoppage occurring after the water had got back into its proper and accustomed channel. The defendant was not bound to go down the street and see whether or not any obstacle existed at the drain. I cannot therefore see that the damage to the plaintiff's horse was the proximate or the probable result of the washing of the defendant's van in the street rather than in his own stable or coach-house. I think that Mr. *Lanyon* put the case upon the true ground. The damage complained of was not proximately caused by the original wrongful act of the defendant. . . .

KEATING, J. After hearing the argument, I must confess I retain the impression I had at the trial. . . . I nonsuited the plaintiff, but gave him leave to move, reserving power to the Court to draw inferences of fact. . . . The damage in question, not being one which the

defendant could be fairly expected to anticipate as likely to ensue from his act, is in my judgment too remote. *Rule discharged.*

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432. SMITH *v.* LONDON & SOUTHWESTERN RAILWAY COMPANY. (1870. L. R. 6 C. P. 14, 21.) *Blackburn, J.*: If the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots; which shews that what a person may reasonably anticipate is important in considering whether he has been negligent. But if a person fires across a road when it is dangerous to do so and kills a man who is in the receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a laborer.

### 433. HILL *v.* WINSOR

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1875

118 *Mass.* 251

AT the trial of an action of tort for personal injuries sustained in consequence of the defendant's steam-tug striking the fender of a bridge on which the plaintiff was at work, the plaintiff's evidence tended to show that the fender, which was built to protect the bridge, consisted of piles driven perpendicularly into the bed of a stream about twelve feet apart, with other piles driven at an angle to each of these, one of which was fastened to the top of each perpendicular pile, with a cap on top extending along the whole row of piles. That the plaintiff was at work standing on a plank nailed to the piles, and, in order to fit an inclined pile to the perpendicular one and the cap, he had put in a brace about a foot long to keep the inclined pile and the upright one apart while he was at work; that, while so at work, he saw the tug coming towards the fender, and tried to get on the cap. when the tug struck the fender some distance from him, and the jar caused the brace between the piles to fall out, the piles came together, and he was caught between them and severely injured. The defendants' evidence tended to show that the plaintiff was not seen by those on the tug until after the accident, though other men at work on the fender were seen. . . .

The defendants requested the judge to rule as follows: . . . 8. If the defendants' agents, as prudent and reasonable men, had no reason to suppose that the moving of the boat along the fender would cause any danger to the workmen, then there was no negligence on their part in using the fender. The judge refused to give the instructions

as prayed for, but gave the following instructions: . . . The accident must be caused by the negligent act of the defendants. • But it is not necessary that the consequences of the negligent act of the defendants should be foreseen by the defendants. It is not necessary that either the plaintiff or the defendants should be able to foresee the consequences of the negligence of the defendants in order to make the defendants liable. It may be a negligent act of mine in leaving something in the highway. It may cause a man to fall and break his leg or arm, and I may not be able to foresee one or the other. Still, it is negligence for me to put this obstruction in the highway, and that may be the natural and necessary cause. In this case, it is for the jury to say whether this injury, which the plaintiff suffered, was a natural and necessary consequence of the negligence of the defendants, if they were negligent.

The jury found for the plaintiff; and the defendants alleged exceptions to the foregoing refusals to rule.

*O. W. Holmes, Jr., and W. A. Munroe, for the defendants.*

*E. H. Derby and W. C. Williamson, for the plaintiff.*

COLT, J. Under the instructions given in the present case, the jury must have found that the injury of the plaintiff was . . . due solely to the defendants' negligence. The evidence reported justifies these findings. The structure upon which the plaintiff was at work was imperfect and out of repair. Its condition at the time, the plaintiff's exposed position upon it, and the knowledge of that exposure which those in charge of the boat had, or in the exercise of due care might have had, were elements affecting the question of the defendants' negligence to which the attention of the jury was especially called. It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in *some* form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence; and it is not necessary that injury in the *precise* form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. *Lane v. Atlantic Works*, 111 Mass. 136, and cases cited.

*Exceptions overruled.*

434. *BROWN v. CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY.* (1882. 54 Wis. 342, 356.) *Taylor, J.* (citing *Hill v. Winsor* with approval): He who commits a trespass must be held to contemplate *all* the damage which may legitimately flow from his illegal act, whether he may have foreseen them or not; and so far as it is plainly traceable, he must make compensation for it. The justice and propriety of this rule are manifest, when applied to cases of direct injury to the person. If one man strike another, with a weapon or with his hand, he is clearly liable for all the direct injury the party struck sustains therefrom. The fact that the result of the blow is unexpected and unusual can make no difference. If the wrongdoer should in fact intend but slight injury, and deal a blow which in ninety-nine cases in a hundred would result in a trifling injury,

and yet by accident produce a very grave one to the person receiving it, owing either to the state of health or other accidental circumstances of the party, such fact would not relieve the wrongdoer from the consequence of his act. The real question in these cases is, Did the wrongful act produce the injury complained of? and not whether the party committing the act could have anticipated the result. The fact that the act of the party giving the blow is unlawful renders him liable for all its direct evil consequences. This was the substance of the decision in the old and often cited squib case of *Scott v. Shepherd*, 2 W. Bl. 892. Justice Nares there says that, "the act of throwing the squib being unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate."<sup>1</sup>

### 435. WALBRIDGE v. WALBRIDGE

SUPREME COURT OF KANSAS. 1909

80 Kan. 567, 103 Pac. 89

ERROR from District Court, Jefferson County; MARSHAL GEPHART, Judge. Action by Christian Walbridge against J. M. Walbridge. Judgment for plaintiff, and defendant brings error. Affirmed.

*Morse & Keeler*, for plaintiff in error. *Phinney & Raines* and *D. D. Stanley*, for defendant in error.

PORTER, J. Christian Walbridge sued J. M. Walbridge to recover damages for assault and battery. The petition alleged that he struck her a blow with his fist which destroyed the sight of one of her eyes. Defendant answered, admitting that he struck the plaintiff, but claimed that she first assaulted him, and that he acted in self-defence, and had no deliberate intention of doing her physical injury. The reply was a general denial. . . . He testified that he had no intention of inflicting any permanent injury on the plaintiff, and that he struck her solely to prevent her from assaulting him. The undisputed evidence is that the plaintiff suffered a permanent injury in the loss of one eye.

<sup>1</sup> [*Bernhard Windscheid*. "Lehrbuch des Pandektenrechts" (9th ed., by Kipp, 1906, p. 61). § 263, note 14. *Reparation of Damage*. Whether one is liable at all, and what the extent of liability is, are questions not to be confused. Whether one is liable by reason of a certain act may well depend on whether its consequences were capable of being foreseen or not. But otherwise, when the question is to what extent he is liable for the consequences of an act which in any event makes him liable for something. (*Editor's Note*.) The foregoing does not seem to me the correct way of stating the doctrine. If a person is liable for a culpable act, it cannot be maintained that because his act is in general a culpable one, therefore he is liable for all its consequences, regardless whether a specific consequence was foreseeable or not. Rather should we inquire, as to each specific consequence, whether he is culpable as to that, i. e. whether it was a consequence which he could and should have foreseen and avoided by different action. For example: A hunter's gun goes off by his negligence, and injures a hunting companion; he is liable. But if at the same time a part of the charge struck some one else concealed in the underbrush, then he is liable only if he could have anticipated the presence of some one at that place.]



The jury found in her favor and gave her damages in the sum of \$1000. A new trial was refused, and the defendant brings the case here for review.

The only error claimed is that the Court refused to give certain instructions. In two of them, the Court was asked to instruct that, if the blow complained of was given in self-defence, the defendant was not answerable for any unforeseen or unexpected damages resulting therefrom. . . . The defendant has no cause to complain. The question is not what the defendant intended, but what were the natural, proximate, or probable consequences of his wrongful act. . . . The act of the defendant in assaulting the plaintiff was unlawful, and he is answerable for all injuries which are the natural or probable consequence of his act without regard to his intent. *Sloan v. Edwards*, 61 Md. 89; *Vosburg v. Putney*, 80 Wis. 523; *Morgan v. Kendall*, 124 Ind. 454; *Hodges v. Nance*, 1 Swan (Tenn.) 57; *Yeager v. Berry*, 82 Mo. App. 534. In *Sloan v. Edwards*, *supra*, which was an action for damages for assault and battery, it is said:

"It is a well-settled principle that the damages recoverable in actions for personal injuries must be the natural and proximate consequence of the act complained of. Therefore, whatever injurious consequences result naturally from the wrongful act done become elements of damage, and it is not necessary that the particular form or nature of the results should have been contemplated or foreseen by the wrongdoer."

The judgment will be affirmed. All the Justices concurring.<sup>1</sup>

### Topic 3. Judge and Jury

436. A. J. WILLARD. *Principles of the Law: Personal Rights*. (1882, c. 26, in part; pp. 236, 254.) It becomes important to fix, as nearly as possible, the legal idea of cause and effect as existing between an act wrongfully performed and certain physical consequences of an injurious character attributable to such act. In the present state of legal development this can only be accomplished approximately. . . . Instances of this class are seldom placed in a position for exhaustive judicial examination. They are placed by the law peculiarly within the province of a jury. Judges seldom employ any but very general propositions in instructing juries as to the means of connecting a wrong with the various physical consequences flowing from it. . . . The institution of a jury, as a means of solving such problems in their most complex form, has obviated the necessity

<sup>1</sup> [TOPIC 2. NOTES:

"Negligence cases: Reasonable anticipation rule, criticised." (C. L. R., VIII, 656.)

"Liability for unusual consequences." (H. L. R., X, 252.)

"Liability for remote consequences." (H. L. R., XIII, 149.)

"Precise form of damages suffered unforeseeable." (H. L. R., XIV, 377.)

"Liability for unforeseeable consequences of defendant's unlawful act." (H. L. R., XV, 225.)

"Personal injuries; elements considered in estimating damages." (Y. L. J., XIX, 124.)]

of drawing out the principles of the law to that nicety and minuteness that would be necessary if the judges were required to give an exact account of the principles on which the extent of damages was to be ascertained, and which would not add to the value of the law as a practical system. . . .

437. OLIVER WENDELL HOLMES, Jr. *The Common Law*. (1881, pp. 115-129, in part.) The distinctions between the functions of Court and jury does not come in question until the parties differ as to the standard of conduct. Negligence, like ownership, is a complex conception. . . . The judge's duties are not at an end when the question of negligence is reached. . . . No doubt, as has been said above, the averment that the defendant has been guilty of negligence is a complex one: first, that he has done or omitted certain things; second, that his alleged conduct does not come up to the legal standard. And so long as the controversy is simply on the first half, the whole complex averment is plain matter for the jury. . . . But when a controversy arises on the second half, . . . when a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the Court, not entertaining any clear views of public policy applicable to the matter, further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury. . . .

It has often been said, that negligence is pure matter of fact, or that, after the Court has declared the evidence to be such that negligence may be inferred from it, the jury are always to decide whether the inference shall be drawn.<sup>1</sup> But it is believed that the Courts, when they lay down this broad proposition, are thinking of cases where the conduct to be passed upon is not proved directly, and the main or only question is what that conduct was, not what standard shall be applied to it after it is established. Most cases which go to the jury on a ruling that there is evidence from which they may find negligence, do not go to them principally on account of a doubt as to the standard, but of a doubt as to the conduct. . . . So, in the case of a barrel falling from a warehouse window, it must be found that the defendant or his servants were in charge of it, before any question of standard can arise.<sup>2</sup> . . .

It becomes of vital importance to understand that, when standards of conduct are left to the jury, it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the Court feels competent to do so. . . . The Courts have been very slow to withdraw questions of negligence from the jury. . . . If the whole evidence in the case was that a party, in full command of his senses and intellect, stood on a railway track, looking at an approaching engine until it ran him down, no judge would leave it to the jury to say whether the conduct was prudent. If the whole evidence was that he attempted to cross a level track, which was visible for half a mile each way, and on which no engine was in sight, no Court would allow a jury to find negligence. Between those extremes are cases which would go to the jury. But it is obvious that the limit of safety in such cases, supposing no further elements present, could be determined almost to a foot by mathematical calculation. The trouble with many cases of negligence is, that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay

<sup>1</sup> Metropolitan Railway Co. v. Jackson, 3 App. Cas. 193, 197.

<sup>2</sup> Byrne v. Boadle, 2 H. & C. 722.

down rules, and that the elements are so complex that Courts are glad to leave the whole matter in a lump for the jury's determination.

438. HENRY T. TERRY. *Leading Principles of Anglo-American Law*. (1882. C. IV, Par. 69, pp. 56, 60.) § 69. The Disposition of Mixed Questions. When a mixed question arises there is no theoretical difficulty about the disposition of it. The questions of law are to be decided by the Court and the questions of fact by the triers of fact. In jury trials the Court must tell the jury what the law is on each of the states of fact which appear probable on the evidence, and the jury, having found which of these possible states of fact is the true one, must apply the rule of law given them by the Court. . . .

2. Curial Facts. § 70. In General. There is another much less simple class of cases where confusion arises between law and fact. The questions here are really questions of fact, but they are always decided by the Court, and not by the jury, and are usually called questions of law. We may therefore for convenience sake designate them as questions of "curial fact." . . . Most questions of negligence and not a few of malice, probable cause, fraud, and also some others will be found on analysis to turn on one of reasonableness, and this is often one of curial fact.

A question of law in the true sense is one that can be decided by the application of a pre-existing rule to the specific facts proved to exist. . . . But in many cases the group of facts that would need to be provided for is so large and complicated, or of such infrequent occurrence, that it is not possible or not worth while to attempt to foresee them or to prescribe any determinate line of conduct. . . . Where the law has laid down no rule, there can be no question of law. Now in most of such complicated cases the law sets up simply the general rule of reasonable conduct. . . . The rule usually propounded, to act as a reasonable and prudent man would in the circumstances, still leaves open the question *how* such a man would act. No general rule can be imagined which should inform a man how fast, he being such a horseman and riding such a horse as he is, it is reasonable for him to ride through a street of such width and crowded to such an extent with people disposed in such a manner as that in which he finds himself. The question, was the specific conduct of the specific person in the specific circumstances reasonable or not, must equally remain as a question which is really one of fact. When the reasonableness or unreasonableness of the conduct is very plain, the Court will decide it; when it seems to the Court to fairly admit of doubt, it will be handed over to the jury. This is expressed in such sayings as that the Court must decide whether there is any evidence of negligence, malice, fraud, want of probable cause, etc., or that the Court must decide whether the facts *may* amount to negligence, etc., and the jury whether they *do*. In any case the Court cannot avoid exercising a tolerably wide discretion whether to decide the question itself or not. . . .

A decision of a Court on a question of curial fact becomes however a precedent as much as any other decision, and in a subsequent case falling within the same ratio decidendi should be followed. This is a mode of judicial legislation, and amounts to making a rule applicable to all like states of fact. . . . In this way there is a constant passing over of questions from the domain of fact into that of law. However, there is often a long-continuing uncertainty, and it sometimes happens that a question that has been decided as one of law is afterwards relegated to the region of fact. Thus, in the English decisions on the liability of railroad companies for not providing proper facilities for the safe alighting of

passengers from trains, the question whether the company has acted properly has been sometimes decided by the Court and sometimes left to the jury. But in a recent case, BRETT, J. A., after saying, "Is not the history of these cases that after a long struggle it has been decided that they are questions of fact and not of law?" cited the case of *Bridges v. The North London Railway Company* [*post*, No. 439], as having put an end to the controversy by deciding them to be questions of fact.

### 439. BRIDGES *v.* NORTH LONDON RAILWAY COMPANY

HOUSE OF LORDS. 1874

*L. R. 7 H. L. (E. & I. App.) 213*

. . . B. was in the last carriage of a railway train. Before reaching the station at which he was to alight the train had to pass through a tunnel. In that tunnel there was, first, a heap of hard rubbish lying by the side of the rails, irregular in form and height, then a short sloping piece of ground, then a piece of flat platform, like the main platform, but narrower, and within the tunnel. Beyond these was the main platform itself. The train only partially went up to the main platform, leaving the last two carriages within the tunnel, which had no light within it, and on the occasion in question was filled with steam. The last carriage but one came opposite the narrow platform; the last carriage was opposite the hard rubbish. A passenger in the last carriage but one (who was called as a witness at the trial) heard the name of the station called out in the usual way and got out upon the narrow platform. He then heard a groaning, and proceeding farther back into the tunnel found B. lying on the rubbish with his legs between the wheels of the last carriage, but neither of them had touched him. B.'s leg was broken, and he had received other injuries, from the effects of all which he died. The witness heard the warning, "Keep your seats," and shortly afterwards the train moved on. . . .

Mr. Justice BLACKBURN was of opinion that there was no evidence of negligence on the part of the defendants, and directed a nonsuit; but the jury expressing a strong opinion to the contrary, a verdict was taken for the plaintiff, the jury assessing the damages at £1200. The nonsuit was then entered, but leave was reserved to move to enter the verdict for the plaintiff for the damages thus contingently assessed.

A rule was accordingly moved for, and, after argument in the Court of Queen's Bench, was refused. On appeal to the Exchequer Chamber the facts were stated in a case, power being reserved to the judges to draw inferences of fact. The case was heard, and the judgment of the Court below was affirmed by four judges to three.<sup>1</sup> This appeal was then brought.

<sup>1</sup> L. R. 6 Q. B. 377.

The Judges were summoned, and Lord Chief Baron KELLY, Mr. Baron MARTIN,<sup>1</sup> Mr. Justice KEATING, Mr. Justice BRETT, Mr. Justice DENMAN, and Mr. Baron POLLOCK attended.

Mr. *Henry James*, Q. C., and Mr. *Kemp* (Mr. *Snagge* was with them), for the plaintiff in error. The question here is, whether there was evidence of negligence on the part of the defendants, which ought to have been left to the jury. . . .

Sir J. *Karslake*, Q. C., and Mr. *Aspinall*, Q. C. (Mr. *A. G. Shiell* was with them), for the defendants in error. The judgment here must be affirmed unless it clearly appears that the deceased man was killed by the negligence of the company's servants. . . . There being no evidence on which the jury could reasonably find, in point of fact, that there had been negligence, there was no necessity for leaving the case to the jury, but the Judge rightly took on himself to say that no case had been made out for the plaintiff and that there must be a non-suit. . . .

Lord CAIRNS, who presided in the absence of the Lord Chancellor, proposed that the following question should be put to the Judges: Whether in the facts stated in the special case, and having regard to the liberty thereby given to the Court to draw any inference or find any facts from the facts therein stated, there was evidence of negligence on the part of the respondents which ought to have been left to the jury? . . .

Mr. Justice BRETT. My Lords, before determining whether there is or is not evidence fit to be left to a jury in support of questions, one must know what the questions are which are to be so left. It seems impossible to answer satisfactorily the question whether there was or was not evidence of negligence which ought to have been left to the jury, without first determining the form in which the question of negligence, if left, should be judicially stated to a jury. It is farther necessary, as it seems to me, to consider the formula which should be applied to the facts in evidence, in order to see whether they ought or ought not to be left to the jury. And farther, how much of the dealing with facts is within the province of the Judge, and how much is exclusively within the province of the jury. . . .

What is the direction in point of law which ought to be given to the jury at the trial? . . . The proposition which the plaintiff undertakes to substantiate is that he has suffered injury by reason of the negligence of the defendants or their servants. . . . This direction, however, is not yet sufficient. It requires to be amplified by a legal definition of what amounts to negligence. That definition is, that negligence consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances, or in the omitting to do some act which a person of ordinary care and skill would do under

<sup>1</sup> Mr. Baron MARTIN heard the argument, but retired from the Bench before the Judges' opinions were delivered.

the circumstances. The final and full and strict direction to a jury therefore in such cases is contained in the following questions: Have the defendants or their servants done anything in the conveyance of the plaintiff to his destination which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done? . . .

Such is the direction to the jury. But before giving this direction it is the duty of the Judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the plaintiff should establish. This being a duty cast exclusively on the Judge, is a question to be decided according to some proposition or rule of law. What is that proposition or rule of law which the Judge is bound to apply to the evidence in order to determine this question of law? It cannot merely be, is there evidence? . . . The proposition seems to me to be this: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain? It may be said that this is so indefinite as to amount to no rule, that it leaves the Judge after all to say whether in his individual opinion the facts in evidence would prove the proposition; but I cannot think so. It is surely possible to admit that reasonable and fair men might come to a conclusion which oneself would not arrive at. And Judges may be able reasonably to say frequently, that although they would not upon the facts have come to the same conclusion to which the jury has come, yet they or he cannot say but that reasonable and fair men might agree with the conclusion of the jury; or, in other words, that, although they would not have arrived at the same conclusion, it is not contrary to reason to have arrived at it.

The Judge must, therefore, before directing the jury in the terms above set forth, first determine the following questions: Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness *might* fairly say that the plaintiff had been injured by some act of commission or omission by the defendants or their servants? . . . If the Judge, not deciding the final issues according to his own individual view, but determining according to the propositions last laid down, holds that there is no evidence fit to be left to the jury on some one of the cardinal questions before stated, he must direct the jury *as matter of law* that there is no case in favour of the plaintiff, or he must nonsuit the Plaintiff. . . . If he holds there is evidence on each of the cardinal questions, he must leave the case to the jury according to the direction in point of law before laid down in this opinion. When the Judge has so directed the jury as to the law he has finished all which it is legal for him exclusively to determine in the case. . . .

The importance of the distinction as applied to this class of cases



seems to me to be manifest. A judge may be of opinion that the calling out of the name of the station ought not in any way to actuate the passenger; [yet] jury after jury may decide that according to the ordinary understanding both of railway officials and passengers it is an indication upon which a passenger may fairly rely [so] that, directly the train stops, he may, unless he receives some other warning, safely alight. . . . If such decisions may be overruled on the mere ground that the Courts or judges do not agree with them, juries are bound to matters of fact by the view of the judges as to facts. This cannot be. . . .

My Lords, the paramount importance which I attach to the enunciation of a rule of conduct or of decision by your Lordships is, that it will prevent the decisions in these cases from being governed by the many different views taken by different judges of facts of every day occurrence in life, and which no one can say are questions of law. The kind of discussion which may be found in this case in the Courts below, and the differing grounds of decision to be found in so many cases, would not be repeated.

Applying to the question proposed by your Lordships the rule I have submitted to be the right one, -I cannot entertain any doubt that there was in this case evidence fit to be left to the jury, and I therefore answer your Lordships' question in the affirmative. . . .

Judgment of the Court of Exchequer Chamber reversed, and the verdict to be entered for the plaintiff for the sum of £1200.

440. *WABASH RAILWAY COMPANY v. BROWN*. (1894. 152 Ill. 484, 488.) *Phillips, J.*: Negligence is ordinarily a question of fact. Where the evidence on material facts is conflicting, or where, on undisputed facts, fair-minded men of ordinary intelligence may differ as to the inferences to be drawn, or where, on even a conceded state of facts, a different conclusion would reasonably be reached by different minds, in all such cases negligence is a question of fact. The fact to be determined is the existence or non-existence of negligence. . . . It may also become a question of law, if a single material fact is conclusively shown or contradicted, the existence or non-existence of which is conclusive of a right of recovery.

#### 441. PENNSYLVANIA RAILROAD COMPANY *v.* KERR

SUPREME COURT OF PENNSYLVANIA. 1869

62 Pa. 353

MAY 29th and 21st, 1870. Before THOMPSON, C. J., READ, AGNEW, and SHARSWOOD, JJ. WILLIAMS, J., absent. Error of the Court of Common Pleas of Huntington County: No. 25, to May Term, 1870.

This was an action on the case brought June 12th, 1868, by William Kerr against the Pennsylvania Railroad Company. The action was to recover for the loss of the plaintiff's furniture in a hotel near the Pennsylvania Railroad, which was destroyed by fire from negligence,

as he alleged, of the defendant's servants in running their locomotive. The fire was first communicated to a warehouse and from that to the hotel.

The facts and questions in the case are fully set forth in the charge of the Court (TAYLOR, P. J.) as follows: . . . The position of the buildings burned with reference to one another and the railroad track, is shown by the diagram. . . . A frame warehouse, 12 feet high to the eve or square, 25 by 47 feet, erected in 1850, stood 15 feet from the railroad track, and parallel with it. The tavern-house, a two-story frame building, 68 by 32, stood west of the warehouse, the lower or east end of it, 39 feet from it. West of the other (or west) end of the tavern-house, and separated from it by a seven-foot alley, there were two adjoining dwelling-houses. Back on the turnpike, about the same distance that the tavern stood above the warehouse, there was and is a one-and-a-half story storehouse; and on the turnpike, still further up, 80 or 91 feet from the warehouse, there was a barn, 60 by 29 feet. In the vicinity there was another house, occupied by Mr. Simpson himself. At the time of the fire, about two-thirds of the tavern-house, next to the warehouse, and one-half of the barn, were leased to the plaintiff. . . . On the 28th of April, 1868, the day of the fire, the employees of the railroad company were using a locomotive engine, attached to a train of six or seven trucks, called the wood or gravel train, carrying ties, past these buildings on the tracks of the road. About the middle of the day they loaded the trucks opposite the frame dwellings above the tavern, and afterwards they fired up the engine, and moved it down the north track, some distance below the warehouse, where they switched on the other track, and backed up past the warehouse with the train. A short time, perhaps about fifteen minutes, after the train passed up, the south side of the roof of the warehouse, next the railroad, was discovered to be on fire in three or four small spots. An early effort to extinguish it probably failed by the breaking of a ladder; and it was soon afterwards enveloped in flames and consumed. The day was warm and dry, and the wind bearing in a strong current, particularly after the fire was fully started, in the direction of the tavern. The part of the burning warehouse, in the direction of the wind, communicated the fire to the tavern-house, which was also burnt, as well as the two frame dwellings above it, and also the barn on the turnpike, while the storehouse and the house of Mr. Simpson were saved. These are the general, undisputed facts in relation to the fire and the burning.

The plaintiff claims that the burning was caused by the sparks from the defendants' engine, negligently emitted, and that the defendants are, therefore, answerable to him in damages. The defendants, denying this, make, in defence, the point that, upon the undisputed facts in the case in relation to the burning, assuming that the warehouse was ignited by sparks from the engine, and that it was chargeable to

the negligence of their servants (which is denied), the plaintiff, whose property was destroyed in another building, to which the fire was communicated from the warehouse, and not from the engine, has no cause of action, for the reason that the alleged negligent burning was not the natural and necessary result of the burning of the warehouse, and we are asked, as a matter of law, so to instruct you. . . . The defendants cite and rely upon the recent and carefully reasoned case in the Court of Appeals of the State of New York, of *Ryan v. The New York Central Railroad*, 35 N. Y. R. 210, in which it is ruled that the negligently burning of a house, and the spreading of the fire to a neighboring house and the burning thereof, do not give the owner of the last house a cause of action against the owner of the house in which the fire originated, because the damages are too remote. . . . In *Ryan v. The New York Central*, the judge of the Circuit nonsuited the plaintiff, and the General Term of the fifth district affirmed the judgment, and that judgment was again affirmed by the Court of Appeals. There it was not left to the jury. . . . If the New York case, therefore, is to be regarded as the law, it rules the point here. . . . Nevertheless, since we have not had time and opportunity to examine all our cases which contain discussions in analogous cases, and which it is claimed hold it to be at least a question for the jury, we reserve the point made by the defendants for consideration hereafter, and submit the cause as if it had not been made. Since, too, the cause has been so carefully tried on both sides, irrespective of this question, we are not without hope that the verdict of this jury will virtually settle the controversy, so that, in any result, the parties will not have to encounter the labor and expense of another trial of it here. . . .

The jury found for the plaintiff \$1959.19, and on the 21st September, 1869, the Court entered judgment pro forma, for the plaintiff on the point reserved, for the amount of the verdict, whereupon this writ of error was sued out by the defendants, who assigned for error that the court erred. . . . 2. In submitting the case to the jury, instead of deciding the question as one of law in favor of the defendants below upon the uncontroverted and admitted fact that the burning of the tavern-house and stable was not the direct result of the negligence of the company or their employees in the use of the engine. . . .

The opinion of the Court was delivered, July 6th, 1870, by

THOMPSON, C. J. It has always been a matter of difficulty to determine judicially the precise point at which pecuniary accountability for the consequences of wrongful or injurious acts is to cease. No rule has been sufficiently defined and general as to control in all cases. Yet there is a principle applicable to most cases of injury which amounts to a limitation. It is embodied in the common-law maxim, "*causa proxima non remota spectatur*," — the immediate and not the remote cause is to be considered. . . .

It is certain, that in most every considerable disaster the result of

human agency and dereliction of duty, a train of consequences generally ensue, and so ramify, as more or less to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. This is one of the vicissitudes of organized society. Every one in it takes the risk of these vicissitudes. . . . There must be a limit somewhere. Greenleaf, Evidence, in Vol. II., § 256, touches the question thus: "the damages to be recovered must be the natural and proximate consequence of the act complained of." This is undoubtedly the rule. The difficulty is in distinguishing what is proximate and what remote. . . .

It is an occurrence undoubtedly frequent, that by the careless use of matches, houses are set on fire. One adjoining is fired by the first, a third is by the second, and so on, it might be, for the length of a square or more. It is not in our experience that the first owner is liable to answer for *all* these consequences, and there is a good reason for it. The second and third houses, in the case supposed, were not burned by the direct action of the match, and who knows how many agencies might have contributed to produce the result. Therefore, it would be illogical to hold the match chargeable as the cause of what it did not do, and might not have done. . . .

[In the case in hand] . . . no doubt the company was answerable for the destruction of the warehouse, resulting from the negligence of the company's servants in the use of the engine. . . . The learned judge charged that the defendants were liable to the plaintiff to the extent of his loss, by reason of the burning of the hotel, although by fire communicated from the warehouse, if the latter was set on fire by the negligence of the defendants' servants, in the manner mentioned. To this charge the defendants excepted, and assign it for error, and this presents the question of the case. . . . This charge was of course the equivalent of holding, that a recovery for *all* the consequences of the first act of negligence of the defendants was in law allowable. We are inclined to think that in this there was error, for the reasons already given, and others that will be given. It cannot be denied that the plaintiff's property was destroyed, but by a secondary cause, namely, the burning of the warehouse. The sparks from the locomotive did not ignite the hotel. They fired the warehouse, and the warehouse fired the hotel. They were the remote cause — the cause of the cause — of the hotel being burned. . . . To hold that act of negligence which destroyed the warehouse destroyed the hotel, is to disregard the order of sequences entirely, and would hold good if a row of buildings a mile long had been destroyed. The cause of destruction of the last, in that case, would be more remote, within the meaning of the maxim, than that of the first, and yet how many concurring elements of destruction there might be in all of these houses, and no doubt would be, no one can tell. So to hold, would confound all legitimate ideas of cause and effect, and really expunge from the law the maxim quoted, that teaches accountability

for the natural and necessary consequences of a wrongful act, and which should, in reason, be only such that the wrongdoer may be presumed to have known would flow from his act. According to the principle asserted, a spark from a steamboat on the Delaware might occasion the destruction of a whole square, although it touched but a single separate structure. No one would be likely to have the least idea of such accountability, so as to govern and control his acts accordingly. A railroad terminating in a city might, by slightest omission on the part of one of its numerous servants, be made to account for squares burned, the consequence of a spark communicating to a single building. . . .

With every desire to compensate for loss when the loser is not to blame, we know it cannot always be, without transcending the boundaries of reason, and, of course, of law. This we cannot do, and we fear we would be doing it, if we affirmed the judgment in this case. The limit of responsibility must lie somewhere, and we think we find it in the principle stated. If not found there, it exists nowhere. . . . At present we will not order a venire de novo, but if the plaintiff below and defendant in error desire, we will order it on grounds shown for it, if made in a reasonable time.

*Judgment reversed.*

#### 442. FENT v. TOLEDO, PEORIA, & WARSAW RAILWAY COMPANY

SUPREME COURT OF ILLINOIS. 1871

59 Ill. 349

APPEAL from the Circuit Court of Livingston County; the Hon. CHARLES H. WOOD, Judge, presiding.

Messrs. *Straights, Young, Harding, & Payson*, for the appellants.

Messrs. *Ingersoll & McCune*, for the appellee.

Mr. Chief Justice LAWRENCE delivered the opinion of the Court.

On the 1st of October, 1867, a locomotive, with a train of freight cars, belonging to the appellee, in passing eastwardly through the village of Fairbury, threw out great quantities of unusually large cinders, and set on fire two buildings and a lumber yard. The weather at the time was very dry, and the wind blowing freely from the south. One of the buildings ignited by the sparks was a warehouse near the track. The heat and flames from this structure speedily set on fire the building of the plaintiffs, situated about two hundred feet from the warehouse, and destroyed it and most of its contents. To recover damages for this loss, the plaintiffs have brought this suit. The defendant in the Circuit Court demurred to the plaintiff's evidence, and the Court sustained the demurrer. To reverse this judgment, the plaintiffs bring up the record.

The evidence shows great negligence on the part of defendant, but it is unnecessary to discuss this question. Where a demurrer is interposed to the evidence, the rule is, that the demurrer admits not only all that the plaintiffs' testimony has proved, but all that it tends to prove. In this case, therefore, the defendant's negligence must be regarded as admitted. It is not, indeed, controverted, but the counsel rely for the defence solely upon the ground that the plaintiffs' building was not set on fire directly by sparks from the defendant's locomotive, but by the burning of the intermediate warehouse, and that therefore the defendant is to be held harmless, under the maxim "*causa proxima, non remota, spectatur.*"

There are not many of the maxims of the law which touch so closely upon metaphysical speculation. The rule itself is one of universal application; but the difficulty lies in establishing a criterion by which to determine when the cause of an injury is to be considered proximate, and when merely remote. Greenleaf, in the second volume of his *Evidence*, § 256, lays down the rule that "the damage, to be recovered, must always be the natural and proximate consequence of the act complained of." But this seems little more than the substitution of one form of general expression for another. Parsons, in his work on *Contracts*, vol. 2, page 456, 1st ed., after alluding to the confusion in which the adjudged cases leave this question, says:

"We have been disposed to think that there is a principle derivable on the one hand from the general reason and justice of the question, and on the other applicable as a test in many cases, and perhaps useful, if not decisive, in all. It is, that every defendant shall be held liable for all of these consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration."

We are disposed to regard this explanation of the rule as clearer, and capable of more precise application, than any other we have met with in our examination of this subject, and it is in substantial accord with what is said by Pollock, C. B., in *Rigby v. Hewitt*, 5 Exch. 240.

The counsel on both sides have furnished us with a very elaborate review of the decided cases. We have not the time, and it would be unnecessary labor, to go over them in detail. With the exception of two recent cases decided in this country upon the precise question before us, it cannot be denied that the great current of English and American authorities would bring the defendant in this case within the category of proximate causes. The great effort of the counsel for the defendant has been to explain away, as far as possible, the effect of these authorities, and to draw a distinction between them and the case at bar. . . . From the oft-quoted squib case of *Scott v. Shephard*, 2 W. Black. 892, down to our own day, the English reports abound with instances in which causes more remote than the cause in this case, have been held sufficiently direct and proximate to be made a ground of damages. . . .



The same rule has also been enforced in two recent English cases. *Piggott v. The Eastern Counties Railroad Co.*, 54 E. C. L. 229, and *Smith v. The London & S. W. Railroad Co.*, 5 Law Rep. Com. Pleas, 98. . . .

We now come to the two cases briefly relied upon by appellee's counsel. They are quite in point, but we are wholly unable to agree with their conclusions. One is *Ryan v. The New York Central Railroad Co.*, 35 N. Y. 214, and the other is *Kerr v. The Pennsylvania Railroad Co.*, decided by the Court of Pennsylvania, at its May Term, 1870. These two cases stand alone, and we believe they are directly in conflict with every English and American case, as yet reported, involving this question. As we understand these cases, they hold that, where the fire is communicated by the locomotive to the house of A, and thence to the house of B, there can be no recovery by the latter. It is immaterial, according to the doctrine of these cases, how narrow may be the space between the two houses, or whether the destruction of the second would be the natural consequence of the burning of the first. The principle laid down by these authorities and urged by the counsel in this case is, that, in order to a recovery, the fire which destroys the plaintiff's property must be communicated directly from the railway, and not through the burning of intermediate property. With all our respect for these Courts, we cannot adopt this principle. . . .

If these two decisions, in New York and Pennsylvania, are correct law, it must be held that, if fire is communicated from the locomotive to the field of A, and spreads through his field to the adjoining field of B, while A must be reimbursed by the company, B must set his loss down as due to a remote cause, and suffer in uncomplaining silence. . . . While the law to be administered by the Courts should not be a mere reflex of uneducated public opinion, at the same time it should be the expression of a masculine common sense, and its decisions should not be founded on distinctions so subtle that they might have afforded fitting topics to the schoolmen. If the field of A contains forty acres, and the whole is overrun by fire, he may recover for the whole. But if A owns twenty acres next to the railway, and B the remaining twenty acres of the field, A shall recover, according to the doctrine of these cases, but B shall not. Yet, the test question is what is the proximate cause of the fire, and this ruling makes the proximate cause depend upon whether the field of forty acres is owned by one person or by two. . . . It seems to us that the arbitrary rule enforced in these two cases, which is simply this, that when there is negligence, there may be a recovery for the first house or field, but in no event for the second, rests on no maintainable ground, and would involve the administration of the law in cases of this character in absurd inconsistencies. We believe there is no other just or reasonable rule than to determine *in every instance* whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surround-

ing the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. . . .

We hold, as we held in reference to this same fire in the case of *The T., P. & W. R. R. Co. v. Pindar*, 53 Ill. 451, that it is *in each case a question of fact*, to be determined *by the jury* under the instructions of the Court. Those instructions should be, in substance, what we have already stated. If the fire is the consequence of the carelessness of the railway company, and the question of remote or proximate cause is raised, the jury should be instructed that, so far as the case turns upon that issue, the company is to be held responsible, if the loss is a natural consequence of its alleged carelessness which might have been foreseen by any reasonable person; but it is not to be held responsible for injuries which could have been foreseen or expected as the results of its negligence or misconduct.

In the case before us, owing to the distance of the plaintiff's building from the one first set on fire, this question might not have been one of easy determination. . . . In this Court, the counsel for the company have not discussed the evidence. They place the case on the single ground, that the company is free from liability, because the plaintiff's house was set on fire, not immediately by cinders thrown from the locomotive, but by the burning of another house. Their position is, that this alone exonerates the company, without any reference whatever to the question whether the second house was so near the first that, in the then state of the wind and weather, its destruction was a natural consequence of the burning of the first, which any reasonable person could have foreseen and would have expected. This question they have not discussed. On the legal question upon which appellee's counsel thus rest the case we cannot adopt their views. . . . The demurrer should, therefore, have been overruled. The judgment is reversed, and the case remanded for trial.

*Judgment reversed.*

#### 443. PENNSYLVANIA RAILROAD COMPANY v. HOPE

SUPREME COURT OF PENNSYLVANIA. 1876

80 Pa. 373

JANUARY 18th, 1876. Before AGNEW, C. J., SHARSWOOD, MERCUR, GORDON, PAXSON, and WOODWARD, JJ. Error of the Court of Common Pleas of Chester County; of January Term, 1876, No. 9.

This was an action on the case issued May 15th, 1874, by Thomas Hope against the Pennsylvania Railroad Company. The cause of action was injury sustained by defendant from the burning of his

fences, grass, and wood, by fire thrown from an engine of the defendants through negligence. The plaintiff was the owner of a tract of land in Chester County, through which the Pennsylvania Railroad passes. On the 18th of March, 1873, about 10 A. M., after the mail train westward had passed the plaintiff's farm, it was discovered that his fences and grass were on fire; before the fire was arrested his grass, fences, and wood had been much burned.

The case was tried June 17th, 1875, before BUTLER, P. J. The plaintiff testified that the fire had burned over a considerable portion of two grass fields; had destroyed one hundred and fifty-two panels of fence and had injured much timber. Rubbish which had been thrown on the railroad had been burned. The rubbish was weeds and grass which had been cut the fall before and permitted to remain. The distance from the railroad track to his fence was five or six feet; from the railroad to the woods it was about two hundred yards. There was a fence between the field and the woods. About eight panels of fence were burned at the railroad. There was at the time a strong wind blowing from the northeast in the direction which the fire took. . . .

The following are points of the defendants with their answers: The sparks emitted from the engine, and the fire thereby caused upon the line of the defendants' roadway were not the proximate cause of the burning of the fence between the pasture land and the woodland itself; both the fence and the woodland being at least six hundred feet distance from the place where the fire originated. The point was reserved. . . .

The Court, amongst other things, charged:

"Now, you will determine from the evidence whether the defendants were guilty of negligence (either as respects the engine or the condition of the roadway), by which the fire was kindled or spread on the plaintiff's property. If they were not guilty of such negligence, your verdict will be for the defendants, and you need go no further. If, however, they were guilty of such negligence in either respect, that is, negligence which kindled or spread the fire on the plaintiff — they are responsible to him for all the injury which you shall find to be the direct and natural result of their act. We repeat, the direct, natural result, because it is only for such injury that an individual or corporation is responsible on account of negligence — that which flows directly, naturally, from one's careless act, and which he ought, therefore, to have foreseen, because common prudence would have enabled him to do so. For the remote consequences of such act — consequences which common prudence could not anticipate and foresee — he is not responsible, and in justice should not be. . . . The defendants contend that burning of the woods and the fence adjoining it was not such direct and natural result, but was the remote consequence of the fire, not reasonably to have been anticipated from starting it. If you find this to be so, you will not include the loss from this source in your verdict, if your verdict should be for the plaintiff. . . ."

Verdict for the plaintiff. . . . Upon the reserved point the Court afterwards said:

"We are now required to dispose of this point. We do so by denying it and directing judgment to be entered for the plaintiff for the whole amount of the damages assessed. Under the circumstances shown, we consider the proximate cause one of fact for the jury. Whenever the injury is the direct result of the act complained of, the natural result, such as should have been anticipated with reasonable certainty, it is not too remote."

The defendants took a writ of error and assigned for error, the answers to the points and entering judgment on the reserved point.

*W. MacVeagh* and *W. Darlington*, for plaintiff in error, cited *Pennsylvania Railroad Co. v. Kerr*, 12 P. F. Smith, 353; *Fairbanks v. Kerr*, 20; *Id.* 91; *Ryan v. N. Y. Central Railroad Co.*, 35 N. Y. 210.

*W. E. Barber*, for defendant in error. . . .

Chief Justice AGNEW delivered the opinion of the Court, February 7th, 1876. Two principal questions arise in this case. The first has relation to the fact of negligence as causing the fire, and the second to the nearness or remoteness of the injury to the negligence causing it. . . .

1. The jury found the fact of actual negligence. . . .

2. The second question is of importance, and in view of our own case of *Pennsylvania Railroad Co. v. Kerr*, 12 P. F. Smith, 353, requires a careful examination. . . . It is contended that the defendants are not liable for the injury to the plaintiff's fence and woods, on the ground that the injury was too remote from the original cause; and *Pennsylvania Railroad Co. v. Kerr* is cited as authority for this. We agree with the Court below that the question of proximity was one of fact peculiarly for the jury. How near or remote each fact is to its next succeeding fact in the concatenation of circumstances, from the prime cause to the end of the succession of facts which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence. . . .

In all, or nearly all cases, the rule for determining what is a proximate cause is, that the injury must be natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances. These are the circumstances of the particular case, and from the nature of the thing must be referred to the jury. All the Court can do is to aid the jury by pointing to the relations of the facts. The jury must determine whether the original cause (that is, the negligence) is, by continuous operation, so linked to each successive fact, that all may be said to be one continuous operating succession of events, in which the first becomes naturally linked to the last, and to be its cause, and thus to be in the probable foresight of him whose negligence ran through the succession to the injury. . . . The practical knowledge and common sense of the jury applied to the evidence steps in to determine whether the injury is the real proximate result of the negligence, or, by reason of

intervening and independent causes, must be regarded as too remote and the result not within the probable foresight of the party whose negligence is alleged to have produced it. Applying to the facts of this case this practical every-day sense, we cannot say that the verdict of the jury was not a well-formed judgment. . . .

These remarks are perhaps sufficient to place this case on a basis of principle. It is also sustained by precedents. . . . The principles announced in *Fent v. Toledo, Peoria, & Warsaw Railway Co.*, 59 Ill. 349 [*ante*, No. 442], tend in the same direction; but it is a case more clearly allied in its facts to *Penna. Railroad Co. v. Kerr* [*ante*, No. 441], which it criticises with some acerbity, and an imperfect understanding of the case, and with a little confusion of thought. It was not held in *Railroad v. Kerr* that, when a second building is fired from the first set on fire through negligence, it is a mere conclusion of law that the railroad company is not answerable to the owner of the second (59 Ill. 362); or that if a fire is communicated from the locomotive to the field of A, and spread through his field to the adjoining field of B, A may be reimbursed by the company, while B must set down his loss to a remote cause, and suffer in silence (*Id.* 358). . . . The case of *Railroad Co. v. Kerr* will be found to be free from much of the criticism expended upon it. . . . The proposition came up in a bald and naked form, of a fire merely communicated from one house to another, and not the natural and necessary result of the burning of the warehouse. This was really the very question which ought to have been submitted to the jury, instead of being reserved in this form. . . . What might have been its fate if it had been committed to the jury to determine whether the communication of the fire from one building to the other was a natural and probable consequence of the firing of the first, it may not now be easy to say. Yet, as the case was placed before the mind of Chief Justice THOMPSON, there is no reason to doubt the correctness of his conclusion. From the very essence of the thing, the natural probability of the consequence which ought to have been seen, is a matter of fact to be determined upon the evidence. Every case must depend upon its own circumstances. . . .

Upon the whole case the conclusion seems to be with the plaintiff below, and the judgment should be affirmed.

#### 444. HAVERLY *v.* STATE LINE & SULLIVAN RAILROAD COMPANY

SUPREME COURT OF PENNSYLVANIA. 1890

135 *Pa.* 50, 19 *Atl.* 1013

No. 333, January Term, 1890, Sup. Ct.; court below, No. 382, September Term, 1882, C. P. On June 22, 1882, LeRoy Haverly brought case against the State Line & Sullivan Railroad Company, to recover

damages for the loss of certain logs and lumber in which the plaintiff has an interest, alleged to have been destroyed by fire in consequence of the defendant company's negligence. The defendant's plea was not guilty. . . . At the fourth trial, on September 10, 1883, the following facts were shown:

On May 11, 1880, the plaintiff was engaged in lumbering upon a tract of land adjoining the railroad of the defendant, under a contract with the owner thereof, by which he agreed to manufacture a lot of logs into lumber in consideration of a share of the manufactured product, and had done a considerable amount of work in the performance of his contract. On the afternoon of that day, between 4 and 5 o'clock, one of the defendant's trains passed over that part of its road near the scene of the plaintiff's operations, and soon afterwards smoke was seen issuing from a stump which stood upon the defendant's right of way and about twenty feet from the track. The testimony for the plaintiff tended to show that the engine which drew the train was not provided with a proper spark arrester; that, in consequence of this lack, it threw out sparks of great size and in large quantities, and that the firing of the stump was caused thereby. The stump was an old hemlock stump, quite rotten and punky. There was quite a bed of dead grass around it, though not a great deal immediately beside it. When the smoke was discovered, one of the plaintiff's employees was sent to extinguish the fire, and on his return he reported that he had done so. No smoke was seen after that, until next morning, about ten o'clock, when the plaintiff sent another employee to look after the fire. Finding the stump burning about the roots, the man threw water upon it until, as he supposed, the fire was extinguished. He remained there, however, for half or three quarters of an hour, to satisfy himself that no fire remained, and went away so believing. About noon the same day a wind arose and a fire broke out in the vicinity of the stump, which the plaintiff and his employees were unable to control on account of the wind and the dryness of the weather, and which burned over the tract on which the plaintiff was operating, destroying his logs and lumber.

At the close of the testimony, the Court, SITTSE, P. J., charged the jury in part as follows: . . . "It is an important question in this case for you to determine whether the setting fire to the stump was the proximate, or the remote cause of the burning of the logs. That is, was the burning of the logs the natural and probable consequence of the firing of the stump, in the light of the attending circumstances? . . . A party is responsible for the natural and probable consequences of his negligence, and not for unforeseen events produced by intervening accidents. . . ."

The plaintiff requests the court to charge: "1. If the jury find that the fire was set in the stump by the negligence of the defendants, and that it was the proximate cause of the plaintiff's injury, he is



entitled to recover unless the jury find that his own negligence contributed in some measure to the injury. . . ."

The jury rendered a verdict for the plaintiff for \$1,643.25. A rule for a new trial was discharged, upon condition that the plaintiff should within ten days file a remittitur of all the verdict in excess of \$800. The plaintiff having complied with this condition, judgment was entered in his favor for \$800 and costs; whereupon the defendant took this appeal. . . .

Mr. *Rodney A. Mercur* and Mr. *Edward Overton* (with them Mr. *John F. Sanderson*), for the appellant: 1. The claim that the firing of the stump was the proximate cause of the plaintiff's loss is founded on presumptions wholly foreign to the present case. The probable consequence of the fire, and all that the defendant had a right to expect from it, was the destruction of the rotten stump upon the defendant's own land. . . . 35 N. Y. 210; *Doggett v. Railroad Co.*, 78 N. C. 306. Under these authorities it was the duty of the Court to instruct the jury whether the firing of the stump was the proximate cause of the injury, the facts being undisputed. . . .

Mr. *H. N. Williams* and Mr. *I. McPherson* (with them Mr. *E. J. Angle* and Mr. *R. H. Williams*), for the appellee. . . .

Opinion, Mr. Justice MITCHELL.

The test by which the line is to be drawn between proximate and remote cause, in reference to liability for the consequences of negligence, has been firmly established by the three cases of *Penna. R. Co. v. Kerr*, 62 Pa. 353; *Penna. R. Co. v. Hope*, 80 id. 373; *Hoag v. R. Co.* . . .

The three leading cases above referred to, though frequently cited on opposite sides of the same argument, are not at all in conflict in principle. The different results which were reached in them depended not on any different view of the law, but of the facts, and on the application of the familiar doctrine that the Court will decide it as a matter of law. In *Penna. R. Co. v. Kerr*, the negligence had been held by the Court below to be the proximate cause of the plaintiff's loss. This Court held that it was remote, and did not award a new venire, but said that it would do so if the plaintiff should desire it upon grounds shown. The question was then new; and, from what was said about the venire, the Court itself does not seem to be entirely clear that it should be decided as matter of law. It may be doubted whether, on the same facts, the Court would not now send it to a jury. Certainly no subsequent case has assumed to decide where the facts were so near the line. *Hoag v. Railroad Co.* was a much clearer case, and so were *Pittsburgh, etc. Ry. Co. v. Taylor*, 104 Pa. 306; *West Mahanoy Tp. v. Watson*, 116 Pa. 344; *South Side Pass. Ry. Co. v. Trich*, 117 Pa. 390, and the other cases where the Court has pronounced the negligence to be remote as matter of law. But, whatever the result of the views taken of the facts in these cases, the principles of decision are the same in all.

1. In the present case, the learned judge left the question of proximate or remote cause to the jury, in substantial conformity with the doctrine of *Penna. R. Co. v. Hope*. Appellant, however, claims that the succession of events was so broken as to bring the case under *Hoag v. Railroad Co.*, and require the judge to direct the jury in its favor. The break in the chain of events was merely a gap in the time. Had the fire extended to the plaintiff's lumber without interval, on the same afternoon, this case would have been exactly parallel with *Penna. R. Co. v. Hope*. But the fact that the fire smouldered awhile in the stump, and, after it was supposed to have been extinguished, broke out again the next day, while it makes the conclusion less obvious that the damage was done by the same fire, does not interpose any new cause, or enable the Court to say as matter of law that the causal connection was broken. . . .

2. But it is argued that it was not until the next morning after the fire started in the stump, and during the time when it was apparently extinguished, that the wind rose, and became a new cause of the spread of the fire to the plaintiff's lumber. This, however, was, like the point already considered, dependent on the circumstances. In *Penna. R. Co. v. Hope*, one of the facts was a strong wind which carried the fire, and so, also, it was in *Penna., etc. R. Co. v. Lacey*, 89 Pa. 458, and in *Lehigh V. R. Co. v. McKeen*, 90 Pa. 129; and in this last case *TRUNKEY, J.*, says, the jury could also determine whether dry weather and high winds, in the spring time, are extraordinary, and whether, under these conditions, . . . the injury was within the probable foresight of him whose negligence ran through from the beginning to the end. . . . The lapse of time before the wind rose, in this case, was therefore not clearly a new cause to be so pronounced by the Court, but a circumstance to be considered with the others, by the jury. . . .

*Judgment affirmed.*

## **SUB-TITLE (II) : SUNDRY RULINGS DECLARING REMOTENESS AS MATTER OF LAW IN SPECIFIC CIRCUMSTANCES**

### **Topic 1. Intervening Event or Force of Inanimate Nature**

#### **446. SHARP v. POWELL**

**COMMON PLEAS. 1872**

*L. R. 7 C. P. 253*

[Printed *ante*, as No. 431.]

447. HAVERLY v. STATE LINE & SULLIVAN RAILROAD  
COMPANY

SUPREME COURT OF PENNSYLVANIA. 1890

135 Pa. 50, 9 Atl. 1013

[Printed *ante*, as No. 444; Point 2 of the opinion]<sup>1</sup><sup>1</sup> [TOPIC 1. PROBLEMS:

In the plaintiff's building, abutting on the street, was a window with a broken pane of glass, left unrepaired by the defendant's negligence. A high wind blew the window in, and a piece of the broken glass fell on the plaintiff, who was passing in the street. Was the defendant responsible? (1899, *Detzur v. Brewing Co.*, 119 Mich. 282, 77 N. W. 948.)

The defendant's ship was lying in stream with a cargo of oil. The defendant negligently allowed the oil to escape, so that the surface of the water was covered with it for some distance around. A fire occurred at the wharf from other causes. The fire caught the oil and spread along the water to the plaintiff's ship, which was burned. Was this too remote? (1909, *The Santa Rita*, D. C. Cal., 173 Fed. 413.)

The defendant floated log-timber down a stream. By reason of an unusual flood, which in that climate however was not unknown, the logs were jammed and broke the plaintiff's dam. Was this too remote? (1902, *Gulf R. C. Co. v. Walker*, 132 Ala. 553, 31 So. 374.)

The defendant, carrying the plaintiff's wool from Buffalo to Boston, negligently detained it six days at Syracuse. On arrival at Albany, it was damaged by a sudden and violent flood in the Hudson river. Was this too remote? (1859, *Denny v. N. Y. C. R. Co.*, 13 Gray, 481.)

The defendant wrongfully shot the plaintiff's dog on the street. The dog rushed into the plaintiff's house and ran into the plaintiff, who was knocked over and injured. Was this too remote? (1898, *Isham v. Dow*, 70 Vt. 588, 41 Atl. 585.)

The plaintiff's building caught fire, and the fire-engines necessarily laid their hose from the hydrants across the defendant's railroad track. The defendant's train passed and cut the hose, and for lack of water the fire spread and damaged the building as it would not otherwise have done. Was this too remote? (1872, *Metallic C. Casting Co. v. R. Co.*, 109 Mass. 277; 1905, *Little Rock T. & E. Co. v. McCaskill*, 75 Ark. 133, 86 S. W. 997.)

The plaintiff's mill adjoined a street, and a gas supply-pipe to the mill was controlled by a tap at the surface of the street. The defendant had negligently covered this tap. A fire broke out in the mill, but was under control, when the gas-pipe at the mill end melted. The street-tap could not be got at to turn off the gas, and the mill was destroyed. Was this too remote? (1898, *Cochran v. R. Co.*, 184 Pa. 565, 39 Atl. 296.)

The defendant maintained a water-system, and the street-main overflowed and the water damaged the plaintiff's house. The escape-valve, which should have prevented the overflow, had worked well for 25 years; but on this occasion a specially severe frost had caused ice to form and thus to obstruct it. By inspection, the defendant might have discovered and removed the ice before the overflow occurred. Was this too remote? (1856, *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781.)

The defendant carelessly backed an engine on a switch-track, which formed an arc with the main track. The engine collided with a train passing on the main track. No one was hurt; but the shock reversed the lever, and the engine

**Topic 2. Intervening Act or Condition of the Plaintiff Himself****448. DICKSON v. HOLLISTER****SUPREME COURT OF PENNSYLVANIA. 1888****123 Pa. 421, 16 Atl. 484**

**BEFORE GORDON, C. J., PAXSON, STERRETT, GREEN, CLARK, WILLIAMS, AND HAND, JJ.** No. 32, October Term, 1888, Sup. Ct.; court below, No. 407, March Term, 1887, C. P. No. 1.

On February 7, 1887, a summons in case was served in an action by Alfred Hollister against Dr. John S. Dickson and Sarah Dickson, his wife, to recover damages for personal injuries received through the alleged negligence of the defendants.

**Issue.** At the trial on November 17, 1887, the facts appearing in evidence were substantially as follows:

On April 10, 1886, the plaintiff, a resident of Utica, New York, was in Pittsburgh, as a travelling salesman for a drug house in New York city, and in the afternoon of that day when passing in front of property belonging to the defendant on Ninth street, in the pursuit of his business, he stepped upon the grating which covered a coal-hole in the foot way. The grating was displaced by his step upon it, and turned or slipped away, whereby the plaintiff fell into the coal-hole to his arm-pits, receiving a severe injury upon his right leg below the knee. He was confined to his bed at St. Charles Hotel for two months, under treatment, and was off duty for still another month. Erysipelas supervened during his confinement. His testimony as to the occurrence resulting in his injury sufficiently appears in the charge of the Court below and in the opinion of this Court. Dr. Orr, his physician, testified that the erysipelas set in on the sixth or seventh day; that erysipelas frequently though not usually followed wounds, but if there had been no wound there would have been no erysipelas. . . .

At the close of the testimony, the Court, STOWE, P. J., charged the jury: . . . If the erysipelas would not have occurred if the injury had not happened, it is to be considered by the jury as part of the injury itself, to be compensated for in some way. The jury returned a verdict in favor of the plaintiff for \$1,325. Judgment having been entered, the defendants took this writ, assigning error. . . .

*Mr. D. T. Watson and Mr. A. H. Clarke, for the plaintiffs in error: . . .*

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went backwards around the switch. As the train passed further along the main track, the engine again collided with it where the switch entered the main track, and the plaintiff passenger was injured. Was this too remote? (1891, *Bunting v. Hogsett*, 139 Pa. 363, 21 Atl. 31.)

**NOTES:**

"Negligence as the Proximate Cause of Injury." (A. L. Reg., LVIII, 306.)

"Proximate Cause — The Santa Rita." (M. L. R., VIII, 378.)]

3. The judge too broadly charged the jury that if erysipelas would not have occurred unless the accident happened, then the plaintiff was entitled to recover for the suffering from the erysipelas, as if it were a part of the original wound. This wholly eliminated from the case the question of intervening causes, and withdrew the question of fact as to whether the wound directly and solely caused the erysipelas. If the wound were a part of the cause of the erysipelas, and yet there were intervening causes without which erysipelas would not have set in, then the defendants were not liable. . . .

Stowe, P. J.: This suit was brought to recover damages for a personal injury sustained by the plaintiff from falling into a coal-hole in front of defendant's premises on Ninth street in the city of Pittsburgh, on April 10, 1886. . . . Whether the cover was made and adjusted in a way that was reasonably safe and secure, was for the jury, and that question was fairly submitted. . . .

Although, according to the testimony of the medical experts, erysipelas is not a necessary consequence of such an injury, yet it is conceded that in frequent instances it does follow flesh wounds. The causes which produce erysipelas would seem to be obscure; the modern theory is that erysipelas is the result of some specific poison, which enters the system through the exposure of the wound; but the nature of this poison and the conditions under which it operates, are not well understood. The disease was, however, a development which might fairly have been anticipated as a result of the injury; and as in this instance the disease developed in the wound, it was a reasonable inference of the jury that if there had been no wound there would have been no erysipelas. There is no intimation that erysipelas intervened from any want of care or skill on the part of Dr. Orr, or that proper precautions were not taken by the use of antiseptics, etc., in the treatment of this wound. On the contrary, it is conceded that the disease, if not the necessary and usual result, frequently occurs in such cases. The negligence of the defendant may therefore be regarded not only as the direct cause of the wound, but of the disease, which, from occult causes, not attributable to treatment, improper habits, or peculiar constitutional tendencies, frequently develops from personal injuries. It was in this view of the case the Court instructed the jury that even if the erysipelas was not the immediate result of the injury, it might nevertheless be regarded by the jury as part of the injury itself. Nothing intervened to produce this disease other than might have been fairly anticipated as the direct, although not the necessary, result of the injury; as well might we attribute the contact of the atmosphere or the microscopic existences therein as an intervening cause in such cases.

Upon an examination of the whole case we find no error, and the

*Judgment is affirmed.*

## 449. GREEN v. SHOEMAKER &amp; COMPANY

COURT OF APPEALS OF MARYLAND. 1909

111 Md. 69, 73 Atl. 688

[Printed *ante*, Book I, as No. 37.]<sup>1</sup><sup>1</sup> [TOPIC 2. PROBLEMS:

The plaintiff was injured by reason of a defect in the defendant's highway. In consequence of a scrofulous tendency already existing, the plaintiff suffered a necrosis of the bone which would otherwise not have occurred. Was this too remote? (1875, *Stewart v. Ripon*, 38 Wis. 591.)

The plaintiff was an unborn child, and his mother was riding in an elevator owned by the defendant. By the defendant's carelessness, the mother and the child were injured. May the child recover? (1900, *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N. E. 638; 1891, *Walker v. Gt. Northern R. Co.*, 28 L. R. Ire. 69; and cases cited in the note to No. 121, *ante*.)

The plaintiff was severely injured by defective machinery of the defendant. His head was affected, and after several weeks he fell into an insane melancholy and committed suicide. Is the defendant responsible? (1909, *Brown v. American S. & W. Co.*, — Ind. App. —, 88 N. E. 80.)

The plaintiff was riding over the defendant's defective bridge, and the bridge gave way. In consequence of the fright, the plaintiff, who was a pregnant woman, suffered a miscarriage. Was this too remote? (1875, *Oliver v. La Valle*, 36 Wis. 592.)

The defendant's negligent act set fire to the plaintiff's premises. While trying to put out the fire, the plaintiff was injured. Was this too remote? (1907, *Illinois C. R. Co. v. Siler*, 229 Ill. 390, 82 N. E. 362.)

The plaintiff was riding on the defendant's coach, and was negligently put into such a position of danger that he jumped, to escape it, and thereby broke his leg. Was this too remote? (1816, *Jones v. Boyce*, 1 Stark. 493.)

The plaintiff was standing on the platform at the defendant's railroad station. The defendant's freight train approached, with a piece of timber projecting from one of the cars. On discovering this, the plaintiff, having no time to do otherwise, threw herself down on the platform to avoid the timber. The blow and shock brought on an illness. Was this too remote? (1890, *Buchanan v. R. Co.*, 52 N. J. L. 265.)

The plaintiff's intestate was intoxicated by the defendant's liquor. He then picked a quarrel with an old enemy, fought with him, ran away to escape the police, stumbled, fell into a river, and broke his neck. Was this too remote? (1899, *Roach v. Kelly*, 194 Pa. 24, 44 Atl. 1090.)

By the negligence of the defendant, a lamp blazed up in its railroad car. Efforts to smother it were unavailing. The plaintiff, in alarm, rose to go into the next car, and in passing out was injured. Was this too remote? (1899, *Gannon v. R. Co.*, 173 Mass. 40, 52 N. E. 1074.)

The defendant thrust a long board through a transom in the hotel bedroom where the plaintiff lived, as she was preparing to retire. The board did not fall into the room; but the plaintiff, in jumping aside to escape it, fell and injured her knee. Was this too remote? (1899, *Ellick v. Wilson*, 58 Nebr. 584, 70 N. W. 152.)

See also the problems cited *ante*, note to No. 38, Book I.

## NOTES:

"Recovery for insanity caused by excitement." (H. L. R., VIII, 176.)

"Accident as cause of insanity and subsequent suicide." (H. L. R., IX, 156.)



**Topic 3. Intervening Third Person's Act****SUB-TOPIC A. THIRD PERSON'S ACT INDUCED DIRECTLY OR  
INDIRECTLY BY DEFENDANT'S ACT****450. ASHLEY v. HARRISON****NISI PRIUS. 1794***Peake* 256 (\*194)

THIS declaration stated that the plaintiff during the time of Lent, 1793, caused to be performed every Wednesday and Friday night, by divers singers and musicians, at a certain place of public amusement called Covent Garden Theatre, certain musical performances for the entertainment of the public for certain rewards paid to him for admission into the said place of public amusement by those persons who were desirous of hearing the said musical performances; by means whereof he derived great gains, &c.; yet the defendant, knowing the premises, but contriving to lessen the profits, &c. and to terrify, deter, &c. a certain public singer called Gertrude Elizabeth Mara; who had been before that time retained by the plaintiff to sing publicly for him at the said place, &c. from so singing, wrote and published a certain false and malicious paper writing of and concerning the said G. E. Mara, and of and concerning her conduct, as such public singer as aforesaid, containing therein, &c. The libel was then set out, and the declaration concluded, that by reason thereof the said G. E. M. could not sing without great danger of being assaulted, ill-treated, and abused, and was terrified, deterred, prevented, and hindered from so singing; and that the profits of the amusement were thereby rendered much less than they otherwise would have been.

On the opening of the cause, Lord Kenyon, C. J., expressed his disapprobation of the action; but on *Erskine*, for the plaintiff, suggesting that the objection was on the record, his Lordship permitted the cause to proceed. The declaration was proved, and Madame Mara said, that "she did not choose to expose herself to contempt again, and therefore refused to sing." When the defendant's counsel were proceeding to their defence, they were stopped by Lord KENYON, who said:

This action is unprecedented, and I think cannot be supported on principle. The injury is much too remote to be the foundation of an action. If this action is to be maintained, I know not to what extent the rule may be carried. For aught I can see to the contrary, it may

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"Owner injured in saving property fired by defendant's negligence." (H. L. R., XVI, 379.)

"Intervening causes: Owner injured in saving property endangered by defendant's negligence." (H. L. R., XXI, 293.)]

equally be supported against every man who circulates the glass too freely, and intoxicates an actor, by which he is rendered incapable of performing his part on the stage. If any injury has happened, it was occasioned entirely by the vain fears or caprice of the actress. Madame Mara says, she did not choose to expose herself to contempt again. The action then is to depend entirely on the nerves of the actress; if she chooses to appear on the stage again, no action can be maintained; if she does not, her refusal is to be followed with an action. . . .

The plaintiff was nonsuited.<sup>1</sup>

#### 451. TARLETON AND OTHERS v. M'GAWLEY

NISI PRIUS. 1804

*Peake* 205

THIS was a special action on the case. The declaration stated that the plaintiffs had sent a vessel called the "Bannister," with a crew on board, under the command of one Thomas Smith, and loaded with goods proper for trading with the natives, to a part of the coast of Africa called Cameroon, to trade with the natives there. That while the last-mentioned ship was lying off Cameroon, a canoe with some natives on board came to the same for the purpose of establishing a trade, and went back to the shore, of which defendant had notice. And that he well knowing the premises, but contriving and maliciously intending to hinder and deter the natives from trading with the said Thomas Smith, for the benefit of the plaintiffs, with force and arms, fired from a certain ship called the "Othello," of which he was master and commander, a certain cannon loaded with gunpowder and shot, at the said canoe, and killed one of the natives on board the same. Whereby the natives of the said coast were deterred and hindered from trading with the said T. Smith for the benefit, &c., and plaintiffs lost their trade.

*Erskine*, in his opening for the plaintiffs, distinguished this case from that of *Ashley v. Harrison* [*ante*, No. 450], where Lord KENYON had held the injury to be too remote to be the foundation of an action. . . . In this case the plaintiffs' loss was not occasioned by the vain fears of the negroes, or even the fear of a battery committed on them, but a fear arising from the danger of life itself.

The plaintiffs called Thomas Smith, who proved the facts stated in the declaration; and further, that the defendant had declared the natives owed him a debt, and that he would not suffer any ship to trade

<sup>1</sup> Reporter's Note. Vide *Tarlton and Others v. M'Gawley*, *post*, p. 205. In *Taylor v. Neri*, 1 Esp. 386, where a person engaged by the manager of a theatre as a public singer had been beaten, and thereby prevented from performing, *Eyre, C. J.*, held, that the manager could not maintain an action for the remote injury which he sustained in consequence.

with them until that was paid; in pursuance of which declaration he committed the act complained of by the plaintiffs. . . .

LORD KENYON, C. J. This action is brought by the plaintiffs to recover a satisfaction for a civil injury which they have sustained. The injury complained of is, that by improper conduct of the defendant the natives were prevented from trading with the plaintiffs. The whole of the case is stated on the record, and if the parties desire it, the opinion of the Court may hereafter be taken whether it will support an action. I am of opinion it will. . . . Had this been an accidental thing, no action could have been maintained, but it is proved that the defendant had expressed an intention not to permit any to trade, until a debt due from the natives to himself was satisfied. If there was any court in that country to which he could have applied for justice, he might have done so, but he had no right to take the law into his own hands.

The plaintiffs had a verdict, and the parties agreed to refer the damages to arbitration.

#### 452. LYNCH *v.* KNIGHT

HOUSE OF LORDS. 1861

9 *H. L. C.* 577, 8 *Ruling Cases* 383

IN this case an action had been brought in the Court of Queen's Bench in Ireland, in the names of Knight and his wife (the former being joined for conformity), to recover damages for slanderous words spoken of the wife. The words complained of were alleged to have been uttered to the husband, and were thus set forth in the first paragraph of the plaint: "Jane is a notorious liar, and she will do her best to annoy you, as she takes delight in creating disturbances wherever she goes, and I advise you not to introduce her into society. Any singularity of conduct which you may have observed in your wife must be attributed to a Dr. Casserly of Roscommon, as she was all but seduced by him; and I advise you, if Casserly comes to Dublin, not to permit him to enter your place, as he is a libertine and a blackguard; I have no other object in view in telling you about her conduct, and in speaking to you as I have done, but your own welfare. She is an infamous wretch, and I am sorry that you had the misfortune to marry her; and if you had asked my advice on the subject, I would have advised you not to marry her." . . .

The averment of special damages was in these terms: "And the plaintiffs aver that from the said false, scandalous, and malicious statements of the defendant the plaintiff William was at first led to believe, and that he did in fact believe that his wife, the plaintiff Jane, had been guilty of improper and immoral conduct before her marriage, and that her character and conduct was such as represented as aforesaid by said defendant; that he, the plaintiff William, ought not any longer to live

with the plaintiff Jane as his wife; and the plaintiff William, influenced solely by the defendant's said slanders, and then believing that the statements so made by the said defendant, who was the stepbrother of his wife, were true, shortly after the speaking of said matter by the defendant, and in consequence thereof, was induced to refuse, and did in fact refuse to live any longer with the plaintiff Jane as his wife, and on the contrary, the plaintiff William required the father of the plaintiff Jane, who lived in the country, to take her home to his own house, which he accordingly did; and the plaintiff Jane, in fact, thereupon left Dublin and returned to her father's house, where she resided for a considerable time, separated from her said husband. And the plaintiffs aver that such separation was solely and entirely caused by and resulted from the acts of the defendant as aforesaid." And the plaintiffs aver that they have sustained damage. . . . The defendant demurred to the plaint upon the grounds, that the words not being actionable in themselves, the special damage assigned was too remote. . . . The jury found a verdict for the plaintiffs, damages £150. The Court of Queen's Bench having overruled the demurrer, judgment was given for the plaintiffs on this finding. The case was then taken on error to the Exchequer Chamber, where the judges were divided in opinion, but the judgment was affirmed. The present proceeding in error was then brought.

Mr. *Bovill* and Mr. *Quain* for the plaintiffs in error. There is no precedent for such an action as this to be found in any of the books. It is not pretended that this action was maintainable without special damage. If so, that damage must be a consequence arising naturally and necessarily from the words spoken. The husband turning the wife out of doors is not such a consequence, for he says the words are false. [The Lord Chancellor, Lord CAMPBELL: It would be a natural consequence in a certain rank of life; the defendant cannot say that what he stated was not true and ought not to have been believed, for he must have meant it to be believed.] . . . Here too the act, really injurious to the wife, was the act of the husband. Suppose that, instead of turning his wife out of doors, the husband had beaten her, and then found the charge against her was false. Surely he could not have sustained any action in respect of his own wrongful act. [The LORD CHANCELLOR: But the plaint alleges special damages in respect of personal suffering by the wife alone. Lord WENSLEYDALE: The loss of the society of her husband.] . . . In *Vicars v. Wilcocks* (8 East, 1) the master wrongfully dismissed the plaintiff on a slanderous statement; as the dismissal was not the legal consequence of the statement, the action was held not maintainable. [Lord BROUGHAM: The master is not bound to institute an action, to try whether the slander is true; but if not, then the person injured is injured by its being false, and the slanderer being the cause of the injury, is not the action maintainable in respect of that injury?] No. Suppose a man bought a cargo of

wheat and was then told that it was bad, and so refused to take the cargo; when he found out that what he had been told was untrue, he could not maintain an action against the slanderer for the loss he had suffered by refusing to take the cargo. [LORD CHANCELLOR: It must not be laid down as a universal rule that a man cannot maintain an action if he is induced by false representations to do an act which occasions him damage. The real question is, whether under the circumstances his conduct is reasonable, not simply whether it is wrongful.] . . .

The Solicitor-General (Sir *W. Atherton*) and Mr. *Exham* (of the Irish bar) for the defendants in error. It is admitted that the words here are not actionable in themselves. . . . It is said that the damage must be the natural result of the words; correctly stated, the proposition would be, must be the natural actual result. It is so here. If the words were true, it is the natural actual result in every sense of that term; and the slanderer cannot be permitted to say that they are not true. He intended that the husband should believe them; the husband did believe them, and he sent his wife back to her father. [The LORD CHANCELLOR: But is there anything here which, if true, would justify the husband in sending her back?] There is, and the innuendo sufficiently alleges it. . . . [LORD WENSLEYDALE. And he had no right at all to turn her away if what was stated was not true.] But it was a natural and probable result of the words that he should act on them as true. Every man should be taken to be answerable for the consequences of his own acts, *Ward v. Weeks* (7 Bing. 211), and therefore the defendant must be taken to have foreseen and intended the mischief he caused. . . . It is not enough to say in order to justify the denial of this right of action, as in *Vicars v. Wilcocks* (8 East, 1), that an action of another sort against other persons might be maintained. . . . No doubt the husband himself could not complain of his own wrongful act; but he is necessarily joined for conformity, the wife being the person who has sustained the injury through the act of the defendant. The matter of form cannot affect her substantive right. . . .

LORD BROUGHAM (17 July). My Lords, in this case I will read the judgment of my noble and learned friend, the late Lord Chancellor. He says:

"After much consideration, I agree with the two dissenting judges in the Court of Exchequer Chamber. . . . Were it not for one defect in the case of the plaintiffs, I should have agreed with them, and I think that all the other objections to the action were properly overruled. I place no reliance on the objection, that in a case like the present the imputation cast on the wife being false, the act of the husband in separating from her is wrongful, and therefore he cannot join as plaintiff in an action, the foundation of which is his own wrongful act. If his dismissal of the wife from his house would have been reasonably justifiable, had the words spoken been true, and this act was a natural, probable, and direct consequence of the imputation, I do not think that the defendant could

avail himself of the objection of the imputation being false, he having intended the husband to believe that it was true, and having intended the husband to act upon it. Mr. *Bovill* observed, that 'the husband ought to have kicked the slanderer out of his house, and not his innocent wife.' But we cannot hear such language from the mouth of his client, the slanderer. I am of opinion that in the present case the action is not maintainable, because, looking to the frame of the declaration, the loss or special damage relied upon is not the natural and probable consequence of the injury complained of, viz., the speaking of the slanderous words. It is allowed that the words are not actionable in themselves. . . . Had those words contained a charge of adultery by the wife, which the defendant pretended to know, and which he asserted as a fact, I should have thought the allegation of special damage sufficient to support the action. In that case the husband, believing the charge to be true, would have been justified in separating from his wife, and this separation would have been the natural and probable consequence of the slander. . . . But, examining the words actually spoken as set out in the plaint, they contain no charge of adultery, nor any imputation of any kind which, if true, would justify the act of the plaintiff William, or would induce any reasonable man to do such an act. The specific charge excludes adultery, and the general charges amount only to levity of manners, requiring vigilance on the part of the husband, and the advice given was consistent with her remaining in the conjugal society of her husband. . . ."

My Lords, I entirely agree with my late noble and learned friend, in his observations, which I have read, upon this case, with this exception, that I am rather inclined to think (though that has become immaterial), that the action does not lie. The words here are not such as would in an ordinary case, and with ordinary persons, naturally produce the effect which they appear to have produced in this case. That is the ground upon which I would hold that the judgment of the Court below is wrong. . . .

LORD WENSLEYDALE. . . . The questions in the case are two: 1st. Whether a wife can maintain an action for the loss of the consortium of the husband by a wrongful act of the defendant (joining, of course, her husband for conformity)? and, 2d. Whether the loss of that consortium is sufficiently connected with and shown to be the consequence of the defendant's wrongful act in this case, so as to be actionable?

There is a considerable doubt upon both these questions, but particularly on the first. I have made up my mind that no such action will lie.<sup>1</sup> . . . This view of the case makes it unnecessary to consider whether the slander of the defendant has been proved to be the cause of the loss, the desertion by the husband — so as to make the words actionable, they not being so unless they have caused a special damage. Upon this question I am much influenced by the able reasoning of Mr. Justice CHRISTIAN. I strongly incline to agree with him, that to make

<sup>1</sup> [On grounds involving the principles of Nos. 39, 86, *ante*.]



the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned might fairly and reasonably have been anticipated and feared would follow from speaking the words, not what would have reasonably followed, or we might think ought to follow. I agree with the learned Judges, that the husband was not justified in sending his wife away. I think he is to blame; but I think that such deliberate and continued accusations, of such a character, coming from such a quarter, might reasonably be expected so to operate, and to produce the result which they did.

In the case of *Vicars v. Wilcocks* (8 East, 1), I must say that the rules laid down by Lord ELLENBOROUGH are too restricted. That which I have taken from Mr. Justice CHRISTIAN seems to me, I own, correct. I cannot agree that the special damage must be the natural *and legal* consequence of the words, if true. Lord ELLENBOROUGH puts, as an absurd case that a plaintiff could recover damages for being thrown into a horsepond, as a consequence of words spoken; but I own I can conceive that when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result, and a compensation might be given for an act occurring as a consequence of an accusation of that crime.

I think the judgment of the Court of Exchequer Chamber should be reversed.

*Judgment reversed.*

### 453. GUILLE *v.* SWAN

SUPREME COURT OF NEW YORK. 1822

19 *Johns.* 381

IN error, on certiorari, to the Justices' Court in the city of New York, *Swan v. Guille*, in the Justices' Court, in an action of trespass, for entering his close, and treading down his roots and vegetables, &c., in a garden in the city of New York. The facts were, that Guille ascended in a balloon in the vicinity of Swan's garden, and descended into his garden. When he descended, his body was hanging out of the car of the balloon in a very perilous situation, and he called to a person at work in Swan's field, to help him, in a voice audible to the pursuing crowd. After the balloon descended, it dragged along over potatoes and radishes, about thirty feet, when Guille was taken out. The balloon was carried to a barn at the further end of the premises. When the balloon descended, more than two hundred persons broke into Swan's garden through the fences, and came on his premises, beating down his vegetables and flowers. The damage done by Guille, with his balloon, was about fifteen dollars, but the crowd did much more. The plaintiff's damages, in all, amounted to ninety dollars. It was contended before the Justice, that Guille was answerable only for

the damages done by himself, and not for the damage done by the crowd. The Justice was of the opinion, and so instructed the jury, that the defendant was answerable for all the damages done to the plaintiff. The jury, accordingly, found a verdict for him, for ninety dollars, on which the judgment was given, and for costs. The cause was submitted to the Court on the return, with the briefs of the counsel, stating the points and authorities.

SPENCER, Ch. J., delivered the opinion of the Court. The counsel for the plaintiff in error supposes that the injury committed by his client was involuntary, and that done by the crowd was voluntary, and that therefore there was no union of intent; and that, upon the same principle which would render Guille answerable for the acts of the crowd in treading down and destroying the vegetables and flowers of S., he would be responsible for a battery, or a murder committed on the owner of the premises.

The intent with which an act is done, is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong. . . . In *Leame v. Bray* (3 East Rep. 595), Lord Ellenborough said: If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen and mischief ensue, I am answerable in trespass; and if one (he says) put an animal or carriage in motion, which causes an immediate injury to another, he is the actor, the causa causans.

I will not say that ascending in a balloon is an unlawful act, for it is not so; but it is certain that the aeronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation; all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help or not, is immaterial; he had put himself in a situation to invite help, and they rushed forward, — impelled, perhaps, by the double motive of rendering aid, and gratifying a curiosity which he had excited. Can it be doubted, that if the plaintiff in error had beckoned to the crowd to come to his assistance, he would be liable for their trespass in entering the enclosure? I think not. In that case, they would have been co-trespassers, and we must consider the situation in which he placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd; he is, therefore, undoubtedly liable for all the injury sustained.

*Judgment affirmed.*

454. LAMB *v.* STONE

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1831

11 *Pick.* 527[Printed *ante*, Book I, as No. 133.]455. HASTINGS *v.* STETSON

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1879

126 *Mass.* 329

TORT, in five counts, for slander, in accusing the plaintiff of the crimes of adultery and fornication. Answer, a general denial. At the trial in the Superior Court, before BACON, J., the evidence tended to show that the words complained of in the first count of the declaration were spoken by the defendant to the brother of the plaintiff in the presence of a number of persons, during an angry altercation between the brother and the defendant; That the words complained of in the second count were spoken by the defendant, to the father of the plaintiff, in a public place, in the hearing of a number of persons, during an angry altercation between the father and the defendant; and That the words complained of in the third count were spoken by the defendant, in another public place, in the hearing of a number of persons. The evidence was conflicting as to what was said by the defendants on the different occasions. There was evidence that the remarks made were repeated by some of the persons who heard them, but there was no evidence that the remarks complained of were repeated to the plaintiff, and how or when, if ever, she heard of what had been said; nor that the defendant asked or authorized in words any one to repeat the remarks he made.

The defendant asked the judge to rule that no damages were to be allowed to the plaintiff on account of statements made by others than the defendant. . . . And at the close of the charge, after discussion by counsel, the judge instructed the jury they were not to consider the repetitions, unless they were the natural and proximate result of the slanders, and the slanders were uttered in such a way by the defendant as to authorize the repetitions. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

*H. H. Bond*, for the defendant.

*G. M. Stearns*, for the plaintiff.

GRAY, C. J. It is too well settled, to be now questioned, that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or

request, by others over whom he has no control, and who thereby make themselves liable to the person slandered; and that such repetition cannot be considered in law a necessary, natural, or probable consequence of the original slander. *Ward v. Weeks*, 4 Moore & Payne, 796; S. C. 7 Bing. 211; *Tunncliffe v. Moss*, 3 Car. & K. 83; *Barnett v. Allen*, 1 F. & F. 125; *Dixon v. Smith*, 5 H. & N. 450; *Parkins v. Scott*, 1 H. & C. 153; *Derry v. Handley*, 16 L. T. N. S. 263; *Stevens v. Hartwell*, 11 Met. 542, 550; *Terwilliger v. Wands*, 17 N. Y. 54.

In the present case, there was no evidence that the defendant, in any form of words, asked or authorized any one to repeat his statements, or that those who did repeat them held any relation to him that would imply such authority. or had any legal justification for the repetition. The presiding judge, though expressly requested to rule that no damages could be recovered by the plaintiff on account of the repetition by third persons of statements made by the defendant, declined so to do, and, in the instructions given, allowed the jury to hold the defendant responsible for repetitions by such persons, and for which they would themselves be liable to the plaintiff. For this reason the

*Exceptions must be sustained.*

#### 456. SOUTHERN TRANSPORTATION COMPANY v. HARPER

SUPREME COURT OF GEORGIA. 1903

118 Ga. 672, 45 S. E. 458

ERROR from City Court of Savannah; T. M. NORWOOD, Judge. Action by W. H. Harper, against the Southern Transportation Company. Judgment for plaintiff. Defendant brings error. Reversed.

*Saussey & Saussey*, for plaintiff in error. *Twiggs & Oliver*, for defendant in error.

CANDLER, J. This was a suit for damages on account of personal injuries, in which the plaintiff obtained a verdict for \$500. The case comes before this Court on exceptions to the overruling of the defendant's motion for a new trial. It appears that the plaintiff was a passenger on a steamboat of the defendant company, which plied on the Savannah River between Savannah and Augusta, and in the course of its passage it was necessary for the vessel to pass between the piers of a drawbridge situated a few miles above the city of Savannah. The petition alleged that "the pilot at the wheel of said steamer, then and there steering and piloting the same as an officer, agent, servant, and employee of said defendant company, ran the said steamer into and against a pier" of the bridge to which reference has been made. The plaintiff was at the time seated in a chair in a portion of the boat reserved for negro passengers. He testified: "I was knocked from my chair when the boat hit the bridge, and the people were pouring out.

I jumped up and twenty-five or thirty rushed over me and knocked me back in the chair. I started to get up again. Eight or ten knocked me down. All the people rushed from that side, and everybody rushed out. Being helpless, and down on the floor, the people rushed over me." There is ample evidence to warrant the jury in finding that the plaintiff's pain and suffering had been intense, and that his injuries were serious and permanent. Aside from the extract from the petition which we have already quoted, the only allegation of negligence was in the following language: "Your petitioner avers that the injuries he has sustained, as described above, are due entirely to the negligence of the said defendant, its servants, agents, and employees, in running the said steamer into and striking against the pier of said bridge." The defence relied on by the defendant company, which was substantially supported by the evidence offered in its behalf, was, in effect, that the collision between the vessel and the pier of the bridge was due to causes entirely beyond its control. . . . The answer also averred "that, if injured at all, the said plaintiff was injured by another and distinct cause" from the striking of the vessel against the pier, "to wit, by the passengers in the cabin on the lower deck with plaintiff ruthlessly, carelessly, and negligently running over and trampling upon him; that this defendant had no control of the said movements of the said passengers; and that the said injuries of the said plaintiff thus sustained are not the legal and natural result of the alleged striking of the pier of the said bridge.

1. After a careful reading of the record, we are led to the conclusion that the verdict of the jury was contrary to law and the evidence, and should have been set aside on motion for new trial. . . .

2. Independently of what has been said, we do not think that the act of the defendant company, through its employees, in permitting the vessel to collide with the pier, even if negligent, can properly be said to have been the natural and probable cause of the injuries sustained by the plaintiff. It appears from the uncontradicted evidence that in approaching the drawbridge the steamer proceeded very slowly, so as to drift into the opening between the piers. There was a fender around these piers in shape of pilings, to prevent vessels passing through from striking against the stone piers. In entering the opening, the forward part of the vessel struck against the piling, and the wind swept the boat around so as to cause her to strike the pier. It does not clearly appear just at what time the negroes became frightened and ran over the plaintiff, whether at the time that the boat ran on to the piling or after she had swung around and struck the pier. But, be that as it may, there was nothing in the act of the employees of the defendant company, conceding that they were negligent, that would naturally and ordinarily give rise to the stampeding of a crowd of passengers. They could not reasonably be required to anticipate that on account of such an occurrence a number of negroes would

become panic-stricken, and run down and trample, almost into insensibility, one of their number.

- We are aware of the great difficulty in deciding, in cases of this kind, just what is and what is not a probable and proximate cause of an injury. We refer, however, to the admirable opinion of Mr. Justice FISH in the case of *Mayor of Macon v. Dykes*, 103 Ga. 847, 31 S. E. 443, for an elaborate discussion of the subject. In that case probably all the Georgia cases bearing on this branch of the law are cited, and the *Dykes Case* itself is strong authority for what is now held. The case of *Southern Ry. Co. v. Webb*, 116 Ga. 152, 42 S. E. 395, is not in point, and is easily distinguishable from the case now under consideration. In the *Webb Case* the negligent act of the railroad company caused the plaintiff's decedent to be thrown from its train upon a track running alongside the one on which the train was, and while he was lying upon that track an engine of another railroad company ran over and killed him. It was held, in effect, that the passage of trains upon this adjoining track was an ordinary and usual occurrence, and one which should have been anticipated by the defendant; and that, as this occurrence was in the direct chain of causation with the negligent act of the defendant, it was liable therefor. In this case, however, the immediate cause of the plaintiff's injuries was his being thrown down and trampled upon by his fellow passengers, and that occurrence was not a probable result of the alleged negligence of the defendant, or one which should reasonably have been anticipated by it.

Judgment reversed. All the Justices concur.<sup>1</sup>

<sup>1</sup> [SUB-TOPIC A. PROBLEMS:

The defendant made libellous statements of the plaintiff, in conversation with a person whom he knew to be a newspaper reporter. The person printed the statement in the newspapers. Is the defendant responsible for this repetition? (1900, *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502.)

The defendant kept a public baseball ground, adjoining the plaintiff's premises. Balls were often knocked over the fence, and persons came over on to the plaintiff's land to get them; and disorderly crowds collected in the neighborhood. Was the defendant responsible? (1899, *Cronin v. Bloemcke*, 58 N. J. Eq. 313, 43 Atl. 605.)

The plaintiff was a blacksmith and horseshoer, of good repute. He shod the horse of R. on a certain day, and shod it well. The defendant secretly loosened the shoe and drove a nail in the foot, intending to make R. believe that the plaintiff's shoeing was incompetent. R. did so believe, and ceased to patronize the plaintiff. Has the plaintiff an action? (1881, *Hughes v. McDonough*, 43 N. J. L. 459.)

The defendant sold laudanum to the plaintiff's wife as a beverage, knowing that it was impairing her health. The plaintiff husband in consequence suffered the loss of her society and services. Was this too remote? (1867, *Hoard v. Peck*, 56 Barb. 202.)

The defendant sold to the plaintiff, for use in his factory, rags containing an infection. Some of the plaintiff's employees in consequence died, others became ill, and others left, and he lost their services. Was this too remote? (1887), *Dushane v. Benedict*, 120 U. S. 630, 648.)

A. was shot by B. in a brawl at the saloon of C., the brawl being caused by



## SUB-TOPIC B. THIRD PERSON'S ACT INTERVENING INDEPENDENTLY

## 458. LYNCH v. NURDIN

QUEEN'S BENCH. 1841

1 Q. B. 29

ON the trial before WILLIAMS, J., at the sittings in Middlesex, in Easter term, 1839, it appeared that on the day in question defendant's cart was in Compton Street, Soho, under the charge of his carman; that the carman went into a house, and left the horse and cart standing at the door, without any person to take care of them, for about half an hour; that the plaintiff, who was a boy under seven years of age, and several other children, were about the cart, and plaintiff, during the carman's absence, got upon it; that another boy led the horse on; and the plaintiff, who, at the time, was getting off the shaft, fell, and was run over by the wheel, and his leg was broken. The defendant's counsel contended that the learned judge ought to direct the jury that there was no evidence in support of the plaintiff's case, his own negligence having brought the mischief upon him. WILLIAMS, J., refused to withdraw the facts from the consideration of the jury, and left it to them to say, first, whether it was negligence in the defendant's servant to leave the horse and cart for half an hour, in the manner

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intoxication with liquor sold by C. Is C. responsible? (1905, Judson v. Barry, 38 Wash. 37, 80 Pac. 194.)

The defendant opened a public pleasure-garden, with a brass band, fireworks, etc.; and the crowd attracted to hear and to see occupied the road so as to obstruct the passage. Was the defendant responsible? (1867, Walker v. Brewster, L. R. 5 Eq. 25.)

The defendant sold intoxicating liquor to the plaintiff's husband, who while drunk killed H., and was sentenced to imprisonment for life. Is the defendant responsible to the plaintiff for the loss of support? (1901, Homire v. Halfman, 156 Ind. 470, 60 N. E. 154.)

The defendant falsely stated to the plaintiff's employer that the plaintiff had removed from his last house in debt for the rent and refusing to pay. The employer dismissed the plaintiff. Is the defendant responsible? (1904, Speake v. Hughes, 1 K. B. 138.)

The defendant, on discharging the plaintiff, falsely recorded "neglect of duty" as the cause. By mutual agreement with other railroads, a person discharged for such cause would be refused employment by the others. The plaintiff was so refused. Is the defendant responsible? (1898, Hundly v. R. Co., 105 Ky. 162, 48 S. W. 429.)

## NOTES:

"Husband and wife — loss of consortium, liability of druggist furnishing morphine." (C. L. R., 1910, X, 268.)

"Recovery by husband for selling opium to wife." (H. L. R., X, 384.)

"Third person defamed; suit by one suffering consequential injury." (H. L. R., XIV, 289.)

## ESSAYS:

Jeremiah Smith, "Liability for Negligent Language." (H. L. R., XIV, 184.)]

described; and, secondly, whether that negligence occasioned the accident. Verdict for the plaintiff. In the same term (May 8th) a rule nisi was obtained for a new trial, on the grounds of misdirection, and that the verdict was against evidence. In Michaelmas term, 1840,

*Shee*, Serjt., showed cause. . . . This case, in principle, resembles *Dixon v. Bell*, 5 M. & S. 198, where defendant sent a child for a loaded gun, desiring that the person who was to deliver it should take out the priming, which he did; the gun, after being delivered, went off by the imprudent act of the child, and wounded plaintiff's son; and the defendant was held liable. It may be contended here that the boy who led the horse on was in fault, and not the defendant. But in *Illidge v. Goodwin*, 5 Car. & P. 190, the defendant's cart and horse were left in the street unattended, and a person going by whipped the horse, and caused him to back the cart against the plaintiff's window; it was suggested that the passer-by, and not the defendant was liable: and an attempt was also made to prove that the bad management of the plaintiff's shop-man contributed to the accident; but TINDAL, C. J., said that, supposing this case to be believed, it did not amount to a defence, adding: "if a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." Here the substantial cause of injury was a gross negligence in the defendant's carman.

*Kelly*, contra. . . .

LORD DENMAN, C. J., in this term (January 18th), delivered the judgment of the Court.

This case was tried before my brother WILLIAMS at the sittings in Easter term, 1839. It was an action of tort for negligence by the defendant's servant, in leaving his cart and horse half an hour in the open street at the door of a house in which the servant remained during that period. The evidence for the plaintiff proved that, at the end of the first half-hour, he, a child of very tender age, being between six and seven years old, was heard crying, and, on the approach of the witnesses, was found on the ground, and a wheel of the defendant's cart going over his leg, which was thereby fractured. The defendant's counsel first applied for a nonsuit. The learned judge refused the application; and no question was made before us that these facts afforded prima facie evidence of the mischief having been occasioned by the negligence of the defendant's servant in leaving the cart and horse. Witnesses were then called to establish a defence by a fuller explanation of the facts that had occurred. They proved that, after the servant had been about a quarter of an hour in the house, the plaintiff and several other children came up, and began to play with the horse, and climb into the cart and out of it. While the plaintiff was getting down from it, another boy made the horse move, in consequence of which the plaintiff fell, and his leg was broken as before mentioned. On this undisputed evidence (for there was no cross-

examination of the witnesses) the defendant's counsel claimed the judge's direction in his favour, contending that, as the plaintiff had obviously contributed to the calamity, it could not be said in point of law to have been caused by the negligence of the defendant's servant. My learned brother, however, thought himself bound to lay all the facts before the jury, and take their opinion on that general point. They found a verdict for the plaintiff. It is now complained that such direction was not given; and at all events the jury are said to have given a verdict contrary to the evidence. The case came on in the new trial-paper last term, and has been fully argued before us.

It is argued that the mischief was not produced by the mere negligence of the servant, as asserted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and so committing a trespass on the defendant's chattel.

1. On the former of these two causes no great stress was laid and I do not apprehend that it can be necessary to dwell at any length. For if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if the injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper, returning from his daily exercise, should rear his loaded gun against a wall in the playground of school-boys whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of these should playfully fire it off at a school-fellow and maim him, I think it will not be doubted that the gamekeeper must answer in damages to the wounded party. This might possibly be assumed as clear in principle; but there is also the authority of the present Chief Justice of the Common Pleas in its support; *Illidge v. Goodwin*, 5 Car. & P. 190. . . .

For these reasons, we think that nothing appears in the case which can prevent the action from being maintained. It was properly left to the jury, with whose opinion we fully concur. *Rule discharged.*

#### 459. LANE v. ATLANTIC WORKS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1872

111 Mass. 136

TORT. The declaration was as follows: "And the plaintiff says that the defendants carelessly left a truck, loaded with iron, in Marion

Street, a public highway in Boston, for the space of twenty minutes and more; and the iron on said truck was so carelessly and negligently placed that it would easily fall off; and that the plaintiff was walking in said highway, and was lawfully in said highway, and lawfully using said highway, and in the exercise of due care; and said iron upon said truck was thrown and fell therefrom upon the plaintiff in consequence of the defendants' carelessness, and the plaintiff was severely bruised and crippled," &c. The answer was a general denial of the plaintiff's allegations.

At the trial, . . . the plaintiff, Fergus Lane, introduced evidence that the defendants left a truck with a bar of iron on it standing in front of their works on Marion Street, which was a public highway in Boston; that the iron was not fastened, but would easily roll off the truck; that the plaintiff, then seven years old, and a boy about the same age named James Conners, were walking, between six and seven in the evening, on the side of Marion Street opposite the truck and the defendants' works; that Horace Lane, a boy twelve years old, being near the truck, called to them to come over and see him move it; that the plaintiff and Conners said they would go over and watch him do it; that they went over accordingly; that the plaintiff stood near the truck to see the wheels move, as Horace Lane took hold of the tongue of the truck; that Horace Lane moved the tongue somewhat; that the iron rolled off and injured the plaintiff's leg; and that neither the plaintiff nor Conners touched the iron or truck at all. . . .

The defendants requested the Court to give the following instruction: . . . "While it is true that negligence alone on the part of Horace Lane, which contributed to the injury, combining with the defendants' negligence, would not prevent a recovery, unless the plaintiff's negligence also concurred as one of the contributory causes also; yet, if the fault of Horace Lane was not negligence, but a voluntary meddling with the truck or iron, for an unlawful purpose, and wholly as a sheer trespass, and this culpable conduct was the direct cause of the injury which would not have happened otherwise, the plaintiff cannot recover."

The judge did not give the ruling requested, but gave rulings . . . as follows: . . .

"If the sole or direct cause of the accident was the act of Horace Lane, the defendants are not responsible. If he was the culpable cause of the accident, that is to say, if the accident resulted from the fault of Horace Lane, they are not responsible. But if Horace Lane merely contributed to the accident, and if the accident resulted from the joint negligence of Horace Lane in his conduct in regard to moving the truck and the negligence of the defendants in leaving it there, where it was thus exposed, or leaving it so insecurely fastened that this particular danger might be reasonably apprehended therefrom, then the intermediate act of Horace Lane will not prevent the plaintiff from recovering, provided he himself was in the exercise of due and reasonable

care." . . . The jury returned a verdict for the plaintiff for \$6000 and the defendants alleged exceptions.

*A. A. Ranney and N. Morse*, for defendants.

*W. G. Colburn*, for plaintiff.

COLT, J. In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended.

The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.

Whether in any given case the act charged was negligent, and whether the injury suffered was, within the relation of cause and effect, legally attributable to it, are questions for the jury. They present oftentimes difficult questions of fact, requiring practical knowledge and experience for their settlement, and where there is evidence to justify the verdict it cannot be set aside as matter of law. The only question for the Court is, whether the instructions given upon these points stated the true tests of liability. . . .

3. The last instruction asked was rightly refused. Under the law as laid down by the Court the jury must have found the defendants guilty of negligence in doing that from which injury might reasonably have been expected, and from which injury resulted; that the plaintiff was in the exercise of due care; that Horace Lane's act was not the sole, direct, or culpable cause of the injury; that he did not purposely roll the iron upon the plaintiff; and that the plaintiff was not a joint actor with him in the transaction, but only a spectator. This supports the verdict. It is immaterial whether the act of Horace Lane was mere negligence or a voluntary intermeddling. It was an act which the jury have found the defendants ought to have apprehended and provided against. *Dixon v. Bell*, 5 M. & S. 198; *Mangan v. Atterton*, L. R. 1 Ex. 239; *Illidge v. Goodwin*, 5 C. & P. 190. *Exceptions overruled.*

460. FRANCIS WHARTON. *Treatise on Negligence*. (1874. § 134.) Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound; another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person.

If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative.

461. STONE *v.* BOSTON & ALBANY RAILROAD

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1897

171 *Mass.* 536, 51 *N. E.* 1

TORT, for the loss of the plaintiff's property by fire caused by the alleged negligence of the defendant. Trial in the Superior Court, before HOPKINS, J., who ruled that the plaintiff could not recover, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion. The case was argued at the bar in October, 1897, and afterwards was submitted on briefs to all the justices except HOLMES, J.

*W. S. B. Hopkins*, (*C. M. Rice* and *H. W. King* with him,) for the plaintiff. *F. P. Goulding*, for the defendant.

ALLEN, J. This is an action of tort to recover for the loss of the plaintiff's buildings and other property by fire, under the following circumstances. The defendant owned and operated a branch railroad extending from its main line at South Spencer to the village of Spencer, and had at the Spencer terminus a passenger station, a freight house, and a freight yard, all adjoining a public street. On the side of the freight house, and extending beyond it about seventy-five feet, was a wooden platform about eight feet wide and four feet high, placed upon posts set in the ground, the under side being left open and exposed. The main tracks ran along on the front side of this platform and freight house, and on the rear of the platform there was a freight track, so near as to be convenient to load and unload cars from and upon it. The plaintiff was engaged in the lumber business, buying at wholesale, and selling at wholesale and retail, manufacturing boxes, etc. His place of business comprised several buildings, some of which were across the street from the defendant's buildings; and his principal buildings were about seventy-five feet from the place on the defendant's premises, beneath the platform, where the fire originated. The evidence tended to show that the platform was mostly used for the storing of oil which had been brought upon the railroad, until it was taken away by the consignees; and that the platform had become thoroughly saturated with oil which had leaked from the barrels, and which not only saturated the platform but dripped to the ground beneath. More or less rubbish accumulated from time to time under the platform, and was occasionally carried away. The evidence tended to show that this space below had been cleaned out two or three weeks before the fire.



On the day of the fire, September 13, 1893, from twenty-five to thirty barrels of oil and oil barrels were upon the platform. Some were nearly or quite empty, some were partly full, but most of them were probably full or nearly full. The only evidence to show how the fire originated tended to prove that one Casserly, a teamster, brought a load of boots to be shipped upon a car which was standing upon the track on the rear side of the platform; that he was smoking a pipe; that he stepped into the car to wait for the defendant's foreman of the yard, who was to help him to unload the boots; that in stepping in he stubbed his toe and knocked some of the ashes and tobacco out of his pipe; that he relighted the pipe with a match, and threw the match down; and that at this time he was standing in the door of the car, facing the platform. It must be assumed, upon the evidence, that the fire caught upon the ground underneath the platform from the match thrown down by Casserly. All efforts to extinguish the fire failed; it spread fast and was almost immediately upon the top of the platform, running up a post according to one of the witnesses, and very soon it reached the barrels of oil, which began to explode, and the fire communicated to the plaintiff's buildings, and they were burned. There was evidence tending to show that all of the oil had been upon the platform for a longer time than forty-eight hours. According to the testimony of the plaintiff, the platform was never to his knowledge empty of oil and oil barrels, it was completely saturated with oil, and that general condition of things, so far as the platform was concerned, had existed for eight years, ever since he himself had been there. Upon the evidence introduced by the plaintiff, the Court directed a verdict for the defendant.

1. The plaintiff in substance contends before us that the defendant was negligent in storing oil upon the platform. . . . In our view this becomes the important and decisive question of the case: Whether, assuming that the defendant was thus in fault, the plaintiff introduced any evidence which would warrant a finding by the jury that the damage to his property was a consequence for which the defendant is responsible; or, in other words, whether the act of Casserly in starting the fire was such a consequence of the defendant's original wrong in allowing the oil to remain upon the platform that the defendant is responsible to the plaintiff for it. . . .

The rule is very often stated that in law the proximate and not the remote cause is to be regarded; and in applying this rule it is sometimes said that the law will not look back from the injurious consequence beyond the last sufficient cause, and especially that where an intelligent and responsible human being has intervened between the original and the resulting damage, the law will not look back beyond him. This ground of exonerating an original wrongdoer may be found discussed or suggested in the following decisions and text-books, amongst others. . . .

It cannot, however, be considered that in all cases the intervention

even of a responsible and intelligent human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. Such was the case of *Lane v. Atlantic Works*, 111 Mass. 136, where it was found by the jury that the meddling of young boys with a loaded truck left in a public street was an act which the defendants ought to have apprehended and provided against, and the verdict for the plaintiffs was allowed to stand. . . . According to this statement of the law, the questions in the present case are, was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable, that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility applicable to a case like this has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. . . .

There may not always have been entire consistency in the application of this doctrine; but, in addition to cases of boys meddling with things left in a public street, Courts have also held it competent for a jury to find that the injury was probable, although brought about by a new agency, when heavy articles left near an opening in the floor of an unfinished building, or in the deck of a vessel, were accidentally jostled so that they fell upon the persons below; *McCauley v. Norcross*, 155 Mass. 584; *The Joseph B. Thomas*, 81 Fed. Rep. 578; when sheep allowed to escape from a pasture and stray away in a region frequented by bears, were killed by bears; *Gilman v. Noyes*, 57 N. H. 627; and when a candle or match was lighted by a person in search of a gas leak, with a view to stop the escape of gas; *Koelsch v. Philadelphia Co.*, 152 Penn. St. 355; and in other cases not necessary to be specially referred to. In all of these cases, the real ground of decision has been that the result was or might be found to be probable, according to common experience. Without dwelling upon other authorities in detail we will mention some of those in which substantially this view of the law has been stated. . . . The rule exempting a slanderer from damages caused by a repetition of his words rests on the same ground. *Hastings v. Stetson*, 126 Mass. 329; *Shurtleff v. Parker*, 130 Mass. 293; *Elmer v. Fessenden*, 151 Mass. 359.

Tried by this test, the defendant is not responsible for the consequences of Casserly's act. . . .

2. The plaintiff, however, contends that this question should have

been submitted to the jury. This course would have been necessary, if material facts had been in dispute. But where upon all the evidence the Court is able to see that the resulting injury was not probable, but remote, the plaintiff fails to make out his case, and the Court should so rule the same as in cases where there is no sufficient proof of negligence. *McDonald v. Snelling*, 14 Allen, 290, 299. In *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 122, Blackburn, J., said: "I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote." It is common practice to withdraw cases from the jury on the ground that the damages are too remote. . . .

3. The fact, if established, that the defendant's platform with the oil upon it constituted a public nuisance [by violating a statute], is immaterial, under the circumstances of the present case. . . . Illegality on the part of a defendant does not of itself create a liability for remote consequences, and illegality on the part of a plaintiff does not of itself defeat his right to recover damages. The causal connection between the two still remains to be established. . . . *Exceptions overruled.*

KNOWLTON, J. I agree to nearly all of the propositions of law in the opinion of the majority, but I do not agree that the case presents no question of fact for the consideration of a jury. It seems to me that the principal question is whether there was evidence of negligence on the part of the defendant in reference to the risk of such an accident as happened. I think that there was such evidence. To say nothing of the particulars testified to, the fact that one is acting in violation of a criminal statute is always evidence of negligence. See Pub. Sts. c. 102, § 74. The opinion assumes that there was evidence of negligence on the part of the defendant in keeping so large a quantity of oil for so long a time in such a place. . . . To constitute negligence creating a liability for the damages to the plaintiff, it is not necessary that the defendant should have contemplated the particular event which occurred. It is enough if it should have contemplated the probable happening of some accident of this kind, which involves danger to the property of others that ought to be guarded against. I think the jury well might have found that the burning of the plaintiff's property was a direct result of the defendant's conduct in keeping this oil on the platform.

#### 462. CURRIER v. McKEE

SUPREME JUDICIAL COURT OF MAINE. 1904

99 Me. 364, 59 Atl. 442

ACTION on the case under the Civil Damage Act, R. S. 1883, c. 27, § 49, now R. S. 1903, c. 29, § 58, brought by the plaintiff to re-

cover of the defendant damages for selling intoxicating liquor to her son, by means of which she alleged she had been injured in her means of support, etc. At the close of plaintiff's testimony, on motion of defendant, the presiding justice ruled that on the evidence of the plaintiff the action could not be maintained, and ordered a nonsuit, and plaintiff excepted. The material facts appear in the opinion.

*Frank L. White and Ira G. Hersey*, for plaintiff. *George H. Smith and Louis C. Stearns*, for defendant.

Sitting: WISWELL, C. J., SAVAGE, POWERS, PEABODY, SPEAR, JJ.

POWERS, J. This is an action under the Civil Damage Act, and comes to the law court on exceptions to the ruling of the presiding justice directing a nonsuit. There was evidence tending to prove that the plaintiff lived with her son Will A. Carrier aged thirty-four upon his farm and was dependent upon him for her support; that the defendant sold intoxicating liquor to the son which caused his intoxication; that while so intoxicated he entered the store of one Boulier who ordered him out of the store; that he went out, but turned and tried to come back with the intention of striking at Boulier and having a fight with him; that he did strike Boulier, who thereupon struck him and broke his jaw, by reason whereof his ability to labor was decreased and the support which he afforded his mother sensibly diminished.

The defendant contends that no recovery can be had except for those injuries of which the intoxication is the proximate cause; that the independent act of an intelligent and responsible human being intervened and caused the broken jaw from which all damage to the plaintiff resulted, and that the intoxication was therefore the remote and not the proximate cause of the injury. . . .

The Legislature seems to have regarded intoxicating liquor as dangerous to society, and to have intended that whoever by furnishing liquor contributed to the intoxication of any person should be held responsible for injuries inflicted by him while in that condition, without placing upon the sufferer the burden of showing that the injury was due to the intoxication. . . . If this provision is to be regarded as calling for the same sequence and connection of causation required by the maxim of the common law which the defendant invokes, that the law looks to the proximate and not to the remote cause, the oft embarrassing question remains of what is a proximate and effective although not the immediate cause of the injury. . . . It is urged that the act of an intelligent and responsible human being, the blow struck by Boulier, intervened between the intoxication of the son and the resulting injury to the plaintiff. Upon the evidence, however, the jury might have found that the illegal sales of the intoxicating liquor by the defendant to the plaintiff's son caused his intoxication, and that his intoxication caused him to make an assault upon Boulier, and that the blow of the latter was solely in self-defence when struck at by the intoxicated son. If so, the intervention of Boulier was rightful. It is the wrongful or negligent

act of the third party intervening which breaks the chain of causation and relieves the original wrongdoer of the consequences of his wrongful act; but if in the right, he is not responsible and the party injured must seek reparation from him whose wrongful act was the first in the order of events causing the injury.

A reference to some of the authorities will show that this principle has been frequently recognized ever since the squib case. *Scott v. Shepard*, 3 Wilson, 403. . . . In *Schmidt v. Mitchell*, 84 Ill. 195, it was held that if a person in consequence of intoxication should get into a difficulty resulting in his being shot in the thigh, the party selling the liquor might be responsible for the direct consequences of the injury received; but that if after becoming sober, his disregard of his physician's instructions should necessitate the amputation of his leg, the liquor seller would not be responsible for the loss of life; there the wound was lawfully inflicted by one Freidenback in defence of his house. *Shugart v. Egan*, 83 Ill. 56, is sometimes cited in support of a contrary doctrine; there, however, the plaintiff's husband, in consequence of mere words used by him while intoxicated, was assaulted and slain by one McGraw; it is evident that mere words would not justify the assault and that McGraw was a wrongdoer. The same Court, commenting upon *Shugart v. Egan* in a later case, said:

"It was there said to be the common experience of mankind that the condition of one intoxicated invited protection against violence rather than attack, and that it was not a natural and probable result of intoxication that the person intoxicated should come to his death by the wilful criminal act of a third party. . . . It was not the intention that the intoxicating liquor alone, of itself and exclusive of other agency, should do the whole injury. That would fall quite short of the measure of remedy intended to be given. The statute was designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to its natural and obvious meaning." *Schroden v. Crawford*, 94 Ill. 357. . . .

The question of proximate cause is for the jury under appropriate instructions of law. One is not bound to anticipate what is merely possible, nor on the other hand is he liable for such consequences only as usually follow. It is sufficient if the result ought to have been apprehended according to the usual experience of mankind. The defendant need not have intended that the plaintiff's son should make an assault upon Boulier or even have expected it or the injury which followed. Enough if according to human experience it was to be apprehended that such were likely to happen from the intoxication. . . . It is natural as well as lawful that one assaulted should use reasonable force to repel the assailant even to his personal injury. It is for the jury to say who is the assailant, and whether, under the circumstances, the force used was reasonable and appropriate. It is also for them to determine whether one, who lets loose such a dangerous agent as intoxicating liquor, is not bound to apprehend that the intoxication thereby pro-

duced is likely to cause unjustifiable assaults and consequent injury to the assailant.

The case should have been submitted to the jury.

*Exceptions sustained.*<sup>1</sup>

<sup>1</sup> [SUB-TOPIC B. PROBLEMS:

The defendants by their negligence caused a gasoline tank car, derailed and wrecked alongside of the track within the city, to emit gasoline into the gutters and create an explosive gas. One D. lit a cigar, while standing on the street and threw the match away; an explosion ensued, damaging the plaintiff's house and badly injuring his head. There was some evidence that D. threw the match maliciously, for the purpose of causing a fire, having been that morning discharged from employment by one of the defendants. Was the damage too remote? (1910, *Watson v. Kentucky & I. B. Co.*, 137 Ky. 619, 126 S. W. 146.)

The defendant carelessly left a railroad car unfastened and without protection. Some boys, trespassing, set it in motion, and it injured the plaintiff's property. Was this too remote? (1902, *McDowall v. R. Co.*, 1 K. B. 618.)

By the defendant's negligence, a live electric-light wire broke and fell into the street. It lay between the sidewalk and the roadway; as plaintiff was passing, a policeman struck the wire with his club, and threw it against plaintiff, from which he received a shock causing injuries. Is the defendant responsible? (1909, *Seith v. Commonwealth El. Co.*, 241 Ill. 252, 89 N. E. 425.)

The defendant falsely stated that there was arsenic in the silk used at the plaintiff's factory. The plaintiff's workmen heard of this, and refused to work for the plaintiff. Is the defendant responsible for the loss of service? (1890, *Elmer v. Fessenden*, 151 Mass. 161.)

The defendant left some explosive caps in a tool-chest in a vacant lot, where boys played. X opened the box, Y took out one of the caps and gave it to Z, and Z carelessly exploded it, injuring the plaintiff. Was this too remote? (1899, *Afflick v. Bates*, 21 R. I. 281, 43 Atl. 539.)

The plaintiff's arm was broken by the defendant's negligence. The surgeon set it badly, so that it healed poorly. Was this additional harm too remote? (1884, *Pullman P. C. Co. v. Bluhan*, 109 Ill. 20.)

The defendant village maintained a sidewalk defectively elevated six feet above the street without a railing. The plaintiff boy was pushed off, by the inadvertent or negligent jostling of another boy, and was injured. Was this too remote? (1889, *Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14.)

The defendant town negligently maintained a deep hole alongside of the street. The plaintiff, a constable, was leading one H. to jail under sentence, and on passing the hole, H. threw the plaintiff into it and escaped. Was the plaintiff's injury too remote? (1888, *Alexander v. Newcastle*, 115 Ind. 51.)

The defendants were custodians of a brutal convict, under the convict-labor contract system. The defendants negligently allowed the convict to escape, and he committed a rape on the plaintiff. Was this too remote? (1897, *Henderson v. Coal Co.*, 100 Ga. 568, 28 S. E. 251.)

The defendant negligently left in the street a barrel of fish-brine. A third person wilfully emptied it on the pavement. The plaintiff's cow lapped it up, and died of the poison. Was this too remote? (1883, *Henry v. Dennis*, 93 Ind. 450.)

NOTES:

"Instinctive acts breaking causal connection." (H. L. R., VII, 55, 302; XIII, 599; XIV, 391.)

"Intervention of wilful act of third person." (H. L. R., XI, 272; XII, 220; XVI, 147.)

"Intervening negligence of third party." (H. L. R., XVI, 227; XVII, 138.)]



SUB-TOPIC C. THIRD PERSON AS INTERMEDIATE LESSEE, BAILEE,  
OR INDEPENDENT CONTRACTOR

## 463. PAYNE v. ROGERS

COMMON PLEAS. 1794

2 H. Bl. 349

*LeBlanc*, Serjt., moved for a rule to shew cause why the verdict found for the plaintiff in this cause should not be set aside, and nonsuit entered. It was an action on the case against the defendant as owner of a house in the occupation of one Platt, his tenant, for an injury sustained by the plaintiff by his left foot slipping through a hole in the foot pavement into a vault or cellar, owing to some plates or bars (which went under the pavement) being out of repair. And the ground of the motion was, that the action ought to have been brought against the actual occupier of the house, whose more immediate benefit it was to know what repairs were necessary and to see that they were made, and not against the landlord. Though the landlord might bear the expense of the repairs, yet as between the occupier and the public, the occupier was bound to look to the state of them, and ought to be liable for any accident that might happen by his neglect. Thus in *Cheetham v. Hampson*, 4 Term Rep. B. R. 318, it was holden that an action on the case for not repairing fences could only be maintained against the occupier.

BULLER, J. Who was to repair in the first instance?

KENYON, L. C. J. Evidence was given of repairs being actually done by the landlord. And I thought at the trial, that though the tenant was *prima facie* bound to repair, and therefore liable, yet if he could shew that the landlord was to repair, then that the landlord was liable.

BULLER, J. The direction of my Lord Chief Justice was most clearly right. I agree that the tenant as occupier is *prima facie* liable to the public, whatever private agreement there may be between him and the landlord. But if he can shew that the landlord is to repair the landlord is liable for neglect to repair.

HEATH, J. If we were to hold that the tenant was liable in this case, we should encourage circuity of action, as the tenant would have his remedy over against the landlord.

ROOKE, J., of the same opinion.

*Rule refused.*

## 464. RICH v. BASTERFIELD

COMMON PLEAS. 1847

4 C. B. (M. G. &amp; S.) 783

ACTION on the case in which the declaration alleged that the plaintiff had been and was possessed of a messuage, &c., which he and his family occupied; that the defendant was possessed of two messuages and yards near to the plaintiff's messuages; and that the defendant, contriving to injure the plaintiff and his family in their occupation, &c., on, &c., erected certain shops and chimneys on the defendant's said yards, near to the plaintiff's house, and continued the same there, and lighted fires in the said shop, and caused smoke, &c., to issue from the said chimneys; whereby the plaintiff's messuage was rendered unhealthy, and he was compelled to keep his windows closed, to exclude the smoke, and was prevented from obtaining fresh air, and the plaintiff and his family were annoyed and prejudiced in the occupation of his messuage, &c. The defendant pleaded, first, not guilty, secondly, that he, the defendant, was not possessed of the said yards and shops.

At the trial before ERLE, J., at the sittings in Middlesex after Hilary term, 1846, it appeared in evidence that the plaintiff was possessed of a house, No. 10, and the defendant of two other houses, being Nos. 12 and 13, in the New Road, east of Tottenham Court Road; that the houses stand a considerable distance back from the road; that in front of the defendant's houses, the defendant some time since erected two low buildings, which were let as shops, from which the smoke was at first carried under ground into one of the chimneys of the house behind it; but, that plan not answering, that he afterwards erected a chimney; and that the shop, with the stove and chimney, was subsequently let to a tenant from week to week, who occupied it at the time when the nuisance to the plaintiff's house was said to have been committed, and by whom the fires complained of were made. A former occupier stated that he used to make fires in the stove, principally of coke, and that no smoke which could be at all injurious then issued from the chimney. The fires made by the present occupier caused a good deal of smoke to issue, which, when the wind blew towards the plaintiff's house, was driven to it and compelled him to keep his windows shut.

Upon this evidence, it was contended, for the defendant, that he was entitled to a verdict on both issues; for, that the act of his tenant in making fires, could not be considered as his act, and therefore he was not guilty; and that, the tenant being in possession at the time when the nuisance was said to have been committed, the defendant was entitled to a verdict on the issue of not possessed, also. The learned judge reserved to the defendant leave to move to enter a verdict in his favour, and left to the jury the question whether the defendant

made a reasonable use of rights in respect of the property in question in a reasonable place; and they found for the plaintiff. In Easter term, 1846, a rule nisi for entering a verdict for the defendant was granted, which was argued in Trinity term, and afterwards stood over for consideration: and, as a considerable change had taken place on the bench before any decision had been come to, it was thought right that the case should be argued a second time, before the Court as at present constituted. . . .

*Talfourd*, Serjt. (with whom was *Peacock*), on a subsequent day in the same term, showed cause. It is true, the defendant did not light the fires the smoke from which penetrated the plaintiff's dwelling-house; but he built the chimney, and afterwards let the shop with the chimney; and therefore, in contemplation of law, he was the author of the nuisance. Every man is responsible for the natural and necessary consequences of his acts: and here, the defendant must be taken to have erected the chimney for the only purpose to which it could be applied. . . .

*Byles*, Serjt., and *Wordsworth*, in support of the rule. The declaration would have clearly disclosed no good cause of action, if it had merely alleged the erection of the chimney; inasmuch as it would not of necessity have been used, or, if used, it might have been used with a description of fuel creating no nuisance. The gravamen here is, the emission of noxious smoke; and upon the evidence it is clear that this is not chargeable on the defendant, for the chimney had never been used when the present tenant's occupation of the shop commenced. . . .

The Court took time to consider; and, the constitution of the court having been materially changed by the decease of TINDAL, C. J., and the removal of ERLE, J., to the Court of Queen's Bench, before any decision was pronounced, a second argument was directed, which took place in Easter term, 1847, before WILDE, C. J., and COLTMAN, CRESSWELL, and V. WILLIAMS, JJ.

May 26. *Talfourd*, Serjt., and *Peacock*, for the plaintiff. The main question is, whether the defendant, having erected the chimney and let the shop with the chimney to a tenant, who, by using it in the ordinary way, caused the nuisance complained of, can be charged as the author of the nuisance; or whether he is discharged from all liability, because he himself did not light the fires. [WILDE, C. J. The tenant may so use the chimney as to cause no nuisance; he may burn coke.] It must be assumed that the chimney was built with a view to its use in the ordinary way. If it is so used as to occasion a nuisance, the landlord has in his power to abate the nuisance by determining the tenancy, instead of sanctioning the continuance of it, by receiving rent week after week. . . .

*Byles*, Serjt., and *Wordsworth*, for the defendant. . . . The evidence failed to establish that the defendant was the author of it. It is said,

that, the defendant having erected the chimney, the lighting of fires therein was the natural and necessary consequence of this act, and, therefore, that he is responsible. [WILDE, C. J. . . . In *The King v. Pedley* there was a positive existing nuisance on the premises at the time of letting, and not, as here, a thing from which a nuisance might possibly emanate at some future time.] Precisely so. The defendant has not actually, or constructively, been guilty of the nuisance charged. . . .

CRESSWELL, J. . . . The case mainly relied on was, *The King v. Pedley*, 1 Ad. & E. 822, in which it was said to have been decided that, if a landlord erects a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and lets the land with the building so erected, he is liable to be indicted for such nuisance being continued or created during the term. . . . On the other hand, it was contended, that, inasmuch as the fires, which created the smoke complained of, were made, not by the defendant or his servants, but by his tenants, he is not responsible; and that, although in some cases, ex. gr. *Bush v. Steinman*, 1 B. & P. 404; *Burgess v. Gray*, 1 Man. Gr. & Scott, 578, and *Randleson v. Murray*, 8 Ad. & E. 109, the owners of property were held liable for injuries arising from acts done upon that property by persons not strictly their agents or servants; yet such liability attached only upon persons in possession; and that the defendant in this case, not being in possession at the time when the nuisance complained of was created, could not be made liable. And such is now the opinion of the Court.

It being quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance, — it seems impossible to say that the tenant was, in any sense, the servant or agent of the defendant, in doing the acts complained of. The utmost that can be imputed to the defendant is, that he enabled the tenant to make fires, if he pleased.

The case, then, resting, not upon the erection of the chimney, but upon the subsequent use of it by the tenant, can the defendant, his landlord, be held to be guilty of the nuisance? Several cases have occurred in which the owners of fixed property have been held liable for the consequences of acts done upon it by persons not strictly their servants or agents. But the principle on which those cases proceeded, and the limits within which they should be restrained, are clearly laid down by Littledale, J., in *Laugher v. Pointer*, 5 B. & C. 547, 8 D. & R. 556; which judgment is cited with much just approbation, and adopted by the Court of Exchequer, in *Quarman v. Burnett*, 6 M. & W. 499. The principle stated by Mr. Justice LITTLEDALE is, that, where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured; and that,

whether his property be managed by his own immediate servants or by contractors or their servants.

This rule explains all the cases except . . . *The King v. Pedley*. . . . That was an indictment which charged the defendant with erecting, near certain public streets and dwelling-houses, two buildings called necessary-houses, for the common use of divers persons residing in and frequenting Diamond Alley, and did also make and cause to be made a certain open sink for the reception of ordure, &c., and, on divers days, &c., divers persons had resorted to and used and still did resort to and use the said necessary-houses, and did place and leave in the said sink large quantities of ordure, — by reason of which, &c. (stating the nuisance resulting). . . . The jury, under Lord DENMAN's direction, found the defendant guilty, subject to a motion to enter a verdict of acquittal. . . . LITTLEDALE, J., seems to have rested his judgment on the principle, that the landlord was not to let the land with the nuisance upon it; and he proceeds: "Here, the periods are short, so there has been a reletting; and that has taken place after the user of the buildings had created the nuisance." He therefore assumes that there was an existing nuisance at the time of the letting, which had not afterwards been removed. To his judgment, proceeding on that ground, we entirely assent; and probably Lord DENMAN meant the same thing, when he said that the receipt of rent was upholding and continuing the nuisance. TAUNTON, J., after adverting to the doubt as to the premises being demised, or remaining in the defendant's possession, — in which case he would certainly have been liable, — proceeds to say, that the landlord was bound to exact from his tenants an obligation to cleanse, with a right of entry in their default; and that he was at all events liable. To this we cannot subscribe, notwithstanding the unfeigned respect which we feel to be due to any opinion expressed by that very learned judge; for, it appears to us, that, if a landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not; the landlord cannot be made responsible for the acts of the tenant: and a fortiori he would not be liable, if he had taken an obligation from the tenant not to use them so as to create a nuisance, even without reserving a right to enter and abate a nuisance, if created. The judgment of WILLIAMS, J., appears to proceed on the ground that the landlord had it in his own power to remove the nuisance; for he refers to the admission said to have been made by him, that he was bound to do the cleansing.

If, then, *The King v. Pedley* is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance; or because he had undertaken

the cleansing and had not performed it; — we think the judgment right, and that it does not militate against our present decision. But, if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised, — we think it goes beyond the principle to be found in any previously decided cases; and we cannot assent to it.

For the reasons already given, we think that the verdict must be entered for the defendant on the plea of not guilty, as well as on the issue of not possessed, which refers to the time when the nuisance was created.

*Rule accordingly.*

#### 465. CLIFFORD *v.* ATLANTIC COTTON MILLS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1888

146 *Mass.* 47, 15 *N. E.* 84

TORT for personal injuries occasioned to the plaintiff by the fall of snow from a building. At the trial in the Superior Court, before HAMMOND, J., without a jury, there was evidence that the defendant owned a block of dwelling-houses on Canal Street in Lawrence; that the block was three stories high, constructed with a steep slate roof, slanting towards the sidewalk, the ridgepole being parallel therewith, and that the roof had no protection or railing to keep the snow from falling upon the sidewalk; that the plaintiff was going along the sidewalk, in the exercise of due care, when a large quantity of snow slid from the roof of one of the houses upon her, and greatly injured her; and that a tenant occupied the house under a written lease which covered the whole house, and provided (so far as it was material) that the lessee should not “make, nor suffer to be made, any alteration in the same, but with the assent in writing” of the agent of the defendant, and “that the said agent, or any one appointed by him for the purpose, may, at any time, enter into said premises to repair the same, or to ascertain if the same are properly used.”

The judge ruled that the plaintiff could not maintain her action, and found for the defendant. The plaintiff alleged exceptions.

*J. M. Stearns* for the plaintiff. *D. Saunders* and *C. G. Saunders*, for the defendant.

HOLMES, J. This is an action for personal injuries done to the plaintiff by the fall of snow from the roof of the defendant's house into the highway. The whole house was let at the time to a tenant. The only difference between this case and *Leonard v. Storer*, 115 *Mass.* 86, is, that there the tenant had agreed to make all needful repairs, while in the case at bar there was no contract on either side, but the landlord reserved the right to enter the premises to repair the same, or to ascertain if the same were properly used, &c. This difference cannot affect the result, because the damage was not caused in either case



by a want of repairs, but by the original character of the structure, and therefore the presence or absence of a covenant to repair has nothing to do with the question, and because the landlord's reservation of a right to enter, in the case before us, did not include the control of the roof, which the landlord was held to have had in *Kirby v. Boylston Market Association*, 14 Gray, 249; *Shipley v. Fifty Associates*, 101 Mass. 251, 254. . . .

There is no doubt that a man sometimes may be liable in tort, notwithstanding the fact that the damage was attributable in part to the concurrent or subsequently intervening misconduct of a third person. *Elmer v. Locke*, 135 Mass. 575, 576; *Lane v. Atlantic Works*, 111 Mass. 136 [*ante*, No. 459]. . . . But the general tendency has been to look no further back than the last wrongdoer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act. See, for example, 111 Mass. 141; *Hastings v. Stetson*, 126 Mass. 329 [*ante*, No. 455]. . . .

In the case of landlords who have given up to the tenant control of the premises in the matter out of which the damage arises, this Court has never gone further than to hold them liable when the use from which the damage or nuisance necessarily ensues was plainly contemplated by the lease. . . . It is true, that, if the nuisance exists when the premises are let, the landlord can be held, although the tenant may be liable also to the person injured; for the landlord is taken to have contemplated the premises remaining in the condition in which he let them. . . .

But the Courts have differed when the nuisance existing at the time of the lease was due to want of repairs, and the tenant had covenanted to make repairs. *Pretty v. Bickmore*, L. R. 8 C. P. 401. . . . And the landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way. The liability will stop with the tenant whose intervening wrong is the immediate cause of the damage. . . . *Mellen v. Morrill*, 126 Mass. 545; *Rich v. Basterfield*, 4 C. B. 783 [*ante*, No. 464]. . . . In such cases it cannot matter whether the wrong on the part of the tenant is an act which makes the premises a nuisance, or an omission which allows them to become so. It is as much his duty to act in the latter case as it is to abstain in the former. In either, as against the public, the landlord, unless he has assumed the duty himself by covenant, has a right to rely upon the tenant's managing the premises in his occupation in such a way as to prevent their being a nuisance. . . .

The defendant's house was not a nuisance in itself. If it was, half the householders in Boston are indictable at the present moment. It was certain to become so at times by the mere working of nature alone, unless the tenant cleared the roof, or took other steps to prevent it. But, as far as appears, the tenant could have done so by using reason-

able care. If he could, it was his duty to do so, and the landlord was not liable, for the reasons which we have stated.

*Exceptions overruled.*

466. *CUNNINGHAM v. ROGERS*. (1909. 225 Pa. 132; 73 Atl. 1094.) *Potter, J.*: The claim of the plaintiff in this case is based upon the alleged ownership by the defendants of the structure which fell, but no sufficient evidence in support of this claim was offered. "As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant, and not the landlord, is liable to third persons for accident or injury occasioned to them by the premises being in a dangerous condition; and the only exceptions to this rule appear to arise where the landlord has either (1) contracted with the tenant to repair, or (2) when he has let the premises in a ruinous condition, or (3) when he has expressly licensed the tenant to do acts amounting to a nuisance." 2 Woodfall on Landlord and Tenant (1st Am. Ed. 1890) \*735. . . . Upon the whole record it is apparent that the responsibility for the condition of the grandstands in this case rested upon the tenant.

#### 467. *GLYNN v. CENTRAL RAILROAD COMPANY*

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1900

175 Mass. 510, 56 N. E. 698

TORT for personal injuries occasioned to a brakeman employed by the New York, New Haven, and Hartford Railroad Company, while at work upon a train of that road at Stonington, Connecticut, a station twelve miles east of New London. Trial in Superior Court, before AIKEN, J., who, at the request of the defendant, directed a verdict for the defendant; and the plaintiff alleged exceptions.

*G. W. Anderson* (*S. A. Fuller* with him), for the plaintiff. *R. Thorne* (of New York) (*C. F. Choate, Jr.*, with him), for the defendant.

HOLMES, C. J. This is an action for personal injuries. The plaintiff was at work for the New York, New Haven, and Hartford Railroad Company, at Stonington, Connecticut, and was engaged in coupling a train to a car belonging to the defendant when his sleeve was caught by a bolt projecting from the deadwood of the car and his hand was crushed. We assume that the car was in such condition that (apart from the question of notice) it would warrant a finding that the defendant was liable, had the car been in its possession and the plaintiff in its employ. We assume further without deciding, that the evidence warranted a finding that the car had come from the possession of the defendant recently, and in the same condition as that in which it was at the time of the accident. But nevertheless we are of opinion that the judge who tried the case was right in directing a verdict for the defendant. There was no dispute that after the car had come into the hands of the New York, New Haven, and Hartford Railroad, and before it had reached the place of accident, it had passed a point at which the cars

were inspected. After that point, if not before, we are of opinion that the defendant's responsibility for the defect in the car was at an end.

There is more obscurity than there ought to be, perhaps, upon the limits of liability in general. The fact that the damage complained of would not have happened but for the intervening negligence of a third person has not always been held a bar; although negligent conduct, so far as it is tort, is unlawful in as full a sense as malicious conduct, and although ordinarily even a wrongdoer would not be bound to anticipate a wilful wrong by a third person. See *Elmer v. Locke*, 135 Mass. 575, 576, and cases cited in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 48 [*ante*, No. 465]; *Englehart v. Farrant* (1897), 1 Q. B. 240; compare *Hayes v. Hyde Park*, 153 Mass. 514, 515, 516.

But when a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed. Thus the case of *Clifford v. Atlantic Cotton Mills*, just cited, shows that the mere ownership of a house so constructed that its roof would throw snow into the street, and therefore threatening danger as it is without more, whenever snow shall fall, is not enough to impose liability when the control of it has been given up to a lessee who, if he does his duty, will keep it safe. In the case at bar the car did not threaten harm to any one, unless it was used in a particular way. Whether it should be used in a dangerous way or not, depended not upon the defendant but upon another road. Even assuming that the car had come straight from the defendant at Harlem River, the defendant did no unlawful act in handing it over. Whatever may be said as to the responsibility for a car dispatched over a connecting road before there has been a reasonable chance to inspect it, yet after the connecting road has had the chance to inspect the car and has full control over it, the owner's responsibility for a defect which is not secret ceases. . . .

Upon the same principle, that commonly when a new control comes in the former responsibility is at an end, a vendor who makes no representation is not liable to a remote purchaser of the article sold, for damage done by a defect in it. *Davidson v. Nichols*, 11 Allen, 514, 518; *Losee v. Clute*, 51 N. Y. 494; *Curtin v. Somerset*, 140 Penn. St. 70. . . .

It is recognized in *Clifford v. Atlantic Cotton Mills*, that the rule is different when the use from which the damage ensued plainly was contemplated by the lease. . . . In *Heaven v. Pender*, 11 Q. B. D. 503, 515, it was considered that the use not only was contemplated but was invited. . . . But contemplation means a good deal more than simply recognizing a probability. In *Sowell v. Champion*, 2 Nev. & P. 627, 634, it was held that an act generally lawful, such as placing a writ for execution in the hands of an officer, was not made unlawful by a full persuasion or even knowledge that the officer was likely to execute it in a place which might and did turn out to be out of his jurisdiction. The officer had an unfettered right of decision, and it was his lookout to see

that he kept within the law. . . . So here as to the car. — There has been a suggestion in some cases of a more severe rule in the case of very dangerous agencies. . . . *Loop v. Litchfield*, 42 N. Y. 351; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. Rep. 400. But whether there be any such qualifications or not, the present case is within it. If it had appeared that the use made of the car was contemplated by the defendant, it still would have been a use subject to inspection, and of a car with no secret defect.

*Exceptions overruled.*

#### 468. TARRY v. ASHTON

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1876

L. R. 1 Q. B. D. 315

[The statement of facts is printed *ante*, in No. 400.]

*A. Collins*, and *Poulter*, shewed cause. It must be admitted that Chappell was not the defendant's servant, as the jury have taken upon themselves to find; but that is quite immaterial. . . . In *Pickard v. Smith* (10 C. B. N. S. 470) the occupier of premises was held liable for injury caused by the trap of the coal cellar belonging to the premises being negligently left open, not by his own servants, but by the servants of the coal merchant. That is a stronger case than the present. . . .

*McIntyre*, Q. C., and *Darling*, in support of the rule. The defendant has been guilty of no negligence. [LUSH, J. Negligence is a relative term. The question is, What is the duty of a person who hangs a thing over the highway?] To take reasonable precautions that it is in a safe condition by being kept in a good repair. This the defendant has done, he did all he could by employing a competent person to repair it in August. He is not answerable for the person's neglect. . . .

BLACKBURN, J. I desire to decide nothing beyond what the circumstances of the case require; and on the facts of the case, I am of opinion that the plaintiff is entitled to keep the verdict. . . . If there were a latent defect in the premises, or something done to them without the knowledge of the owner or occupier by a wrongdoer, such as digging out the coals underneath and so leaving a house near the highway in a dangerous condition I doubt, at all events, I do not say, whether or not the occupier would be liable. But if he did not know of the defect, and neglected to put the premises in order, he would be liable. He would be responsible to this extent, that as soon as he knew of the danger he would be bound to put the premises in repair or pull them down. . . .

It being his duty to put it in repair, he employs Chappell to do so. We must assume, I think, that Chappell was a proper person to employ; and I may observe that he was clearly not the defendant's servant, as the jury say, but an independent contractor. But it was the defendant's duty to make the lamp reasonably safe; the contractor failed to do that;

and the defendant, having the duty, has trusted the fulfilment of that duty to another who has not done it. Therefore the defendant has not done his duty, and he is liable to the plaintiff for the consequences. It was his duty to have the lamp set right; it was not set right.

*The rule must be discharged.*<sup>1</sup>

<sup>1</sup> [SUB-TOPIC C. PROBLEMS:

The defendant was owner and lessor of a house; a gutter-pipe for discharging rain-water was defectively constructed, so that ice formed on the sidewalk, and the plaintiff was injured thereby. The house was under the control of a lessee at the time. Is the defendant responsible? (1903, *Isham v. Roderick*, 89 Minn. 397, 95 N. W. 224.)

The defendants were landlords of a baseball park. The plaintiff received an injury from the grandstand falling. The stand was erected before the landlords took title and was owned by the tenant; the tenancy continued after the change of ownership, and a new lease was made to the same tenant before the original term had expired, and the tenant continued in exclusive possession, and there was no time prior to the accident when the landlords were actually in possession, or could lawfully have taken possession. Were the defendants liable? (1909, *Cunningham v. Rogers*, 225 Pa. 132, 73 Atl. 1094.)

The plaintiff was injured by the fall of a smokestack erected partly on the defendant's land leased to the adjoining owner and partly on the adjoining owner's land; the defendant used the stack, and was under agreement to keep it in repair. Is the defendant or the tenant responsible? (1900, *Boyce v. Snow*, Ill., 58 N. E. 403.)

The plaintiff, a reporter, was injured by the fall of plaster from the ceiling of a room used as a city-council chamber. The declaration alleged that the city was "in possession and use" of the room, and negligently suffered it to be insecure. Was this sufficient? (1872, *Chicago v. O'Brennan*, 65 Ill. 160.)

A statute provides that all buildings shall have suitable metallic leaders sufficient to carry all water to the street. Defendant's building was equipped with a leader made of zinc, with joints which could slide to allow for contraction or expansion, and it descended from the gutter to a point about five feet from the sidewalk, where it ran horizontally to the line of the street. Water froze in the horizontal part of it, forcing the water to fill up the leader and back up into the gutter, thereby creating an accumulation of ice upon the gutter and along the leader, and plaintiff was injured by a fall of such ice. At the time the premises were leased by a lease requiring the lessee to save the lessor harmless from any claim for damage arising from neglect in not removing snow and ice from the roof of the building or the sidewalks. Was defendant liable for the injuries? (1908, *Coman v. Alles*, 198 Mass. 99, 83 N. E. 1097.)

The defendant was owner and lessor of oil wells, the oil being stored in tanks after leaving the wells. The lessee managed the wells and the tanks. Oil escaped therefrom, caught fire, and injured the plaintiff's property. Is the defendant responsible? (1903, *Langabaugh v. Andersen*, 68 Oh. 131, 67 N. E. 286.)

The plaintiff was a guest in a hotel leased and occupied by M and owned by the defendant. On the second floor a door opened sheer out over the sidewalk; but it had a lock, key, and shutter. The tenant failed to keep it properly locked, and the plaintiff went out by it, fell, and was hurt. Is the defendant responsible? (1899, *Texas Loan Agency v. Fleming*, 92 Tex. 458, 49 S. W. 1039.)

NOTES:

"Injury from defective flooring: liability of landlord to third parties." (C. L. R., VI, 277.)

"Damage suffered after completion of work: liability of contractor." (H. L. R., VIII, 290, 291; X, 191.)]

SUB-TOPIC D. THIRD PERSON AS INTERMEDIATE VENDEE  
(PRIVITY OF CONTRACT)

469. WINTERBOTTOM *v.* WRIGHT

EXCHEQUER. 1842

10 M. & W. 109

CASE. The declaration stated, that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward with the Postmaster-General, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead: That the defendant, under and by virtue of the said contract, had agreed with the said Postmaster-General that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and secure state and condition for the said purpose, and took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid: That Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the Postmaster-General to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also not, on any pretence whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the Postmaster-General: That the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and whilst the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathaniel Atkinson and his co-contractors as mail-coachmen, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred, that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to wit, on the 8th of August, 1830, whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach being a mail-coach found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then



well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, infirm, and dangerous state and condition, to wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter, or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and, in consequence of injuries then received, had become lamed for life.

To this declaration the defendant pleaded several pleas, to two of which there were demurrers; but as the Court gave no opinion as to their validity, it is not necessary to state them.

*Peacock*, who appeared in support of the demurrers, having argued against the sufficiency of the pleas, —

*Byles*, for the defendant, objected that the declaration was bad in substance. This is an action brought not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the Postmaster-General, and totally unconnected with them or with the plaintiff. Now it is a general rule, that wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action is conceived be *ex contractu* or *ex delicto*, the party who made the contract alone can sue: *Tollit v. Sherstone*, 5 M. & W. 283. If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. . . .

*Peacock, contra.* This case is within the principle of the decision in *Levy v. Langridge*. Here the defendant entered into a contract with a public officer to supply an article which, if imperfectly constructed, was necessarily dangerous, and which, from its nature and the use for which it was destined, was necessarily to be driven by a coachman. That is sufficient to bring the case within the rule established by *Levy v. Langridge*, 4 M. & W. 337. In that case the contract made by the father of the plaintiff with the defendant was made on behalf of himself and his family generally, and there was nothing to show that the defendant was aware even of the existence of the particular son who was injured. . . .

LORD ABINGER, C. B. I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. This is an action of the first impression, and it has been brought in spite of the precautions which were taken, in the judgment of this Court in the case of *Levy v. Langridge*, 4 M. & W. 337, to obviate any notion that such an action could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favor; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here the action is brought simply because the defendant was a contractor with a third person; and

it is contended that thereupon he became liable to everybody who might use the carriage. If there had been any ground for such an action, there certainly would have been some precedent of it; but with the exception of actions against inn-keepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is however contended, that this contract being made on the behalf of the public by the Postmaster-General, no action could be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence, — he may be remediless altogether. There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. . . .

ALDERSON, B. I am of the same opinion. . . .

GURNEY, B., concurred.

ROLFE, B. The breach of the defendant's duty, stated in this declaration, is his omission to keep the carriage in a safe condition; and when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and, during all the time aforesaid, it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract; and the fallacy consists in the use of that word "duty." If a duty to the Postmaster-General be meant, that is true; but if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none. This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*; it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.

*Judgment for the defendant.*

#### 470. THOMAS v. WINCHESTER

COURT OF APPEALS OF NEW YORK. 1852

6 N. Y. 397 (2 Selden)

APPEAL from the general term of the Supreme Court, into the Sixth District, where a motion for a new trial, made upon a bill of exceptions,

had been denied, and judgment entered upon a verdict in favor of the plaintiffs. This action was brought by Samuel Thomas, and Mary Ann his wife, against the defendants, Winchester and Gilbert, to recover damages for negligently putting up, labelling and selling, as and for extract of dandelion, a simple and harmless medicine, a jar of extract of belladonna, a deadly poison; by means whereof, the plaintiff, Mary Ann Thomas, to whom a dose of dandelion had been prescribed by a physician, and to whom a portion of the contents of the jar of belladonna had been administered, as and for extract of dandelion, had been greatly injured. . . .

It was proved, on the trial, before MASON, J., that Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison county, where the plaintiffs resided. A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects; such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of mind. She recovered, however, after some time, from its effects, although, for a short time, her life was thought to be in great danger. The medicine administered was belladonna, and not dandelion. The jar from which it was taken was labelled " $\frac{1}{2}$  lb. dandelion, prepared by A. Gilbert, No. 108 John Street, N. Y. Jar 8 ox." It was sold for, and believed by Dr. Foord to be, the extract of dandelion, as labelled. Dr. Foord purchased the article, as the extract of dandelion, from James S. Aspinwall, a druggist at New York. Aspinwall, a druggist, bought it of the defendant, as extract of dandelion, believing it to be such.

The defendant, Winchester, was engaged at No. 108 John Street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others, were labelled alike. Both were labelled like the jar in question, as "prepared by A. Gilbert." Gilbert was a person employed by the defendant at a salary, as an assistant in his business. The jars were labelled in Gilbert's name, because he had been previously engaged in the same business, on his own account, at No. 108 John street, and, probably, because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell and taste; but may, on careful examination, be distinguished the one from the other by those who are well acquainted

with these articles. Gilbert's labels were paid for by Winchester, and used in his business, with his knowledge and assent. . . .

The defendant's counsel moved for a nonsuit, on the following grounds:

1. That the action could not be sustained, as the defendant was the remote vendor of the article in question: and there was no connection, transaction, or privity between him and the plaintiffs, or either of them.

2. That this action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord. . . .

The motion for a nonsuit was overruled.

The judge, among other things, charged the jury that . . . if the defendant Winchester was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover.

The defendant Gilbert was acquitted by the jury under the direction of the Court, and a verdict was rendered against Winchester for eight hundred dollars damages. . . . Winchester took this appeal.

*Charles P. Kirkland*, for the appellant.

*Nicholas Hill, Jr.*, for respondents.

RUGGLES, C. J. [After stating the facts.] The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is, whether the defendant, being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If, in labelling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A. build a wagon, and sell it to B., who sells it to C., and C. hires it to D., who in consequence of the gross negligence of A. in building the wagon is overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life. . . . This was the ground on which the case of *Winterbottom v. Wright*, 10 M. & W. 109, was decided. . . . The reason of the decision is best stated by Baron Rolfe. A.'s duty to keep the coach in good condition was a duty to the postmaster-general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label. . . . In respect to the wrongful and crim-

inal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not likely to fall on him, or on his vendee who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. . . . The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabelled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown. . . . In *Longmeid v. Holliday*, 6 Law and Eq. Rep. 562, the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be in the label; and that the suit, if it could be sustained at all, should have been brought against Foord. . . . But it seems to me to be clear that the defendant cannot, in this case, set up as a defence, that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion; and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall, cannot be complained of by the defendant.

GARDINER, J., concurred in affirming the judgment, on the ground that selling the belladonna without a label indicating that it was a poison, was declared a misdemeanor by statute (2 R. S. 694, § 23); but expressed no opinion upon the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.

GRIDLEY, J., was not present when the cause was decided. All the other members of the Court concurred in the opinion delivered by Ch. J. Ruggles.

*Judgment affirmed.*

471. HUSET *v.* CASE THRESHING MACHINE COMPANY

UNITED STATES CIRCUIT COURT OF APPEALS. 1903

120 *Fed.* 866

IN error to the Circuit Court of the United States for the District of Minnesota. This writ of error was sued out to reverse a judgment sustaining a demurrer to the amended complaint of O. S. Huset, the plaintiff below and the plaintiff in error here, in an action for personal injury, which he brought against the J. I. Case Threshing Machine Company, a corporation. These are the facts which the complaint discloses: The threshing machine company was a corporation engaged in the manufacture and sale of threshing rigs, which consisted of an engine, a separator, a band-cutter, and self-feeder. The band-cutter and self-feeder consisted of a series of fast revolving knives covered with a sheet-iron covering and a frame designed to fit into the front of the separator in which the cylinder was located. The cylinder was made of iron and steel about forty-eight inches in length and twenty inches in diameter, set with rows of steel teeth and spikes projecting about two inches, and so placed as to pass between similar teeth in a concave frame in front of and under the cylinder. When the machine was in operation, this cylinder revolved at a very high rate of speed with great force, and threshed the grain. The self-feeder and band-cutter was designed to be fastened to the separator, and its sheet-iron covering fitted onto the front of the separator just above and over the front part of the cylinder so as to cover the cylinder completely. The object and design of the defendant in placing this covering over the cylinder was that it should be used by any person who might operate the machine to walk upon in passing from the top of the main part of the thresher to the feeder. This sheet-iron covering was made without any support, and was so pliable and easily bent that it was incapable of sustaining the least weight, and would necessarily bend and collapse when subjected to the weight of any man who might walk or step on it. It was necessary for the operator to walk over the covering of the cylinder in operating the machine. This machine, covered in this way, was imminently and necessarily dangerous to the life and limbs of those who operated it, and it was well known to be thus dangerous by the defendant when it shipped the same and supplied it to the purchaser, J. H. Pifer; but this dangerous condition was of such a nature as not to be readily discovered by persons engaged in operating the machine or working thereon, but was concealed, and thereby rendered more dangerous still. On August 25, 1901, the defendant sold this threshing outfit to J. H. Pifer, who started to operate it on the next day, and employed the plaintiff, O. S. Huset, as a laborer to assist him in running it. It became the duty of the plaintiff to walk upon the top



of the machine over the cylinder while it was in operation in order to superintend the pitching of bundles into the self-feeder, to prevent its clogging, and to oil the bearings of the parts of the cylinder and band-cutter. When he walked upon the covering of the cylinder, this covering sank so as to come in contact with the cylinder, and the plaintiff's right foot was caught thereby, and his foot and leg were drawn into it and crushed to a point above the knee joint, so that it was necessary to amputate the leg above the knee. The demurrer to this complaint rests upon the grounds that the defendant owed no duty to the plaintiff, who was a stranger to the transaction between the defendant, the manufacturer and vendor of the threshing machine, and the vendee, Pifer. The Court sustained the demurrer, and dismissed the action.

*Halvor Steenerson* (Charles Loring, on the brief), for plaintiff in error.

*W. E. Black* (Alfred L. Cary and Horace A. J. Upham on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating case as above, delivered the opinion of the Court.

Is a manufacturer or vendor of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life and limbs of any one who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use?

The argument of this question has traversed the whole field in which the liability of contractors, manufacturers, and vendors to strangers to their contracts for negligence in the construction or sale of their articles had been contested. The decisions which have been cited are not entirely harmonious, and it is impossible to reconcile all of them with any established rule of law. And yet the underlying principle of the law of negligence, that it is the duty of every one to so act himself and to so use his property as to do no unnecessary damage to his neighbors, leads us fairly through the maze. With this fundamental principle in mind, if we contemplate the familiar rules that every one is liable for the natural and probable effect of his acts; that negligence is a breach of a duty; that an injury which is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen or reasonably anticipated as the probable effect of such an act is not actionable, because the act of negligence in such a case is the remote, and not the proximate, cause of the injury; and that, for the same reason, an injury is not actionable which would not have resulted from an act of negligence except from the interposition of an independent cause (*Chicago, St. Paul, Minneapolis & Omaha R. Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582), — nearly all the decisions upon this subject range themselves along symmetrical

lines, and establish rational rules of the law of negligence consistent with the basic principles upon which it rests.

Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreements. Hence the limits of liability for negligence are not the limits of liability for breaches of contracts, and actions for negligence often accrue where actions upon contracts do not arise; and vice versa. It is a rational and fair deduction from the rules of which brief reference has been made that one who makes or sells a machine, a building, a tool, or an article of merchandise designed and fitted for a specific use is liable to the person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the manufacturer or vendor in its construction or sale. But when a contractor builds a house or a bridge, or a manufacturer constructs a car or a carriage, for the owner thereof, under a special contract with him, an injury to any other person than the owner for whom the article is built and to whom it is delivered cannot ordinarily be foreseen or reasonably anticipated as the probable result of the negligence in its construction. So, when a manufacturer sells articles to the wholesale or retail dealers, or to those who are to use them, injury to third persons is not generally the natural or probable effect of negligence in their manufacture, because (1) such a result cannot ordinarily be reasonably anticipated, and because (2) an independent cause — the responsible human agency of the purchaser — without which the injury to the third person would not occur, intervenes, and, as Wharton says, "insulates" the negligence of the manufacturer from the injury to the third person (Wharton on Law of Negligence, 3d ed., § 134). For the reason that in the case of things of the character which have been mentioned the natural and probable effect of the negligence of the contractor or manufacturer will generally be limited to the party for whom the article is constructed, or to whom it is sold; and, perhaps more than all this, for the reason that a wise and conservative public policy has impressed the Courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines and structures which are to be operated or used by the intelligent and the ignorant, the skilful and the incompetent, the watchful and the careless, parties that cannot be known to the manufacturers or vendors, and who use the articles all over the country hundreds of miles distant from the place of their manufacture or original sale, — a general rule has been adopted and has become established by repeated decisions of the Courts of England and of this country that in these cases the liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends is limited to the persons to whom he is liable under his contracts of construction or sale. The limits of the liability for

negligence and for breaches of contract in cases of this character are held to be identical. The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles. *Winterbottom v. Wright*, 10 M. & W. 109. . . .

The views expressed by the judges in this case have prevailed in England and in the United States, with the exceptions of two decisions which are in conflict with the leading case and with all the decisions to which reference has been made. Those cases are *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, in which Smith, a painter, employed Stevenson, a contractor, to build a scaffold ninety feet in height, for the express purpose of enabling the painter's workmen to stand upon it to paint the interior of the dome of a building, and the Court of Appeals of New York held that Stevenson was liable to a workman of Smith, the painter, who was injured by a fall, caused by the negligence of Stevenson in the construction of the scaffold upon which he was working; and *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559, in which a painter purchased of a manufacturer a step-ladder and one of the painter's employees, who was injured by the breaking of a step caused by the negligence of the manufacturer, was permitted to recover of the latter for the injuries he had sustained. . . .

But while this general rule is both established and settled, there are, as is usually the case, exceptions to it as well defined and settled as the rule itself. There are three exceptions to this rule.

The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. *Dixon v. Bell*, 5 Maule & Sel. 198; *Thomas v. Winchester*, 6 N. Y. 397 [*ante*, No. 469].<sup>1</sup> . . .

The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another, without notice of its qualities, is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. *Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 337; *Wellington v. Oil Co.*, 104 Mass. 64, 67; *Lewis v. Terry* (Cal.), 43 Pac. 398. In *Langridge v. Levy*, 2 M. & W. 519, a dealer sold a gun to the father for the use of the son, and represented that it was a safe gun, and made by one Nock. It was not made by Nock, was a defective gun, and when the son discharged it, it exploded and injured him. The son was permitted to recover, because the defendant had know-

<sup>1</sup> [The learned Court's second "exception" is the case of invitees who do not assume the risk of dangerous premises; treated *post*, Book III.]

ingly sold the gun to the father for the purpose of being used by the plaintiff by loading and discharging it, and had knowingly made a false warranty that this might be safely done, and the plaintiff, on the faith of that warranty, and believing it to be true, had used the gun, and sustained the damages. . . .

Turning now to the case in hand, it is no longer difficult to dispose of it. . . . The case falls fairly within the third exception. It portrays a negligence imminently dangerous to the lives and limbs of those who should undertake to operate it, a concealment of this dangerous condition, a knowledge of the defendant when it was shipped and supplied to the employer of the plaintiff that the rig was imminently dangerous to all who should use it for the purpose for which it was made and sold, and consequent damage to the plaintiff. . . . It is perhaps improbable that the defendant was possessed of the knowledge of the imminently dangerous character of this threshing machine when it was delivered, and that upon the trial of the case it will be found to fall under the general rule which has been announced in an earlier part of this opinion. But upon the facts alleged in this complaint, the act of delivering it to the purchaser with a knowledge and a concealment of its dangerous condition was so flagrant a disregard of the rule that one is bound to avoid any act imminently dangerous to the lives and health of his fellows that it forms the basis of a good cause of action in favor of any one who sustained injury therefrom.

The judgment of the Circuit Court must be reversed, and the cause must be remanded to the Court below for further proceedings not inconsistent with the views expressed in this opinion.

472. *PETERS v. JOHNSON*. (1902. 50 W. Va. 644; 41 S. E. 140.) *Brannon, J.*: The single question in a given case is, Was there a duty on the part of the defendant to the person suing him? Whence does duty come? The general rule is that damages only come from what is natural, reasonable, and probable consequence of an act. If harm may come reasonably and probably to any one from another's action, there is duty on him so to act as to avoid such injury. . . . Our case in hand is the case of one selling by mistake the wrong article, by negligence or incompetency as is claimed, selling a hurtful drug for medicine, when a harmless medicine was called for, and injury resulting to a stranger to the sale. Many authorities hold that one who sells provisions for consumption that are bad and hurtful is liable. *Craft v. Parker, Webb & Co.* (Mich.), 55 N. W. 812, 21 L. R. A. 139. Much more in the case of hurtful drugs! Would you limit the liability for selling foul food to only him who made the contract of purchase, and leave others at the table, wife, child, boarder, guest, suffer the harm? If one contracts to prepare a supper for a ball or festival, and furnishes sickening victuals, ought not any one injured to go to him for reparation? Under the facts, is he not under duty to every one present, in addition to his duty to his contracting party? It was held that he was in *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715. Why not, also, one selling drugs? . . . We must distinguish cases, and not carry the principle of allowing strangers to the contract to sue for damages in every case. We cannot say that every one injured from

defects in a railroad car or carriage or machinery can sue the maker or seller. This would be saying that any stranger could sue for injury for breach of a contract, resulting in injury to him. Who would sell under such a rule? The explosion of a defective cylinder of a threshing machine did not give action to a person operating it, against the manufacturer, for want of privity of contract; if the manufacturer knew of the defect, he would be liable; but if he did not, it would be otherwise, though guilty of negligence in manufacturing and testing: *Heizer v. Manufacturing Co. (Mo.)*, 19 S. W. 630, 32 Am. St. Rep. 482, 15 L. R. A. 821. . . . What is the test or criterion always applicable? Hardly any. Each case involving this nice principle must be largely its own arbiter. We may say that, as the authorities cited show, a third party, a stranger to the sale, can only sue when the thing used or the negligent act is very dangerous to human life, and injury may reasonably be expected to happen to others therefrom.

473. *KUELLING v. LEAN MANUFACTURING COMPANY*. (1905. 183 N. Y. 78; 75 N. E. 1098). [Here the defendant had knowingly made the tongue of a road-roller from imperfect wood, concealing the defect with putty and paint; he sold it to W., who sold to F., who sold to the plaintiff; the tongue broke, the horses ran away, and the plaintiff was injured.] *Vann, J.*: While the machine was not inherently dangerous, that fact is not controlling; for the danger was in the concealed defect in an implement sold as sound, and which not only appeared to be sound, but the maker caused it to so appear with intent to deceive. It would be illogical to hold the maker of a poisonous medicine, who negligently, but unintentionally, labelled it as an innocent remedy, and sold it, liable to any one who used it without notice of its character, but not to hold him liable if he intentionally created a danger in a machine apparently safe, which might be as fatal as poison, and, after concealing it in such a way as to prevent detection, put it on the market. While the danger in the one case is not so great as in the other, still, if the natural result would cause bodily harm to a human being, that regard for the safety of life and limb which the common law is so careful to shield should hold the wrongdoer liable in both. A land-roller is an implement not ordinarily dangerous; but one with a defective tongue, when the defect is thoroughly concealed for the purpose of making a better sale, may turn out to be as dangerous as a cartridge loaded with dynamite instead of gunpowder. Liability in this case rests on the simple extension of the well-established principle that the maker of an article inherently dangerous, but apparently safe, who puts it on the market without notice, is liable to one injured while using it, to the case of the maker of an article *not inherently* dangerous, who *made it dangerous by his own act*, but so concealed the danger that it could not be discovered, and put it on the market to be sold and used as safe. The extension is logical, and consistent with the authorities; for if the implement is not inherently dangerous, but the use thereof is made dangerous by a defect wrongfully concealed; the result is the same and the motive worse. I concur for reversal.<sup>1</sup>

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<sup>1</sup> [SUB-TOPIC D. PROBLEMS:

The plaintiff was eating at a lunch-counter, when the coffee-urn exploded and injured him. The urn had been defectively made by the defendant and sold to the restaurant-owner. Is the defendant responsible? (1909, *Statler v. Ray Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063.)

The defendant sold to the plaintiff one dozen four-ounce bottles of ginger-extract, representing it to be pure. In fact it contained 85 per cent of wood-

**SUB-TITLE (III): SUNDRY RULINGS DECLARING PROXIMATE-  
NESS AS MATTER OF LAW IN SPECIFIC CIRCUMSTANCES  
(NEGLIGENCE PER SE; ACTING AT PERIL)**

**Topic 1. General Principle**

475. OLIVER WENDELL HOLMES, JR. *The Common Law*. (1881, pp. 81-154, in part. Lectures III, IV.) There are two theories of the common-law li-

alcohol. The plaintiff drank some and died. May his representatives recover? (1910, *Darks v. Scudders-Gale G. Co.*, Mo. App. 130 S. W. 430.)

The defendant sold a horse to M. fraudulently concealing the fact that the horse had the glanders. The plaintiff was employed by M. to take care of the horse, and contracted the disease while doing so. Was the defendant responsible? (1894, *State v. Fox*, 79 Md. 514, 29 Atl. 601; 1903, *Skinn v. Reuter*, 135 Mich. 57, 97 N. W. 152.)

The defendant sold sulphuric acid to R., without properly labeling it; R. placed it on a shelf next to some cream; by mistake it was sold to the plaintiff, who drank it. Is the defendant responsible? (1905, *Burk v. Creamery Package M. Co.*, 126 Ia. 730, 102 N. W. 793.)

The defendant sold a folding-bed to A., who placed it in her boarding-house; A. rented a room therein to the plaintiff. The bed was negligently constructed, and the plaintiff in using it was hurt. Is the defendant responsible? (1896, *Lewis v. Terry*, 111 Gal. 39, 43 Pac. 398.)

The defendant sold a side-saddle to M., husband of the plaintiff; the plaintiff, using it, was injured by reason of its defective materials. Is the defendant responsible? (1898, *Bragdon v. Perkins C. Co.*, C. C. A., 87 Fed. 109.)

The defendant made and sold a quantity of oil to M., who sold to N., who sold to O., who sold a lampful to the plaintiff. The oil was dangerously explosive, by fault in its manufacture. It exploded and injured the plaintiff. Is the defendant responsible? (1875, *Elkins v. McKean*, 79 Pa. 493, 502.)

The defendant contracted with M. to make repairs on a van belonging to M. The defendant made the repairs negligently, so that afterwards a wheel came off while the van was being driven by the plaintiff, an employee of M. Is the defendant responsible? (1905, *Earl v. Lubbock*, 1 K. B. 253.)

[NOTES:

"Liability of a vendor to one with whom he has no contractual relation" (note). (A. L. Reg., 57 O. S., 563, 58 id. 445.)

"Manufacturer's liability for defects in machinery." (C. L. R., II, 58.)

"Dangerous commodities: limit of owner's responsibility." (C. L. R., VII, 436.)

"Dangerous food: liability of packer." (C. L. R., VII, 437.)

"Liability of maker or vendor of a chattel to third person injured by its use." (H. L. R.)

"Nature and grounds of liability in general." (VI, 261; XV, 666; XVIII, 318; XIX, 372.)

"Class reasonably likely to use the article; liability to members of." (VI, 61; VIII, 291; IX, 224; X, 191, 529; XV, 666; XVI, 133.)

"Directions for excessive dose on bottle of patent medicine." (III, 227.)

"Tests as to what chattels are within rule." (XVII, 274.)

"Druggist selling proprietary medicine without knowing contents." (M. L. R., I, 63.)

"Liability of manufacturer to one not a party to the contract of purchase." (M. L. R., II, 151, 235, 422.)



bility for unintentional harm. Both of them seem to receive the implied assent of popular text-books, and neither of them is wanting in plausibility and the semblance of authority.

The first is that of Austin, which is essentially the theory of a criminalist. According to him, the characteristic feature of law, properly so called, is a sanction of detriment threatened and imposed by the sovereign's commands. As the greater part of the law only makes a man civilly answerable for breaking it, Austin is compelled to regard the liability to an action as a sanction, or, in other words, as a penalty for disobedience. It follows from this, according to the prevailing views of penal law, that such liability ought only to be based upon personal fault; and Austin accepts that conclusion, with its corollaries, one of which is that negligence means a state of the party's mind.<sup>1</sup> . . .

The other theory is directly opposed to the foregoing. It seems to be adopted by some of the greatest common-law authorities, and requires serious discussion before it can be set aside in favor of any third opinion which may be maintained. According to this view, broadly stated, under the common law a man *acts* at his peril. It may be held as a sort of set-off, that he is never liable for omissions except in consequence of some duty voluntarily undertaken. But the whole and sufficient ground for such liabilities as he does incur outside the last class is supposed to be that he has voluntarily acted, and that damage has ensued. If the act was voluntary, it is totally immaterial that the detriment which followed from it was neither intended nor due to the negligence of the actor.

[This doctrine I will notice first, and afterwards the one first mentioned].

1. The arguments for the doctrine under consideration are, for the most part, drawn from precedent, but it is sometimes supposed to be defensible as theoretically sound. Every man, it is said, has an absolute right to his person, and so forth, free from detriment at the hands of his neighbors. In the cases put, the plaintiff has done nothing; the defendant, on the other hand, has chosen to act. As between the two, the party whose voluntary conduct has caused the damage should suffer, rather than one who has had no share in producing it. . . . I will begin with an early and important case.<sup>2</sup> It was trespass *quare clausum*. The defendant pleaded that he owned adjoining land upon which was a thorn hedge; that he cut the thorns, and that they, against his will (*ipso invito*), fell on the plaintiff's land, and the defendant went quickly upon the same, and took them, which was the trespass complained of. And on demurrer, judgment was given for the plaintiff. The plaintiff's counsel put cases which have been often repeated. One of them, Fairfax, said: "There is a diversity between an

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"Action against manufacturer by one not a purchaser." (M. L. R., III, 420, 494.)

"Selling poison without label." (M. L. R., III, 590.)

"Liability of manufacturer to third person for defects." (M. L. R., IV, 400.)

#### ESSAYS AND CHAPTERS:

C. B. Labatt, "Negligence in Relation to Privity of Contract." (L. Q. R., XVI, 168.)

Henry T. Terry, "Some Leading Principles of Anglo-American Law," c. XIII, § 416, p. 413.]

<sup>1</sup> Austin, *Jurisprudence* (3d ed.), 440 et seq., 474, 484, Lect. XX., XXIV., XXV.

<sup>2</sup> Y. B. 6 Ed. IV, 7, pl. 18, A. D. 1466 (Thorn-Cutting Case); cf. Ames, *Cases in Tort*, 69, for a translation, which has been followed for the most part.

act resulting in felony, and one resulting in trespass. . . . If one is cutting trees, and the boughs fall on a man and wound him, in this case he shall have an action of trespass, &c. And, also, sir, if one is shooting at butts, and his bow shakes in his hands, and kills a man, *ipso invito*, it is no felony, as has been said, &c.; but if he wounds one by shooting, he shall have a good action of trespass against him, and yet the shooting was unlawful, &c., and the wrong which the other receives was against his will, &c.; and so here, &c.” Brian, another counsel, states the whole doctrine, and uses equally familiar illustrations. When one does a thing, he is bound to do it in such a way that by his act no prejudice or damage shall be done to, &c. “As if I am building a house, and when the timber is being put up, a piece of the timber falls on my neighbor’s house and breaks his house, he shall have a good action, &c.; and yet the raising of the house was lawful, and the timber fell, *me invito*, &c. And so if one assaults me and I cannot escape, and I in self-defence lift my stick to strike him, and in lifting it hit a man who is behind me, in this case he shall have an action against me, yet my raising my stick was lawful in self-defence, and I hit him, *me invito*, &c.; and so here, &c. “Littleton, J., to the same intent, and if a man is damaged he ought to be recompensed. . . . If your cattle come on my land and eat my grass, notwithstanding you come freshly and drive them out, you ought to make amends for what your cattle have done, be it more or less. . . . Choke, C. J., to the same intent. . . . As to what was said about their falling *ipso invito*, that is no plea, but he ought to show that he could not do it in any other way, or that he did all that was in his power to keep them out.” Forty years later,<sup>1</sup> the Year Books report Rede, J., as adopting the argument of Fairfax in the last case. In trespass, he says, “the intent cannot be construed; but in felony it shall be. As when a man shoots at butts and kills a man, it is not felony, *et il sera come n’avoit l’entent de luy tuer*; and so of a tiler on a house who with a stone kills a man unwittingly, it is not felony.<sup>2</sup> But when a man shoots at the butts and wounds a man, though it is against his will, he shall be called a trespasser against his intent.” There is a series of later shooting cases, *Weaver v. Ward*,<sup>3</sup> *Dickinson v. Watson*,<sup>4</sup> and *Underwood v. Hewson*,<sup>5</sup> followed by the Court of Appeals of New York in *Castle v. Duryee*,<sup>6</sup> in which defences to the effect that the damage was done accidentally and by misfortune, and against the will of the defendant, were held insufficient. . . .

The above-mentioned instances of the stick and shooting at butts became standard illustrations; they are repeated by Sir Thomas Raymond, in *Bessey v. Olliot*,<sup>7</sup> by Sir William Blackstone in the famous squib case,<sup>8</sup> and by other judges, and have become familiar through the text-books. Sir T. Raymond, in the above case, also repeats the thought and almost the words of Littleton, J., which have been quoted, and says further: “In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering.” Sir William Blackstone also adopts a phrase from *Dickenson v. Watson*,

<sup>1</sup> Y. B. 21 Hen. VII, 27, pl. 5, A. D. 1506,

<sup>2</sup> Cf. Bract., fol. 136 b. But cf. Stat. of Gloucester, 6 Ed. I. c. 9; Y. B. 2 Hen. IV. 18, pl. 8, by Thirning; Essays in Anglo-Saxon Law, 276.

<sup>3</sup> Hobart, 134, A. D. 1616 [*post*, No. 479].

<sup>4</sup> Sir T. Jones, 205, A. D. 1682.

<sup>5</sup> 1 Strange, 596, A. D. 1723.

<sup>6</sup> 2 Keyes, 169, A. D. 1865.

<sup>7</sup> Sir T. Raym. 467, A. D. 1682 [*post*, No. 477].

<sup>8</sup> *Scott v. Shepherd*, 2 Wm. Bl. 892, A. D. 1773 [*ante*, No. 10].

just cited: "Nothing but inevitable necessity" is a justification. So Lord Ellenborough, in *Leame v. Bray*:<sup>1</sup> "If the injury were received from the personal act of another, it was deemed sufficient to make it trespass;" or, according to the more frequently quoted language of Grose, J., in the same case: "Looking into all the cases from the Year Book in the 21 H. VII. down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." Further citations are deemed unnecessary.

2. In spite, however, of all the arguments which may be urged for the rule that a man acts at his peril, it has been rejected by very eminent Courts, even under the old forms of action. . . . Conciliating the attention of those who (contrary to most modern practitioners) still adhere to the strict doctrine, by reminding them once more that there are weighty decisions to be cited adverse to it, and that, if they have involved an innovation, the fact that it has been made by such magistrates as Chief Justice Shaw goes far to prove that the change was politic, I think I may assert that a little reflection will show that it was required not only by policy, but by consistency. . . . The general principle of law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. . . . The State might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and State aid for those who suffered in person or estate from tempest or wild beasts. As between individuals, it might adopt the mutual insurance principle *pro tanto*, and divide damages when both were in fault, as in the "*rusticum judicium*" of the admiralty,<sup>2</sup> or it might throw all loss upon the actor irrespective of fault. The State does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo. State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise. The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to these objections, but (as it is hoped the preceding discussion has shown) to the still graver one of offending the sense of justice. Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning. . . .

The law [thus] does not *in general* hold a man liable for unintentional injury, unless he might and ought to have foreseen the danger, or, in other words, unless a man of ordinary intelligence and forethought would have been to blame for acting as he did.

3. The next question is, whether this vague test is all that the law has to say upon the matter, and the same question is another form, by whom this test is to be applied. Notwithstanding the fact that the grounds of legal liability are

<sup>1</sup> 3 East, 593. See, further, Coleridge's note to 3 Bl. Comm. 123; Saunders, Negligence, ch. 1, § 1; argument in *Fletcher v. Rylands*, 3 H. & C. 774, 783; Lord Cranworth, in s. c., L. R. 3 H. L. 330, 341.

<sup>2</sup> [The Woodrop-Sims, *post*, Book III, No. 629.]

moral to the extent above explained, it must be borne in mind that law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards. . . . Again, any legal standard must, in theory, be one which would apply to all men, not especially excepted, under the same circumstances. . . . If now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards, at least to some extent, and that to do so must at least be the business of the Court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances. The standard which the defendant was bound to come up to was a standard of specific acts or omissions, with reference to the specific circumstances in which he found himself. If in the whole department of unintentional wrongs the Courts arrived at no further utterance than the general principle of negligence, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they required the defendant to know, and would assert, by implication, that nothing could be learned by experience. But neither Courts nor Legislatures have ever stopped at that point. From the time of Alfred to the present day, statutes and decisions have busied themselves with defining the precautions to be taken in certain familiar cases; that is, with substituting for the vague test of the care exercised by a prudent man, a precise one of specific acts or omissions. . . .

It will be observed that . . . the argument of this Lecture, although opposed to the doctrine that a man acts or exerts force at his peril, is by no means opposed to the doctrine that he does *certain particular acts* at his peril. It is the coarseness, not the nature, of the standard which is objected to. If, when the question of the defendant's negligence is left to the jury, negligence does not mean the actual state of the defendant's mind, but a failure to act as a prudent man of average intelligence would have done, he is required to conform to an objective standard at his peril, even in that case. When a more exact and specific rule has been arrived at, he must obey that rule at his peril to the same extent. . . .

Some examples of the process of specification will be useful. . . . The rule of the road and the sailing rules adopted by Congress from England are modern examples of such statutes. By the former rule, the question has been narrowed from the vague one, Was the party negligent? to the precise one, Was he on the right or left of the road? . . . Another example may perhaps be found in the shape which has been given in modern times to the liability for animals, and in the derivative principle of *Rylands v. Fletcher*,<sup>1</sup> that when a person brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, he must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. Cases of this sort do not stand on the notion that it is wrong to keep cattle, or to have a reservoir of water. . . . It may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken. . . .

<sup>1</sup> L. R. 3 H. L. 330, 339 [post No. 590].

I therefore repeat, that experience is the test by which it is decided whether the degree of danger attending given conduct under certain known circumstances is sufficient to throw the risk upon the party pursuing it. For instance, experience shows that a good many guns supposed to be unloaded go off and hurt people. The ordinary intelligent and prudent member of the community would foresee the possibility of danger from pointing a gun which he had not inspected into a crowd, and pulling the trigger, although it was said to be unloaded. Hence, it may very properly be held that a man who does such a thing does it at his peril, and that, if damage ensues, he is answerable for it. . . . Another case of conduct which is at the risk of the party without further knowledge than it necessarily imports, is the keeping of a tiger or bear, or other animals of a species commonly known to be ferocious. If such an animal escapes and does damage, the owner is liable simply on proof that he kept it. . . . Experience has shown that tigers and bears are alert to find means of escape, and that, if they escape, they are very certain to do harm of a serious nature. The possibility of a great danger has the same effect as the probability of a less one, and the law throws the risk of the venture on the person who introduces the peril into the community.

476. HENRY SIDGWICK. *Elements of Politics*. (1891. Chap. VIII, § 2, pp. 110–112.) Let us observe that blameworthiness, in some degree, is normally characteristic of mischief for which reparation ought to be legally enforced as well as of that for which punishment is inflicted as punishment. This is not, perhaps, clear at first sight; it may be thought that the need of reparation arises from the mere fact that mischief, such as law aims at preventing, has been inflicted by A on B, without any consideration of the blameworthiness of A; that if A has caused, even quite accidentally, a loss of utility which must ultimately fall on somebody, it is more reasonable that the burden of the loss should be borne by A, who did in a physical sense act, than by B, who is innocent of any action whatever. But reflection will, I think, show that, from a utilitarian point of view, it would be wrong to hold men responsible for all results to which they physically contributed, however impossible it may have been to foresee such results. It is fundamentally important for the general happiness of any society that its members should be acting strenuously and energetically in some way or other; and it would too seriously interfere with this to lay down the broad rule “that every man acts at his peril” and is responsible for any mischief that may result. I hold, therefore, that damages for unintentional mischief should only be legally enforced, as a general rule, when the man who has physically caused the mischief has not taken due and proper care: *i. e.*, has not taken such care as would be taken by an ordinary person desirous of avoiding injury to others, as completely as this can be done without serious interference with his normal functions — supposing that his normal industry is not ordinarily dangerous. In this latter case special care may reasonably be required. The line, of course, is a difficult one to draw exactly: it must to a great extent be left to be decided by common sense and experience applied to particular circumstances.

As will be seen from the language that I have just used, I by no means assume that in *every* case where a man was rightly held legally responsible for the consequences of his act, there was something morally blameworthy in the state of mind that preceded the act in question. As Mr. Holmes says: “The law considers what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that: if a man is born



hasty and awkward . . . his neighbours require him at his proper peril to come up to their standard." But it remains true that, if responsibility be thus determined, the object of the law in enforcing damages is in all cases not merely reparative, but partly also preventive: it aims at maintaining a certain average standard of carefulness by providing that those who fall short of this standard shall act at their peril.

In laying down as a general principle that reparation should only be due where there has been at least negligence, if not culpable intention, I do not mean to affirm that there may not be important exceptions. Where protection from a particular mischief is of great importance, and where it is especially difficult to prove mischievous intention or neglect of others' rights on the part of persons who contribute in a secondary way to the mischief, it may easily be the less of two evils to make the burden fall on these contributories, though innocent even of negligence. This is perhaps the case where damage has been innocently done to the property of another by a man who had good reason for regarding it as his own. Suppose, *e. g.*, that a man has innocently purchased stolen goods, under circumstances which gave no occasion whatever for suspicion. It seems hard that he should have to compensate for any damage done to the goods; but considering the great importance of protecting property, the great difficulty of tracing it when stolen, the ease with which trade in stolen goods may be carried on undetected, it is perhaps needful, for adequate repression of this trade, and adequate deterrent to possible purchasers of other men's goods, to adopt the broad principle that no seller can give a better title than he has got: so that not only restoration of such goods, but also reparation for any damage done to them, will be due to the rightful owner from the most innocent and diligent purchaser. And other exceptions may have to be admitted on similar grounds. Still, I conceive it will remain generally true that the enforcement of damages, no less than the infliction of punishment (in the narrow sense), should be regarded as implying, in the broad and general sense just explained, some degree of culpability in the person on whom reparation is imposed.

477. *BESSEY v. OLLIOT*. (1694. T. Raym. 467.) *Raymond*, C. J.: In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering. And therefore Mich. 6 E. IV. 7. a. pl. 18 [Thorn-Cutting Case], trespass quare vi & armis clausum fregit, & herbam suam predibus conculcando consumpsit in six acres, the defendant pleads, that he had an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they ipso invito fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the bough falls upon another ipso invito, yet an action lies. If a man shoots at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river-side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbour's house, and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *Actus non facit reum nisi mens sit rea*.



478. CHARLES VINER. *General Abridgment of Law and Equity*. "Trespass" (X) (1793, 2d ed., Vol. XX). The intent shall not be construed in trespass. *Contra* in felony. As where a man shooting at butts kills T. N., it is not felony; so where a tyler drops a stone, which kills a man, not knowing it. But in those cases, if they lame or hurt a man, trespass lies; for there the intent is not to be considered.<sup>1</sup>

**Topic 2. Striking, Shooting, Cutting, Driving, Walking; Handling Chattels; and Sundry Similar Acts**

**479. WEAVER v. WARD**

KING'S BENCH. 1616

*Hob.* 134

WEAVER brought an action of trespass of assault and battery against Ward. The defendant pleaded that he was, amongst others, by the commandment of the lords of the council, a trained soldier in London, of the band of one Andrews, captain, and so was the plaintiff; and that they were skirmishing with their muskets charged with powder for their exercise in re militari against another captain and his band; and as they were so skirmishing, the defendant, casualiter et per infortunium et contra voluntatem suam, in discharging his piece, did hurt and wound the plaintiff; which is the same alleged trespass, absque hoc, that he was guilty aliter sive alio modo. And, upon demurrer by the plaintiff, judgment was given for him. For, though it were agreed that if men tilt or tourney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony, or if a lunatic kill a man, or the like; because felony must be done animo felonico; yet, in trespass, which tends only to give damages according to hurt or loss, it is not so. And, therefore, if a lunatic hurt a man, he shall be answerable in trespass. And, therefore, no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, prout ei bene licuit), except it may be judged utterly without his fault, — as if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.

<sup>1</sup> [TOPIC 1. NOTES:

"Civil liability: Inevitable accident as defence." (H. L. R., V, 36.)

"Liability without intent or negligence: in general." (H. L. R., VII, 452-456; VIII, 174; XI, 196; XV, 225.)

ESSAYS:

Oliver Wendell Holmes, Jr., "Privilege, Malice, and Intent." (H. L. R., VIII, 1.)

M. P. B. Mignault, "The Modern Conception of Civil Responsibility." (Law Journal, XLV, 528, A. L. R. XLIV, 719.)

Clarke Butler Whittier, "Mistake in the Law of Torts." (H. L. R., XV, 335.)

## 480. VINCENT v. STINEHOUR

SUPREME COURT OF VERMONT. 1835

7 Vt. 62

THE cause came from the court below upon the following bill of exceptions: This was an action of trespass for defendant's driving against and over the plaintiff with his horse and sulkey. Plea, not guilty, and trial by jury. The plaintiff gave evidence tending to prove that he was walking in the road, east of the part usually travelled by carriages, in the town of St. Albans, and that the defendant was travelling the same road with his horse and sulkey, driving fast, and when coming near, the defendant drove out on the east side, in such a manner as to bring his horse in contact with the plaintiff, which knocked him down, and the sulkey wheel passed over his body and leg, whereby he was much bruised and injured. On the part of the defendant, the deposition of S. P. Bascomb was read. The plaintiff requested the Court to charge the jury, that if they found the plaintiff was walking out of the travelled path, and was run upon by the defendant, the plaintiff must recover, though there was not fault, neglect or want of prudence on the part of the defendant. But the Court declined so to charge. . . . To which neglect to charge as requested, and charging as aforesaid, the plaintiff excepted: and thereupon the cause passed to this court for revision.

*Turner* for the plaintiff. . . . 2. The defendant cannot excuse himself by saying that the injury proceeded from the misconduct of the horse, or inevitable accident. Nor is this a hardship on the defendant. An injury has been done, and suppose it purely accidental, it is no worse for the defendant to sustain it than the plaintiff. He was guilty of no wrong, and the defendant, to say the least, was driving a skittish horse; and if the horse was frightened and became unmanageable, the injury done by him should be borne by the defendant. It should be his misfortune, and not the misfortune of the plaintiff. 3. Trespass does not imply any evil intention on the part of the trespasser. 1 Str. 596. It may be purely accidental, as where one enters on the land of another by mistake, or where one driving in the dark happens to get on to the wrong side of the road and injure the carriage of another by accident. . . . 5. The act may be a trespass, though the mind dissent, as where a person goes to cut timber on his own land, adjoining another's, and does not intend to trespass; yet if he cut the other's timber, it would be trespass, and it would be no answer to the action for him to say he did not intend it, and used great precaution, and carefully examined the lines in order to prevent it. . . .

*Hunt and Bearsley*, for the defendant. The only question presented by this case is, whether, where one man, in the proper exercise of a lawful employment, is the occasion of damage to another, and the act producing

the damage could not be controlled by the use of proper prudence and caution, he is liable to repair the damage, whatever it may be. The defendant insists he is not. . . .

The opinion of the Court was delivered by

WILLIAMS, Ch. J. In this case the jury must have found that the injury suffered by the plaintiff was the result of unavoidable accident, and that there was no want of prudence or care on the part of the defendant. They were instructed by the Court, that if they found these to be the facts, their verdict must be for the defendant. . . .

From an examination of the case, we find the charge of the Court was conformable to the law, and is wholly unexceptionable. The principle of law, which is laid down by all the writers upon this subject, and which is gathered from and confirmed by the whole series of reported cases, is, that no one can be made responsible, in an action of trespass, for consequences where he could not have prevented those consequences by prudence and care. Thus it has been laid down, that if a horse, upon a sudden surprise, run away with his rider, and runs against a man and hurts him, that is no battery. Where a person in doing an act which it is his duty to perform hurts another, he is not guilty of battery. A man falling out of a window, without any imprudence, injures another, — there is no trespass. A soldier, in exercise, hurts his companion — no recovery can be had against him. . . . In the case of *Wakeman v. Robinson*, 2 Bing. 213, in trespass for driving against plaintiff's horse, and injuring him with shafts of a gig, it was considered a good defence, that the horse was frightened by the noisy and rapid approach of a butcher's cart, and became ungovernable, so that the injury was occasioned by unavoidable accident. In the case of *Goodman v. Taylor*, 5 Car. & Payne, 410, which was an action of trespass for an injury done to a horse by a pony and chaise running against it, evidence was given on the part of the defendant, that his wife was holding the pony by the bridle, when a punch and judy show came by and frightened the pony, which ran off with the chaise. It was held, that, if true, this was a good defence on a plea of not guilty. . . .

To prevent any abuse of this protection, a person is accounted negligent or careless, and blame is imputed to him, if he does not use an extraordinary degree of circumspection and prudence, greater than is commonly practised, and if he might have prevented the accident. Therefore, where a person is doing a voluntary act, which he is under no obligation to do, he is held answerable for any injury which may happen to another, either by carelessness or accident. On this principle, the case of *Underwood v. Hewson*, 1 Str. 596, was decided. The act of uncocking the gun was voluntary, not unavoidable; a greater degree of prudence was therefore required. The case of a man turning round, and knocking down another, whom he did not see, — the shooting an arrow at a mark, which glanced, — were of this class. The act was purely voluntary, not one which the person was required to do. . . .

The result of our examination is, that we think there must be some blame, or want of care and prudence, to make a man answerable in trespass; and that where a horse takes a sudden fright, and there is no imprudence in the rider, either in managing the horse or in driving an unsafe horse, and the horse runs against another, and injures him, the trespass is wholly involuntary and unavoidable, for which no action can be maintained. . . . *The judgment must therefore be affirmed.*

#### 481. BROWN v. KENDALL

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1850

6 Cush. 292

THIS was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in. It appeared in evidence, on the trial, which was before WELLS, C. J., in the Court of Common Pleas, that two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury. . . .

The defendant requested the judge to instruct the jury, that "if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover." . . . The judge declined to give the instructions, as above requested, but left the case to the jury under the following instructions: "If the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict but a popular sense." . . .

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

This case was argued at the sittings in Boston, in January last, by *J. G. Abbott*, for the defendant, and by *B. F. Butler* and *A. W. Farr*, for the plaintiff.

SHAW, C. J. This is an action of trespass, *vi et armis*, brought by George Brown against George K. Kendall, for an assault and battery; and the original defendant having died pending the action, his executrix has been summoned in. . . .

The facts set forth in the bill of exceptions preclude the supposition that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases it is stated that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis* lies; if consequential only, and not immediate, case is the proper remedy. *Leame v. Bray*, 3 East, 593; *Huggett v. Montgomery*, 2 N. R. 446. In these discussions, it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that *some* action will lie. These *dicta* are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, nor careless. . . .

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. *Wakeman v. Robinson*, 2 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising

therefrom. *Davis v. Saunders*, 2 Chitty, 639; *Vincent v. Stinehour*, 7 Vt. 69 [*ante*, No. 480]. . . . In using this term, "ordinary care," it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man who should have occasion to discharge a gun on an open and extensive marsh, or in a forest, would be required to use less circumspection and care than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed. . . .

We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. . . .

The Court are of opinion that these directions [of the trial court] were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it.

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. . . .

*New trial ordered.*

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## 482. ANON [THORN-CUTTING CASE]

*Y. B. 6 Edw. IV, 7, pl. 18 (1466)*

[Printed *ante*, in No. 475.]



483. BASELY *v.* CLARKSON

KING'S BENCH. 1681

3 *Lev.* 37

TRESPASS for breaking his close called the balk and the hade, and cutting his grass, and carrying it away. The defendant disclaims any title in the lands of the plaintiff, but says that he hath a balk and hade adjoining to the balk and hade of the plaintiff; and in mowing his own land he involuntarily and by mistake mowed down some grass, growing upon the balk and hade of the plaintiff, intending only to mow the grass upon his own balk and hade, and carried the grass, &c., *quæ est eadem*, &c. Et quod ante emanationem brevis he tendered to the plaintiff 2s. in satisfaction; and that 2s. was a sufficient amends. Upon this the plaintiff demurred, and had judgment; for it appears the fact was voluntary, and his intention and knowledge are not traversable: they cannot be known.

484. WHITECRAFT *v.* VANDERVER

SUPREME COURT OF ILLINOIS. 1850

12 *Ill.* 235

THIS was an action of debt brought in the Christian Co. Circuit Court, to recover a penalty under the statute for cutting trees. The declaration contains but one count, which is as follows: That they (the defendants) render unto the plaintiff the sum of \$1166, which they owe to and unjustly detain from him; for that whereas, heretofore, to wit, on, etc., and from thenceforward continually, until the bringing of this suit, at, etc., the said plaintiff was the owner of certain land (describing it) and that the said defendants, on, etc., and on divers other days and times, before the bringing of the suit, did fell 68 elm trees, 68 elm saplings, etc., etc., which said trees and saplings theretofore, and up to the times of felling the same, as aforesaid, were standing and growing upon the land aforesaid, belonging to the plaintiff, as aforesaid; by reason whereof, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff, to demand and have of and from the said defendants a large sum of money, to wit, the sum of \$1,166, above demanded, yet, etc., to the damage of the plaintiff of \$200. To this declaration there was a demurrer and joinder, and a plea of nil debet, and issue joined thereon. The declaration was amended, and the cause was submitted to a jury, and a verdict was found for plaintiff for \$476; DAVIS, Judge, presiding. The cause was tried at a special term in August, 1850.

Motions for a new trial and arrest of judgment were made and overruled.

*W. J. Ferguson*, for defendants (plaintiffs in error). The judgment should have been arrested. The declaration does not allege either that the trees were cut *vi et armis*, or that they were cut without the permission of the owner. . . .

*Lincoln & Herndon*, for plaintiffs (defendants in error): 1. The statute of this State to prevent trespassing upon and cutting timber is not purely a penal statute, but a kind of remedial one — at least not penal: 13 Pick. 100; 6 Iredell 352; 10 Missouri 781; 1 Blackstone Com. 87, note. 2. It is not necessary to prove that the defendants wilfully and maliciously trespassed upon the land and cut the timber. It was a defence once to a certain extent, but that extent was repealed in 1833: Revised Laws, 604, § 6, and the repealing clause following § 1; 6 Blackford, 258; 5 Mass. 341. . . .

TRUMBULL, J. All the facts stated in the declaration may be true, and yet the defendants below have committed no act that would subject them to this action. . . .

1. The declaration, after setting forth the felling of the trees on the land of the plaintiff, alleges that, “by force of the statute in such case made and provided, an action hath accrued,” etc. There is no statute giving an action of debt in such a case as that stated. The words of the law (R. S. ch. 104, sec. 1) are: “Any person who shall cut, fell, box, bore, or destroy, or carry away any black walnut, black, white, yellow or red oak, whitewood, poplar, wild cherry, blue ash, yellow or black locust, chestnut, coffee or sugar tree, or sapling, standing or growing upon land belonging to any other person or persons, without having first obtained permission so to do, from the owner or owners of such lands, shall forfeit and pay for such tree or sapling so cut, felled, boxed, bored or destroyed, the sum of eight dollars.” The subsequent part of the same section prescribes a penalty of three dollars for cutting, etc., trees of any other description than those before enumerated. . . .

2. The question of intention or knowledge on the part of the defendants that they were trespassing upon the land of the plaintiffs, as necessary to render them liable to this action, was raised in the court below, has been argued here and will probably arise again upon another trial. It becomes therefore necessary to settle it now. Notwithstanding the statute, a party may still sue in trespass for an injury to his timber in the same manner as if the statute had never been enacted. The object of the statute is to furnish an additional remedy to the owner of the land, and also punish the wrongdoer. To subject a party to such punishment, he must have committed the wrong knowingly and wilfully, or under such circumstances as show him guilty of criminal negligence. It could never have been the intention of the legislature to impose a penalty upon a person, who, supposing in good faith that he was cutting upon his own land after having taken reasonable pains to ascertain its boundaries, should, inadvertently and by mistake, cut trees upon the land of another: *Cushing v. Dill*, 2 Scam.

461; *Batchelder v. Kelly*, 10 N. H. 436. For an injury committed under such circumstances, the party is left to his common law remedy by action of trespass.

The judgment of the Circuit Court is reversed, and the cause remanded, with leave to the plaintiff below to amend his declaration.

*Judgment reversed.*

#### 485. MAYE v. YAPPEN

SUPREME COURT OF CALIFORNIA. 1863

23 Cal. 306

APPEAL from the District Court, Eleventh Judicial District, Placer County. The facts are stated in the opinion of the Court.

*Tuttle & Fellows*, for appellants.

*P. L. Edwards* and *H. O. Beatty*, for respondents.

CROCKER, J., delivered the opinion of the Court; COPE, C. J., and NORTON, J., concurring.

This is an action to recover damages, in the sum of \$2,000, which the plaintiffs allege they sustained, by reason of the acts of the defendants, in entering upon the mining claim of the plaintiffs, and taking away gold and gold-bearing earth of that value. The case was tried by a jury, who found for the plaintiffs damages in the sum of fifty dollars, for which amount judgment was rendered, and the plaintiffs appeal therefrom, and from an order refusing a new trial. . . .

1. It appears that the plaintiffs and defendants are the owners of adjoining mining claims, which are worked by deep under-ground tunnels. The fact that the defendants mined over the dividing line between the claims, and worked out a portion of the mining ground of the plaintiffs, is not disputed. But they contend that it was not done wilfully or unintentionally, but in ignorance of the locality of the dividing line, between the claims, under the surface; and they were led to work over the line by the representations of one of the plaintiffs, as to its locality, in relation to the tunnel and the place they were working. On the trial, the plaintiffs objected to all evidence showing that the defendants were ignorant of the location of this dividing line; but the Court overruled the objection, and permitted several of the defendants to testify to those facts, and this is assigned as error. The plaintiffs, in this action, were not entitled to vindictive or exemplary damages, but could only recover the damages they had actually sustained by being deprived of the gold or gold-bearing earth taken by the defendants from their mining ground. It follows, that the question whether the defendants acted wilfully and maliciously, or ignorantly and innocently, in digging up and taking away the gold-bearing earth, is entirely immaterial. The defendants took property belonging to the plaintiffs, and have thereby injured them to a cer-

tain amount; and that amount is made no greater nor less by the fact that the act was done without any malicious intent. The right of the plaintiffs to recover damages, or the amount of the damages to which they may be entitled, is not affected by the fact that the trespass was not wilful in its character. The ruling of the Court upon this question was therefore erroneous. . . .

2. The Court also gave the following instruction, which the appellants assign as error: "If the jury believe, from the testimony, that defendants entered upon plaintiffs' ground in good faith, believing it to be their own ground, and were misled into so doing by the acts or declarations of plaintiffs, then if the plaintiffs recover at all, they can only recover the net sums taken from plaintiffs' ground, over and above the expense of extracting it." The plaintiffs claim that the rule of damages in such cases is the value of the property after it is separated from the freehold and becomes a chattel, or the value of the gold after it is extracted from the earth. . . . In *Wood v. Morewood* (cited in 3 Queen's Bench, 440) it was held by PARKE, Baron, at *Nisi Prius*, that if there was fraud or negligence on the part of the defendant, they might give as damages, under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter* (8 M. & W. 352); but if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he did, they might give the fair value of the coal as if the coal field had been purchased from the plaintiff; and the jury adopted the latter estimate. . . . It will be noticed that the rule of damages in such cases depends, to some extent, upon the form of the action; whether the action is for an injury to the land itself, or for the conversion of a chattel which has been severed from the land. The complaint in this case alleges that the defendants, at divers times, wrongfully entered upon a portion of plaintiff's mining claim, and extracted the gold and gold-bearing earth from a portion thereof, which gold and gold-bearing earth they wrongfully carried away and converted to their own use; and the value of the gold thus carried away is alleged to have been two thousand dollars. No demand of the possession of the gold after it was separated from the earth appears to have been made upon the defendants, and the gravamen of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule for damages, in a case like the present, is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. This seems to be a just and proper rule, and one established by the decisions upon this question. In estimating these damages, the expense of extracting the gold and separating it from the earth, after it is first moved from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs. The instruction of the Court upon

this point is very nearly correct, but it is proper that the rule should be accurately stated to the jury. The difference in the amount of damages may or may not be great, but we have no means of determining whether it is large or small.

The judgment is reversed and the cause remanded.

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#### 486. HOBART *v.* HAGGET

SUPREME JUDICIAL COURT OF MAINE. 1835

12 Me. 67

TRESPASS for the alleged taking and converting to his own use by the defendant, of an ox, the property of the plaintiff. The general issue was pleaded and joined. The defendant proved that he met the plaintiff in the street, and paid him \$25.50 for an ox, which the plaintiff directed him to go and take. That he went and took an ox out of the plaintiff's inclosure, supposing it to be the one he had so purchased; and produced much other evidence, tending to show that the ox taken was the one he had bargained for. The plaintiff introduced evidence to show that there had been a mistake and misunderstanding between himself and the defendant; and that the ox, which he supposed he had sold, was another ox of much less value; and that he never supposed that the defendant considered himself as having purchased the ox which he had taken, until he, the plaintiff, returned home and found the ox in question had been taken instead of the other.

WHITMAN, C. J., who tried the cause in the Common Pleas, instructed the jury that, if they were satisfied there had been an innocent mistake between the parties, and that the defendant had supposed he had purchased the ox in question, when in fact the plaintiff supposed he was not selling that ox, but another, they would find for the plaintiff.

The jury, thereupon, returned their verdict in the following form, viz.: "The jury find that the defendant did commit the trespass alleged against him." . . . To this ruling and direction of the Court, the defendant took exceptions, and thereupon brought the case up to this Court.

*Daveis*, for the defendant, contended that trespass would not lie upon these facts. This remedy implies a degree of wrong. And if the maxim "*damnum absque injuria*" will apply anywhere, it is in such a case as this. . . . Where the act complained of is involuntary and without fault, trespass will not lie. . . .

*Fessenden & Deblois* were of counsel for the plaintiffs. . . .

PARRIS, J. . . . The jury having found for the plaintiff have virtually found that he did not sell the ox in controversy, and the question is raised whether the defendant is liable in trespass for having taken it by mistake.

It is contended that where the act complained of is involuntary and without fault, trespass will not lie, and sundry authorities have been referred to in support of that position. But the act complained of in this act was not involuntary. The taking the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when on a precept against A., he takes by mistake the property of B., intend to commit a trespass; nor does he intend to become a trespasser, who, believing that he is cutting timber on his own land, by mistaking the line of division cuts on his neighbor's land; and yet, in both cases, the law holds them as trespassers. The case of *Higginson v. York*, 5 Mass. 341, was still stronger than either of those above supposed. In that case one Kenniston hired the defendant to take a cargo of wood from Burntcoat Island to Boston. Kenniston went with the defendant to the island, where the latter took the wood on board the vessel and transported it to Boston, and accounted for it to Kenniston. It turned out on trial, that Phinney had cut this wood on the plaintiff's land without right or authority, and sold it to Kenniston. York, the defendant, was held liable to the plaintiff for the value of the wood in an action of trespass, although it was argued that he was ignorant of the original trespass committed by Phinney. A mistake will not excuse a trespass. Though the injury has proceeded from mistake, the action lies, for there is some fault from the neglect and want of proper care, and it must have been done voluntarily. *Basely v. Clarkson*, 3 Lev. 37 [*ante*, No. 483]. Nor is the intent or design of the wrongdoer the criterion as to the form of remedy, for there are many cases in the books where the injury being direct and immediate, trespass has been holden to lie though the injury were not intentional, as in *Guille v. Swan*, 19 Johns. 381 [*ante*, No. 453]. . . .

The exceptions are overruled and there must be

*Judgment on the verdict.*

#### 487. HAMILTON *v.* HUNT

SUPREME COURT OF ILLINOIS. 1853

14 Ill. 472

[Printed *ante*, as No. 396.]

#### 488. MONK *v.* GRAHAM

COMMON PLEAS. 1721

8 Mod. 9

AT Nisi Prius in the Common Pleas. The case was thus: one Hackett bought stock to the value of £750, in the third subscription of the South-Sea company, and received £50 per annum for it, and after-



wards sold it, which by several mesne conveyances came to the now plaintiff, Mrs. Monk, who purchased it for £1000; and she, living in the country, entrusted one Rosse (who was an officer of the Exchequer) with the minutes [of the corporate books], and an order to receive this £50 per annum for her use, the said Rosse being then a man of credit, and discounting for at least £30,000 per annum of the revenue. Afterwards, Rosse pretending he had a power to sell the said stock, made an agreement in writing with the defendant Graham to sell it to him for £994, and told him that the plaintiff would sign the transfer. But he got another woman to personate the plaintiff, and to sign the transfer; and at the next opening of the books of the company he got the same transferred to the defendant, and made affidavit of the sale, and got it entered in the said books, this being required by Act of Parliament to every transfer, and then he withdrew himself out of the kingdom, so that he could not be found. The plaintiff, hearing that Rosse was withdrawn, came to London, and demanded the stock of the defendant, who told her that he had bought it of Rosse, and had got the minutes, the transfer, and the affidavit, which were all the conveyance the law could give, and believed that if she had any title, she had nothing to shew to make it appear; and therefore she came too late to make any demand on him.

Afterwards the defendant (though forbid by the plaintiff) sold this stock for £1090 to T. S., who sold it again to R. W. for £1109, and then the plaintiff brought an action of trover against the defendant. And, notwithstanding her folly in trusting Rosse with the minutes (which the counsel for the defendant did much rely on), the Chief Justice, Sir Peter KING, directed the jury to find for the plaintiff, which they did, and gave her no more than £750 damages. •

#### 489. SWIM v. WILSON

SUPREME COURT OF CALIFORNIA. 1891

90 Cal. 126, 27 Pac. 33

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial. The facts are stated in the opinion of the Court.

*Wilson & Wilson*, for appellant. A commission stock-broker who, in the regular course of his business, and in good faith, receives and sells stolen stock, and pays over the proceeds of the sale to the felon, without notice that the stock was stolen, is not liable to the true owner as for a conversion. (*Rogers v. Huie*, 2 Cal. 571; 56 Am. Dec. 363. See *Greenway v. Fisher*, 1 Car. & P. 190.) Both the plaintiff and the defendant were innocent parties, but if one of them must suffer, then he who puts it in the power of the wrongdoer to do the wrong must be that sufferer. (Civ. Code, § 3543.) . . .

*Tilden & Tilden*, for respondent. A stock-broker who sells and transfers stolen stock cannot escape liability by paying the proceeds of such sale to the thief. . . .

DEHAVEN, J. The plaintiff was the owner of one hundred shares of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employee in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant, relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of the sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and the facts as above stated appearing, the court in which the action was tried gave judgment against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals.

It is clear that the defendant's principal did not, by stealing plaintiff's property, acquire any legal right to sell it, and it is equally clear that the defendant, acting for him, and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property.

"It is no defence to an action of trover that the defendant acted as the agent of another. If the principal is a wrongdoer, the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." (*Kimball v. Billings*, 55 Me. 147; 92 Am. Dec. 581; *Coles v. Clark*, 3 Cush. 399; *Koch v. Branch*, 44 Mo. 542; 100 Am. Dec. 324.)

In *Stephens v. Elwell*, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad, and in rendering his decision on the case presented, Lord ELLENBOROUGH uses this language:

"The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another who had himself no authority to dispose of it."

To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every-day experience that one cannot always be perfectly

secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who, it now appears, was a thief, and, relying on his representations, aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff its value than it would be to take the same away from the innocent vendee, who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner; and this rule has been applied in this court to the case of an innocent purchaser of shares of stock. (*Barstow v. Savage Mining Co.*, 64 Cal. 388; 49 Am. Rep. 705; *Sherwood v. Meadow Valley Mining Co.*, 50 Cal. 412.) . . .

Indeed, we discover no difference in principle between the case at bar and that of *Rogers v. Huie*, 1 Cal. 429, 54 Am. Dec. 300, in which case, Bennett, J., speaking for the Court, said:

"An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase-money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods, than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them." . . .

It was the duty of the defendant in this case to know for whom he acted, and, unless he was willing to take the chances of loss, he ought to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a personal liability by the conversion of property not belonging to such principal.

Judgment and order affirmed.

GAROUTTE, J., MCFARLAND, J., and SHARPSTEIN, J., concurred.

BEATTY, C. J., and PATTERSON, J., dissented.

Rehearing denied.

#### 490. STEPHENSON *v.* HART & WATERHOUSE

COMMON PLEAS 1828

4 *Bing.* 595

CASE against the defendants as carriers.

The first count of the declaration alleged, that the defendants had received from the plaintiff a box containing money, goods, and chattels, of the value of £50, to be safely carried by the defendants from Birmingham to London, and there, at London, "to be safely delivered

for the plaintiff, for certain reasonable reward, to the defendants in that behalf"; yet that the defendants, not regarding their duty in that behalf, did not deliver the box and its contents for the plaintiff; but that defendants so negligently conducted themselves in the premises, that through their negligence and default the box with its contents was lost to the plaintiff.

The second count stated, that the defendants had received the box and its contents of the plaintiff to be redelivered to the plaintiff; yet the defendants, not regarding their duty in that behalf, did not safely keep the box and its contents for the plaintiff, nor redeliver it upon his demanding it, but so negligently conducted themselves in the premises that through their negligence and default the box and its contents were lost to the plaintiff.

The third count was in trover, with an allegation that the defendants had converted the box and its contents to their own use. Plea, not guilty.

At the trial before Lord TENTERDEN, C. J., at the last Summer Assizes at Warwick, the facts were as follows: On the 27th of September, 1826, a person calling himself J. West, applied to the plaintiff, a comb manufacturer at Birmingham, for a parcel of combs, and after taking a certain quantity with him, ordered £30 worth to be forwarded as early as possible, addressed to J. West, Esq., 27 Great Winchester Street, London. In payment he gave the plaintiff a bill of exchange which had two months to run, purporting to be drawn at Edinburgh for £50 by Guerin, upon LeCointe & Co., merchants, Devonshire Square, London, and accepted by them, payable at Smith, Payne & Smith, bankers, London. There were several indorsements on the bill, and one purporting to be for the Royal Bank of Scotland. The plaintiff agreed to discount the bill; and on the 30th of September packed up the combs, and the change supposed to be due to West (£6. 10s.) in a box; addressed it as directed by West; and booked it for London at the defendants' office in Birmingham. The box arrived the next day: the defendants, upon offering to deliver it at No. 27 Great Winchester Street, found, not only that no such person as West was known there, but that the house had not been tenanted for a twelve-month. About a week or ten days afterwards, the defendants received a letter from St. Alban's, signed J. West, informing them that a box for him had been addressed by mistake to Great Winchester Street, and requesting them to forward it to the Pea Hen, a public house at St. Alban's. The defendants forwarded the box accordingly, when a person calling himself West, who had been staying two or three days at the Pea Hen, and who had told the mistress of the house that he could not pay his bill till a box arrived in which he expected money, said on its arrival, "That is the box I expected; it contains money;" and proceeding to open it, took out money and paid his bill. He shortly afterwards disappeared.

The bill of exchange given by West to the plaintiff having been presented for payment when it became due in December, it was found that there was no such firm as LeCointe & Co., in Devonshire Square, and that no such persons had ever kept cash with Smith, Payne & Smith. Application for the box on behalf of the plaintiff was then made at the defendants' office in London. They first asserted that the box had been returned to Birmingham, but afterwards produced the letter signed by West, and said that on receiving it they had delivered the box at St. Alban's, as before stated.

LORD TENTERDEN, who in the course of the trial had observed that it was for the jury to say from the whole transaction, whether it was not a mere act of swindling, upon summing up, said that the question for them to consider was, Whether the defendants had delivered the box according to the due course of their business and duty as carriers?

The jury having found a verdict for the plaintiff, damages £37 17s. 6d. . . .

*Bosanquet*, Serjt., showed cause. The defendants have acted with gross negligence, for the consequences of which they are liable, even though the person who received the box at St. Alban's were the same person who ordered the goods; of which, however, no direct evidence has been given. . . .

*Wilde* and *Adams*, Serjts., *contra*. It is clear, from all the circumstances of the case, that the person who received the box at St. Alban's was the person who had ordered the goods of the plaintiff, and to whom the box was consigned; no one else at St. Alban's could have stated beforehand what were its contents. If he were that person, the defendants, so far from having been guilty of negligence, have strictly performed their duty. . . .

The Court desired to hear *Bosanquet* on the applicability of the count in trover, thinking the evidence did not support the first two counts of the declaration. He referred to *Noble v. Adams*; *Rex v. Jackson*, 3 Campb. 370; *Earl of Bristol v. Wilsmore*, 1 B. & C. 514, and *Duff v. Budd*, to show that where goods are obtained by fraud, the property in them does not pass out of the vendor, who may therefore maintain trover; and to 2 Salk. 655; *Perkins v. Smith*, 1 Wils. 328; *Youl v. Harbottle*, Peake N. P. C. 68; *Devereux v. Barclay*, 2 B. & A. 702; and *Stephens v. Elwall*, 4 M. & S. 259, to show that delivery by a bailee to a wrong person amounted to a conversion; *Ross v. Johnson*, 5 Burr. 2825 [*ante*, No. 387], being distinguishable as a case of mere omission on the part of the carrier. In the present case if the property did not pass out of the plaintiff, the delivery was clearly to a wrong person. . . .

PARK, J. I rather incline to think that the special counts [for negligence] in this declaration are not borne out by the evidence in the cause.

But I consider the action to be maintainable upon the count in trover. From the cases which have been cited, it is clear that trover lies against

a carrier for misfeasance in delivering a parcel to a wrong person. In *Ross v. Johnson*, a distinction was taken between misfeasance and non-feasance, and it was holden that trover would not lie where a carrier had lost goods by robbery or theft, Lord MANSFIELD and ASTON, J., considering that a case of mere omission. But in *Youl v. Harbottle*, Lord KENYON, referring to *Ross v. Johnson*, said that, where the carrier was actor and delivered the goods to the wrong person, he was liable in trover. Abbott, C. J., in *Devereux v. Barclay*, took the same distinction between omission and commission, and held the defendant liable for having done an act which he ought not; Bayley, J., referred to *Youl v. Harbottle*.

The question, therefore, on the present occasion, is, Whether the defendant has been guilty of a wrongful delivery for which trover lies? The plaintiff has sold goods to a felon (for I will not call him a swindler), who tendered a mere fictitious bill in payment. Upon such a transaction the question is, not what the seller means to do, but what are the intentions of the customer. Did he mean to buy in the present case? Never: he went with an intention to commit a felony. . . . It is clear that in the present case, the person calling himself West, never meant to pay for the goods, and the question of fraud was sufficiently left to the jury by the Chief Justice's saying, in the course of the trial, that the whole appeared to be a swindling transaction. Then, on summing up, he left it to the jury to say, whether the defendants had delivered the box according to the course of their business and duty. It is manifest that they had not. . . . A felon could not be the right person. . . .

I am, therefore, clearly of opinion that the rule which has been obtained on the part of the defendants must be discharged.

BURROUGH, J. I am of opinion that the verdict is right, that there is no ground for a new trial, and that the action is maintainable on the second count of this declaration. . . . The whole transaction was a gross fraud, the goods procured by a bill with a false drawer and a false acceptor, and no such person as the consignee ever heard of at the place to which he had addressed the goods. That circumstance ought to have awakened the suspicions of the defendants, and they were guilty of gross negligence in parting with them without further inquiry. In the result, they have the goods of the plaintiff in their possession, and they are liable to him if they deliver them wrongfully.

GASELEE, J. I am of opinion that the defendants conducted themselves with gross negligence. . . . Then can the action be maintained in trover? There can be no doubt that this was a swindling transaction, and I incline to think that the question was sufficiently left to the jury by what fell from the learned Chief Justice in the course of the trial. But taking that to be so, my doubt is, whether, the goods having been delivered to the person who, up to the time the bill drawn by LeCointe became payable, was the person apparently entitled to them, the defendants are liable in trover for such delivery, as having been guilty



of a wrongful conversion of the goods. For delivery to a wrong person, a carrier is no doubt responsible in trover; but from all that appears in this case, it may be collected that the person who received the box at St. Alban's was the person calling himself West, and the person to whom it was intended the box should be delivered. However, Lord Tenterden having left it properly to the jury to say whether the box was delivered in the due course of the defendants' business, a new trial could not be granted except upon payment of costs; the plaintiff, too, would amend, and probably recover upon the second trial, so that justice appears upon the whole to have been done; and my two learned Brothers entertaining a different opinion on the subject of the declaration, the rule must be

*Discharged.*

## 491. EDWARDS v. AMERICAN EXPRESS COMPANY

SUPREME COURT OF IOWA. 1903

.121 Ia. 744, 96 N. W. 741

APPEAL from the District Court, Marshall County; OBED CASWELL, Judge. The opinion states the case. Affirmed.

*Binkford & Snelling*, for appellant. *J. M. Whitaker*, for appellee.

WEAVER, J. Plaintiff alleges that in the spring of 1901 he was the owner of \$200, at Marshalltown, Iowa, which property the defendant, by its agents and employees, wrongfully took and carried away, and has failed to return or account thereof, and judgment is asked for the damages thus occasioned. The defendant answers that it is engaged in business as a common carrier, and that at the time mentioned in the petition one McArthur caused to be delivered to defendant at the Tremont Hotel two packages, said to contain one slot machine each, and at the direction of said McArthur defendant transported and delivered the same to one Schaefer in Chicago, Ill. It is further averred that said packages were received, shipped, and delivered in good faith, without any notice of the claim of plaintiff to any of said property, and that such notice was not received until after the property had passed from defendant's possession, and it was no longer within its power to return the same to plaintiff. The District Court rendered judgment in plaintiff's favor for the value of the machine, and defendant appeals.

The presumption which supports the judgment of the trial Court in an action at law requires us to give the appellee the benefit of the most favorable construction which can fairly be placed upon the testimony. The record will justify the conclusion that at the time in question there were three slot machines temporarily stored in the basement or baggage-room of the hotel, although there is a testimony to support a finding that but two of those three were in this room; the third being in another room on the same floor. Two of

the instruments belonged to McArthur and one to the plaintiff. On February 21, 1901, McArthur, being at Des Moines, wrote defendant's agent at Marshalltown: "Kindly ship to Peter Schaefer, Chicago, Ills., two slot machines; the one that was returned from Tama and the other you will find at the Tremont Hotel." The reference in this letter to the "one returned from Tama" appears to have been understood as directing attention to a machine which had been received for McArthur from that place and had been delivered by defendant at the hotel. On receipt of the letter the agent gave it to defendant's driver, and directed him to go to the hotel and get the machines therein called for. The driver applied to the landlord or manager of the hotel, and, being told that the machines were down in the baggage-room, went to the place designated, and, finding two slot machines there (and only two, according to his statement), took them to the defendant's office, where they were billed and shipped to Chicago. On March 5, 1901, McArthur, having discovered that one of the machines shipped to Schaefer belonged to plaintiff, notified defendant's agent at Marshalltown of the mistake, and asked to have the right instrument obtained from the hotel and forwarded to same address, which was done accordingly. Plaintiff's machine was never returned.

The appeal is based principally upon the proposition laid down in *Hutchinson on Carriers* (2d Ed.), § 115, to the effect that a common carrier "accepting goods for carriage in good faith from a person not the owner, but in apparent control of them, and able immediately to assume the actual custody of them, and after carriage to the destination delivers them again to such person, is not liable to the true owner as for conversion." The principle here announced may be conceded to its fullest extent without requiring a reversal of the judgment in this case. Neither the plaintiff nor McArthur, nor any other person having apparent possession or control of this machine, delivered it to the defendant. Its agents — acting, it is true, in entire good faith — undertook, in excess of its ordinary duties as common carrier, to select and identify the machines as called for by McArthur's letter, and in so doing unfortunately took one belonging to the plaintiff. If A, having a horse feeding in the same pasture or stable with the horse of B, request a carrier to get his animal, and ship it to another place, and the carrier by mistake takes possession of the animal belonging to B, it would be a hard rule, indeed, which would deny the latter any remedy against the party by whose error or trespass his property has been lost. The mistake in the present case was not chargeable to McArthur, for he did not direct defendant to ship this machine. Neither was it chargeable to the hotel proprietor, who did not attempt to select or point out the machines belonging to McArthur. Still less can it be said that the plaintiff himself was in any manner to blame for the confusion by which he

has been made to suffer damage. The judgment of the District Court has sufficient support in the record. . . .

There appears to be no reversible error in the record, and the judgment of the District Court is affirmed.

492. *HOLLINS v. FOWLER*. (1875. L. R. 7 E. & I. App. (H. L.) 757.) *Blackburn, J.*: However hard it may be on those who deal innocently and in the ordinary course of business with a person in possession of goods, yet, as long as the law, as laid down in *Hardman v. Booth*, is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the plaintiff's goods, by any one, however innocent, that person must pay the value of the goods to the real owners, the plaintiffs. . . .

. . . But we cannot act on any notions of hardship. When a loss has happened through the roguery of an insolvent, it must always fall on some innocent party; and that must be a hardship. Had the Legislature thought fit to make a sale in the cotton-market at Liverpool equivalent to a sale in market overt, the loss would have fallen on the plaintiffs. As it is, it falls on any one who has done what the law esteems a conversion. . . . We must, I apprehend, in such cases look only to the question, whether on the established principles of law the complaining party makes out that the loss should fall on the innocent defendant rather than on himself, the equally innocent plaintiff. If, as is quite possible, the changes in the course of business since the principles of law were established make them cause great hardships or inconvenience, it is the province of the Legislature to alter the law. That has been done to a considerable extent by the Factors' Acts.<sup>1</sup>

#### <sup>1</sup> [TOPIC 2. PROBLEMS:

The defendant operated an electric street-car at night without a headlight, and the plaintiff was injured thereby. Is the defendant responsible per se? (1892, *Rascher v. R. Co.*, 90 Mich. 413, 51 N. W. 463; 1894, *McGee v. R. Co.*, 102 Mich. 107, 60 N. W. 293.)

The defendant left some railroad cars standing on a track in a highway, and while coupling a car to them, injured the plaintiff. Is the defendant responsible per se? (1894, *Louisville & N. R. Co. v. Popp*, 96 Ky. 99, 27 S. W. 992.)

The defendant and the plaintiff went out hunting together, each agreeing to take a certain part of the river-bank. The defendant went to a part different from that agreed on, and by mistake shot the plaintiff. Is the defendant responsible per se? (1909, *Rudd v. Byrnes*, 156 Cal. 636, 105 Pac. 957.)

The defendant and the plaintiff went out hunting together. As the defendant was walking behind the plaintiff, the former's gun went off accidentally and shot the plaintiff. Is the defendant responsible per se? (1895, *Winans v. Randolph*, 139 Pa. 606, 32 Atl. 622.)

The plaintiff was in a telephone booth, conversing. The defendant stood without, and, in the course of a dispute with some one else, struck and broke the glass of the booth, and a piece of the glass injured the plaintiff's eye. Is the defendant responsible per se? (1908, *Schmitt v. Kurrus*, 234 Ill. 578, 85 N. E. 261.)

The defendant set fire to some brush on the highway, to clear it off. The fire spread and damaged the plaintiff's property. Is the defendant responsible per se? (1907, *King v. Norcross*, 196 Mass. 373, 82 N. E. 17.)

W. forged a bill of lading for wheat of the plaintiff's in transit, obtained the wheat, and delivered it to the defendants as his factors. They were unaware of the fraud. At W.'s order, they sold the wheat and sent the proceeds

### Topic 3. Keeping Animals

#### SUB-TOPIC A. DAMAGE BY ENTRY ON LAND

494. *REGISTRUM BREVIVM* (ed. 1595; fol. 94). *Quare vi & armis clausum ipsius prioris apud L. fregerunt, & blada in garbis ac foenum in tassibus sua ad valentiam centum solidorum ibidem inuenta cum quibusdam auerijis depastus est, conculcauit, & consumpsit, & alia enormia &c.*

to W. Are they responsible in trover? (1902, *Johnson v. Martin*, 87 Minn. 370, 92 N. W. 221.)

Plaintiff agreed to sell land to M.; one half of the crop was to be plaintiff's and was to be delivered by M. to the defendant elevator-company in the plaintiff's name. M. delivered it to defendant, but took the storage-tickets in his own name, then sold the grain, and on the sale the defendant shipped the grain out of the State to the vendee. Was the defendant responsible in trover? (1898, *Towne v. Elevator Co.*, 8 N. D. 200, 77 N. W. 608.)

The defendant left a freight-car standing in the highway; the plaintiff's horse took fright at it and ran away, injuring the plaintiff. The horse was of ordinary gentleness. Is the defendant responsible per se? (1853, *Gilbert v. R. Co.*, 51 Mich. 488.)

The defendant railroad ran a train through a city of 17,000 population at a speed of 25 miles an hour, and the plaintiff was injured thereby. Is the defendant responsible per se? (1894, *Tobias v. R. Co.*, 103 Mich. 330, 61 N. W. 514.)

The plaintiff was unlawfully trying to tear up railway tracks which the defendant was protecting. The defendant's gun accidentally went off, and shot the plaintiff. Is the defendant responsible per se? (1897, *Shriver v. Bean*, 112 Mich. 508, 71 N. W. 145.)

The defendant was shooting at a target with an airgun. One shot accidentally hit the plaintiff in the eye. Is the defendant responsible per se? (1897, *Chaddock v. Tabor*, 115 Mich. 27, 72 N. W. 1093.)

The defendant had been out hunting, and found that his gun would not work. He sat in a room trying to discover what ailed it. He thought he had taken out all of the cartridges, but in fact had not. The gun accidentally went off, and shot the plaintiff, who was in the room. Is the defendant responsible per se? (1897, *Bahel v. Manning*, 112 Mich. 24, 70 N. W. 327.)

The defendant was employed by C. to cut grass. Not knowing where the boundary line was between C.'s land and the plaintiff's, he unwittingly cut over a part of the plaintiff's land. Afterwards other employees gathered up and took off the grass. Is the defendant responsible per se? (1887, *Donahue v. Shippee*, 15 R. I. 453.)

The defendant and others were shooting pheasants. The plaintiff was employed by one of the party to carry cartridges. The defendant, in shooting at a bird, shot the plaintiff by accident, the bullet having apparently glanced from an intervening tree. Is the defendant responsible per se? (1891, *Stanley v. Powell*, 1 Q. B. 86.)

The defendant was out hunting wolves, and shot by mistake the plaintiff's dog, who looked like a wolf. Is the defendant responsible per se? (1888, *Ranson v. Kitner*, 31 Ill. App. 241.)

The plaintiff's dog was on the defendant's land. The defendant, intending only to scare it off, shot in the dog's direction, but struck and killed the dog. Is the defendant responsible per se? (1897, *Harris v. Eaton*, 20 R. I. 81, 37 Atl. 308.)

The plaintiff and the defendant were playing at a school recess. The defendant had a bow and arrows. The defendant said, "See me shoot that basket,"

495. RUST *v.* LOW

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1809

6 Mass. 90

THIS was a replevin of cattle. The defendants, as bailiffs of Abigail Trask, well acknowledge the taking and detaining them as

and shot an arrow. The plaintiff, who had been hiding behind a fire-screen in fear of the arrow, raised his head at that moment, and the arrow struck him and put out his eye. Is the defendant responsible per se? (1829, *Bullock v. Babcock*, 3 Wend. 391.)

P. took a cow to the defendant, an auctioneer, with instructions to sell. M. offered £11 for the cow. The defendant communicated the offer to P., who accepted it. The money was paid by M. to the bank to the defendant's account, and the defendant paid it to P. In fact, P. was not the owner of the cow, having already sold it to the plaintiff. Is the defendant responsible? (1887, *Turner v. Hockey*, 40 L. T. N. S. 746.)

The defendant, a surgeon, performed an operation on the plaintiff's leg. But instead of operating on the left leg, as agreed, he operated by mistake on the right leg. Is the defendant responsible per se? (1898, *Sullivan v. McGraw*, 118 Mich. 39, 76 N. W. 149.)

The defendant drove a herd of cattle from his home near Boston to pasture in New Hampshire. The plaintiff's cow, loose in the highway, joined the herd. The defendant, on counting the herd, found that it tallied; but in fact one of their own cows, unknown to them, had strayed away. On returning from placing the cows in pasture, the defendant was visited by the plaintiff, who demanded his cow, but the defendant denied that he had it. Was there a conversion? (1844, *Wellington v. Wentworth*, 8 Met. 548.)

The defendant left his cart and horse untied in front of the plaintiff's shop. Some passer-by struck the horse, and it backed up against the plaintiff's shop-window, thereby breaking the window and some china therein. Was the defendant responsible per se? (1881, *Illidge v. Goodwin*, 5 C. & P. 190.)

The defendant was driving a pair of horses, with a load of grain for the mill. A passing locomotive frightened the horses; they became unmanageable and ran away, striking a stone post belonging to the plaintiff. The post was near the highway, and bore a street-lamp. No lack of care or skill in managing the horses was shown by the defendant. Is he responsible at peril? (1873, *Brown v. Collins*, 53 N. H. 442.)

The plaintiff was sub-tenant under a tenant of the defendant. After a dispute between the tenant and the defendant, the defendant resumed possession by legal proceedings, which were however void and left him nevertheless a trespasser. He removed the plaintiff's goods and tore down a stable building erected by the plaintiff; the plaintiff being at the time absent. In the stable, in a feed-box, and in a tin box therein, the plaintiff had been keeping some money, amounting to about \$2000; this money was stolen or lost by the persons who tore down the stable for the defendant. Is the defendant responsible per se for the money? (1875, *Eten v. Luyster*, 60 N. Y. 252.)

## NOTES:

"Automobile: Care required of an operator." (A. L. Reg., 51 O. S. 109.)

"Carrier innocently transporting goods wrongfully shipped." (H. L. R. XIV, 233.)

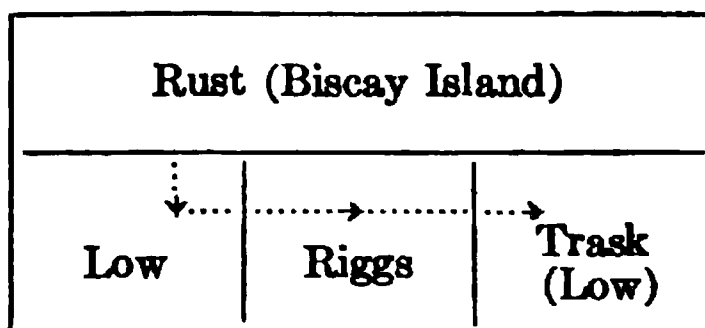
"Automobiles: Dangerous machines, Liability of owner." (M. L. R., VIII, 146.)

damage feasant in the close of the said Trask. To this conusance the plaintiff pleads in bar, that he is seised of a close called Biscay Island, which is enclosed by a fence; that to his said close are adjoining Trask's close, the locus in quo, Riggs's close, and also Low's close; and that Low's close is also adjoining upon Trask's close; and that Low's close is adjoining Riggs's close; that the partition fence, between the plaintiff's close and the locus in quo, was and is undivided, and that he and Trask are jointly and equally bound by law to make and maintain the same; That the partition fence between the plaintiff's and Low's closes was and is also undivided, and that the plaintiff and Low are jointly and equally bound by law to make and maintain the same, but that the same partition fences are in all parts not legal nor sufficient; That the plaintiff put the cattle into his own close to depasture, whence they escaped into Low's close, through the insufficiency of the partition fence, thence into Riggs's close, for want of any partition fence between those closes, and thence into the locus in quo, because there was no partition fence between Riggs's and the locus in quo.<sup>1</sup>

To this plea the defendants demur generally, and the plaintiff joins in demurrer. The cause was argued, at the last November term in this county, by *Prescott* and *Andrews* for the plaintiff, and *Dane* and *Story* for the defendants.

For the defendants. . . . It is not alleged in the bar that Trask was bound to make the fence between her and Riggs, and in excuse of a confessed trespass the Court will presume nothing. At common law, no man is bound to fence his close against his neighbor's adjoining field; but every man is bound to keep his cattle within his own close at his peril; and an obligation to maintain a fence could only arise by covenant or prescription.<sup>2</sup> Further, at common law, if a man be bound to make the fences of his close, this duty extends only as against the owner of the adjoining close, or some person having an interest therein, but not as against strangers; and therefore, if the cattle of a mere stranger escape into the close from defect of fence, trespass lies.<sup>3</sup>

#### <sup>1</sup> PLAN OF CLOSES



<sup>2</sup> Fitzherbert, *Natura Brevium*, 128; 22 H. VI, 9; Broke, *Abridgment*, *Trespass*, 345, 439; 16 H. VII, 14; 13 Viner, *Abridgment*, *Fences*, A., cites *Dyer*, 372, pl. 10; 20 Edw. IV, 10; 6 Mod. R. 314.

<sup>3</sup> *Salkwill v. Milwarde*, 22 H. VI, 23; 22 H. VI, 7, 8; Broke, *Abridgment*, *Curia Claud.* 2, *Tresp.* 145, 321, 439. . . .



The common law on this subject is still in force in this Commonwealth; and the statutes of 1785, c. 52 and c. 53, have altered it only as between owners of adjoining closes, and occupants under them. . . . The statute of 1788, c. 65, Par. 3, which provides that every man, having his land legally fenced, may have trespass, or impound, &c., is merely affirmative, and affects the cases of lands legally fenced, and not the cases at common law where lands are not fenced. There is nothing in this act which shows an intent to repeal the common law in other particulars; and manifestly its provisions apply only as between adjoining owners, and not strangers. . . .

For the plaintiff, it was contended that our statutes had virtually repealed the common law in this case; or rather that the English common law on this subject had never been adopted here. By our laws every man is bound to fence his close, not only against his neighbors, but against all the world. This law naturally arose out of the situation in which our ancestors found themselves in this country on their emigration, and for a long time afterwards. For want of proper pasture land, it was absolutely necessary that the cattle should be permitted to go at large into the forests for subsistence; and from the sparseness of the settlements, and the scarcity of inhabitants, it was impossible to watch them, so as to prevent their trespassing upon the unenclosed lands of others, the owners of which are therefore held to protect their enclosures by sufficient fences. . . .

By the statute of the Commonwealth, 1788, c. 65, Par. 3, it is provided that any person injured in his mowing, tillage, or other lands under improvement, that are enclosed with a legal and sufficient fence, by swine, sheep, horses, or neat cattle, may have an action of trespass, &c., or he may impound the creatures, &c. The inference is irresistible, that if his lands are not so enclosed with a legal and sufficient fence, he must sustain the damage himself, and has no remedy against the owner of the cattle doing the damage. . . . The plaintiff's cattle were, then, lawfully in Riggs's close; and Trask was bound to fence against any cattle, which were lawfully in the adjoining close. . . .

The cause standing continued nisi for advisement, the opinion of the Court was delivered in Suffolk, November term, 1809, by

PARSONS, C. J. (after reciting the pleadings). We are to decide whether the bar is, or is not, a sufficient answer to the conusance.

1. At common law, the tenant of a close was not obliged to fence against an adjoining close, unless by force of prescription; but he was, at his peril, to keep his cattle on his own close, and to prevent them from escaping. And if they escaped, they might be taken, on whatever land they were found damage feasant; or the owner was liable to an action of trespass by the party injured. . . . In the case

of a prescription to fence, he could be obliged to fence by the writ of *curia claudenda*. . . .

When our ancestors first settled in this country, they found it uncultivated; and when closes were made by the settlement and cultivation of the lands, there could be no prescription to fence; and therefore the common law authorizing the writ of *curia claudenda*, being inapplicable to the state of the colony, was never introduced.

2. Provision respecting fences was early made by the legislature of the colony of Massachusetts Bay. . . . The legal obligations of the tenants of adjoining lands to make and maintain partition-fences, where no written agreement has been made, rest on this statute. But in this position are not included adjoining lands, which are not both occupied by the respective owners, nor lands enclosed in a general field or common pasture, nor a close adjoining to a highway. These cases may be governed by different rules. . . . Every person, then, may distrain cattle doing damage on his close, or maintain trespass against the owner of the cattle, unless the owner can protect himself by the provisions of the statute, or by a written agreement, to which the parties to the suit are parties or privies, or by prescription. . . .

3. We are perfectly satisfied, he is obliged to fence only as in the case of prescription at common law. The manifest object of the statute was, to establish the rights and obligations of tenants of adjoining occupied closes respecting the making and maintaining partition fences; and the rights of persons, not having any interest in either of the adjoining closes, remain unaffected by the statute, and are to be defined and protected by the common law. . . .

4. At common law, when a man was obliged by prescription to fence his close, he was not obliged to fence against any cattle, but those which were rightfully in the adjoining close.<sup>1</sup> . . .

Against this position, the plaintiff has cited Fitzherbert, Abridgment, 298, note 6, where it is said, that if A be bound to fence against B, and B against C, and beasts escape out of the land of C into the land of B, and thence into the land of A, A shall not maintain trespass against C. But if A be bound to fence against B, and the beasts of B escape into the lands of A, and thence into the lands of D, a stranger, D may maintain trespass against B, who shall be left to his *curia claudenda* against A. By calling D a stranger, I suppose is meant, that neither A nor D is bound to fence against each other. For this distinction is cited 10 E. IV, 7, and 36 H. VI, Fitzherbert, Abridgment, *Curia Claudenda*, Bar, 168.

As this distinction is not supported, but opposed by other cases, we have looked into the authorities cited. The 10 E. IV, 7, clearly proves that D may maintain his action. It is thus laid down by

<sup>1</sup> 10 E. 4, 7, 8; 22 E. 4; Fitzherbert, Abridgment, *Curia Claudenda*, 2; Jenkins, 4 Century Cases, 5.

Choke, Justice: — “If I have a close between the close of A on one side, and the close of B on the other side, which I ought to fence, and through defect of fence A’s cattle escape into my close, I can have no action, for it is through my own default. But if they pass through my close into the close of B, he may have an action against A, who shall be put to his writ de curia claudenda against me.” The case of 36 H. VI is not reported in the year books, but there is a short statement of it in Fitzherbert, Abridgment, Bar, 168. And I believe the distinction arose from a mistake of the case. It is thus: — “Note, that it was adjudged by the court, if my beasts go into the close of another (de autre), which is adjoining to my close, for the defect of the close of the other (de l’autre), and further go into another (autre) close of the other (de l’autre), that I shall not be punished because I do not retake them and put them again into my close until reparation be made of the other close, because they would go again,” &c. Now, by mistaking the third close [i. e. the second close of the second person] for a close of a third person, who, because of the defect of his own fence, could maintain no action against the owner of the cattle, the distinction arose. But it was not well founded. That I have given the true translation appears from Jenkins, 4 Century Cases, 5. The rule, as there laid down, is, If A has green acre, adjoining to his own close white acre, which adjoins to B’s close black acre, which A ought to fence against, if B’s cattle go from his black acre to A’s white acre, and thence to A’s green acre, this is no trespass, because A did not fence his white acre against B’s black acre. This seems to be the same case of 36 H. VI, stated in Fitzherbert, Bar, 168.

We therefore consider it settled at common law, that the tenant of any close is not obliged to fence, but against cattle which are rightfully on the adjoining land. . . . Let us now examine the bar in the case before us. . . .

We conceive it immaterial whether the cattle escaped into Low’s close through his default or not. The cattle thence escaped into Riggs’s close, through want of any fence. And it does not appear that Low and Riggs were obliged to make a partition fence. If the cattle were rightfully on Low’s close, he was bound, at his peril, to prevent their escape into Riggs’s close; and when they did escape, a trespass was committed. Trask has not fenced her close against Riggs, and the cattle were by wrong on Riggs’s close; the owner of the cattle having no interest in that close, or any right to put his cattle there. And Trask was not obliged to fence against any cattle that had escaped from Low’s close to Riggs’s close. When the cattle escaped into her close from Riggs’s, it was a trespass, and her bailiff might lawfully distrain them damage feasant.

The bar is, therefore, bad, and no sufficient answer to the countenance of the defendants.

If, in fact, the cattle had escaped from the plaintiff's close into Low's, through the defect of Low's fence, yet the plaintiff must fail in his replevin against the defendants, and may have his remedy against Low by an action of the case. Vide *Cro. Jac.* 665, *Holbach v. Warner*; 1 *Salk.* 335, *Star v. Rookesby*.

By the Court. Plea in bar adjudged bad.

#### 496. WOOD *v.* SNIDER

COURT OF APPEALS OF NEW YORK. 1907

187 *N. Y.* 28, 79 *N. E.* 859

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 24, 1905, affirming a judgment of the Monroe County Court, which affirmed a judgment of a Justice's Court dismissing the complaint.

The defendant and six other persons owned forty or fifty cattle in severalty, which were being driven along a public highway toward a slaughter house. The cattle were attended by their owners and others and without negligence on the part of the attendants they escaped from the highway and crossed the lands of one B., a distance of ten or twelve rods, to and upon the lands of the plaintiff, a nurseryman, and thereby did the plaintiff substantial damage. They were immediately pursued by the attendants and driven from the plaintiff's land. No fence was maintained by B. between said highway and his lands, and a division fence was maintained between the lands of B. and the plaintiff. The defendant owned ten of said cattle. The plaintiff brought this action in Justice's Court to recover his said damages, and he insists that he is entitled to a judgment for such part of his damages as the number of defendant's cattle bears to the whole number of cattle that trespassed upon his lands. The defendant obtained a judgment in Justice's Court dismissing the plaintiff's complaint, and such judgment was affirmed on appeal to the County Court of Monroe County, and on a further appeal to the Appellate Division. An appeal is taken to this court by leave of said Appellate Division.

*Richard E. White*, for appellant. It is the duty of the owner of animals to restrain them from entering upon the premises of others. If he fails to do so, he is liable to respond in damages for the injury done. . . . The only exception to the rule is that where cattle are being driven along the highway and are properly managed, and they escape into unfenced land immediately adjoining the highway, the owner of the said land cannot maintain an action for damages, provided the cattle are driven from his land within a reasonable time. . . . The exception stated does not apply to the facts of this case, because the trespass was committed, not upon land which adjoined the high-

way, but upon land which was back of or beyond the land adjoining the highway. . . .

*George E. Warner*, for respondent. As a matter of law, the defendant cannot be held liable for any damage sustained by the plaintiff. . . .

CHASE, J. In deciding whether the plaintiff is entitled to recover the damages done by the cattle as alleged, it is necessary to consider the rules or principles which have long been established relating to the possession of real property by its owner.

1. Every person whose rights are unaffected by some statute, contract, or prescription, is entitled to the possession of his real property undisturbed and unmolested by others. Every man's land is in the eye of the law inclosed and set apart from another's either by visible and material fences, or by an ideal invisible boundary, and in either case every entry or breach carries with it some damages for which compensation can be obtained by action (*Waterman on Trespass*, vol. 2, § 873). By the common law, it was as unlawful for the beasts of a neighbor to cross the invisible boundary line as it would be to over-leap or throw down the most substantial wall (*Cooley on Torts*, 3d ed. 684). At common law every person was bound at his peril to keep his cattle within his own possessions, and if he failed to do so he was liable for their trespasses upon the lands of another, whether the lands trespassed upon were inclosed or not (*Ingham on Animals*, 258; *Cooley on Torts*, supra; 2 *Am. & Eng. Encyc. of Law*, 2d ed. 351; 2 *Cyc.* 392; *Cowen's Treatise*, 4th ed., § 536; *Bush v. Brainard*, 1 *Cowen*, 78 (note); *Tonawanda R. R. Co. v. Munger*, 5 *Denio*, 255). . . .

2. There is an exception to the common law rule stated in favor of a person lawfully driving domestic animals along a highway. If such a person exercise due care in so doing, he is not liable for injuries which they do by escaping from his control upon the adjoining lands if they are pursued and promptly removed (*Rightmire v. Shepard*, 36 *N. Y. S. R.* 768).

3. Fence laws have been adopted in this and other States which materially affect the question of the rights of parties when cattle trespass upon lands from other lands in which they are rightfully allowed to roam. Where by statute or otherwise an obligation rests upon an owner of real property to fence the same, such obligation extends only in favor of persons owning domestic animals which are rightfully on adjoining lands. It is a principle of the common law, universally recognized where the common law prevails, that owners of real property are not obliged to fence but against cattle which are rightfully on the adjoining lands (see cases and authorities cited above). The statutes of this State are drawn in recognition of this rule. . .

The fence law of this State provides:

"Each owner of two adjoining tracts of land, except when they otherwise agree, shall make and maintain a just and equitable portion of the division fence between such lands, unless one of such shall choose to let his lands lie open to

If, in fact, the cattle had escaped from the plain ad does  
Low's, through the defect of Low's fence, yet so lying  
fail in his replevin against the defendants, and ad by Laws  
against Low by an action of the case. Vide  
v. Warner; 1 Salk. 335, Star v. Rookesby.

By the Court. Plea in bar adjudged

496. WOOLF

COURT OF APPEAL

187

APPEAL from a judgment  
Court in the fourth  
affirming a judgment  
judgment of a Judge

The defendant is not unlawfully in the highway; neither does it extend  
severalty, nor  
slaughter  
and with a recovery for an inadvertent trespass by cattle lawfully on the high-  
from way is not denied because the cattle are lawfully upon the lands ad-  
joining the highway; but the exception to the rule is, as we have also  
seen, an arbitrary and artificial one arising from necessity or an effort  
to relieve persons engaged in a lawful traffic on a public highway from  
too heavy a burden, and goes only to the extent of depriving such  
owner of lands adjoining the highway of a remedy by action for such  
trespasses. The cattle are not lawfully upon such adjoining lands,  
and if they trespass upon lands of another after crossing the lands so  
adjoining the highway, they do so from a place where they had no  
right to roam; and as an owner of the lands, even where division  
fences are required by statute or prescription, it is not required to fence  
against cattle not rightfully upon the adjoining lands, the plaintiff is  
not deprived of his remedy for the trespass of the defendant's  
cattle. . . .

This limitation on the exception to the rule of the common law  
relating to trespass upon real property has been stated by the Courts  
so far as appears from the reports whenever the question has been  
squarely presented. In 1604, in the case of Harvey v. Gulson (Hil. 1  
Jac. C. B.), reported by William Noy (Eng.), in 1669, and found at  
page 107 of his volume of reports, the Hilary Term James I, Common  
Pleas Court, said: "That if A hath a Close next to the Highway and  
beasts come out of the Highway into the close of A, and thence they  
enter into another Close of B adjoining and that B ought to fence,  
there in default of enclosure, etc., it is a good plea against A, but not  
against B or another stranger, etc. Vide 36, H. VI Barr. 168." . . . It  
thus appears both upon principle and from precedent that the owners



cattle were liable to the plaintiff for any damage which he has

the record it could be found that the cattle were all upon land and that they did equal damage to him; if so the liable for such part of the damage done by all the cattle cattle owned by him bears to the whole number of upon the plaintiff's land (*Partenheimer v. Van Order*,

each court should be reversed, with cost in all

WARD T. BARTLETT, WERNER and WILLARD  
RAY, J., absent. HISCOCK, J., not sitting.  
*Judgment reversed.*

#### D. DAMAGE BY BITING, KICKING, ETC., PERSONS OR CHATTELS

497. *REGISTRUM BREVIUM* (ed. 1595; fol. 111). *Ostensus quare quosdam canes ad mordendas oues consuetos apud B. scienter retinuit, qui quidem canes centum oues ipsius Iohannis ibidem inuentas tam grauiter momorderunt, quod sexaginta oues precij centum solidorum de ouibus praedictis interierunt, & oues residuae multipliciter deterioratae fuerunt, & alia enormia ei intulit, ad graue damnum ipsius Iohannis vt dicit. Et habeas ibi nomina plegiorum & hoc breue.* T. &c.

498. Sir MATTHEW HALE. *Pleas of the Crown* (ante 1680. Pt. I, c. 33, Vol. I, p. 430). If a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality, he is not punishable. . . . These things seem to be agreeable to law:

1. If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it.

2. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's Case*, whose child was bit by a monkey that broke its chain and got loose.

3. And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm the owner is liable to answer damages.

499. *REX v. HUGGINS*. (1730. 2 Ld. Raym. 1574, 1583.) *Raymond*, L. C. J.: . . . There is a difference between beasts that are *feræ naturæ*, as lions and tygers, which a man must always keep up at his peril; and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature, such as oxen and horses. In the latter case an action lies, if the owner has had notice of the quality of the beast; in the former case an action lies without such notice.

## 500. M'CASKILL v. ELLIOT

COURT OF APPEALS OF SOUTH CAROLINA. 1850

5 *Strobh.* 196

CASE for wrongfully keeping a dog that bit the plaintiff. The first count alleged that the dog was accustomed to bite mankind; the second, that he was of a ferocious and mischievous disposition; both counts alleged the scienter of defendant.

It appeared that the dog was large, and in appearance fierce; that he would run out of the yard of defendant (who lived near to a road) and bark furiously at persons passing by, and that once he bit the heels or tail of a horse that a witness was riding; that once at a mill, he attacked a negro who passed near to a horse he was lying by, but was kept off with a stick; that defendant had said, "the dog will follow me wherever I ride and lie by my horse, and then nobody must come near." On the occasion of a big meeting, defendant's son went fifteen minutes or so earlier than his father, the dog following; the son pulled off his saddle and scolded the dog, who slunk back and lay down by the saddle. The plaintiff coming afterwards, during service in the church, hitched his horse, and walking towards the church passed near the dog. The dog flew at and bit him. Testimony was offered as to the subsequent conduct of the parties, which it is useless to report.

There was no testimony to show that the dog had previously bit any person. The defendant's counsel contended that this was indispensable, citing 7 Car. & Payne, 756. The Circuit Judge thought that a previous biting, known to defendant, might have an effect upon the degree of care which would afterwards be required of him, but was not indispensable under the second count. He directed the jury to inquire whether the evidence had satisfied them, first, that the dog was of a ferocious and mischievous nature; second, that this was known to the defendant; and third, that the defendant had been blamably negligent in his keeping of such a dog. If these propositions were established, he thought the verdict should be for the plaintiff. The jury found for the plaintiff a sum sufficient to carry costs.

The defendant appealed, and moved for a new trial on the following grounds: 1. Because the first count sets out that the defendant knew that the dog was "used and accustomed to attack and bite mankind;" and the other count sets out that the defendant knew the dog "was of a ferocious and mischievous nature;" and it is most respectfully submitted, that in such case, to entitle the plaintiff to a verdict, he must prove, that before biting him the dog had bit some person, and that the defendant had had notice of that fact. . . . 3. Because the verdict is against the law and evidence of the case.

*Smart*, for the motion.

*Kershaw*, *contra*.

CURIA, per WARDLAW, J. In every case for mischief done by an animal, where no evil design is imputed to the defendant, the cause of action is the defendant's breach of social duty, in not effectually preventing a thing within his control from doing the harm complained of, when his previous information ought to have shown that the thing was likely to do such harm if not prevented. . . . 1. Under the second count, alleging a ferocious and mischievous disposition, whatever was calculated to establish the dangerous propensity of the animal, in sufficient degree tended to support the allegation, and was properly left to the jury. That a dog has once bitten a man, is a circumstance from which the probability of its biting another, may be inferred: but the same inference may be drawn with equal confidence from other indications of the dog's disposition. . . .

2. But if the evidence sustained the second count, the defendant says that count is insufficient. . . . The defect alleged is the want of any special averment of negligence. . . . The argument is this: "He who keeps a dog that he knows is accustomed to bite mankind, does so at his peril; . . . but a ferocious and mischievous disposition is uncertain, admitting of various degrees; — it cannot be said to be necessarily wrong to keep a dog of such a disposition, and therefore negligence in the keeping under the circumstances is a necessary ingredient in an action for damage done by such a dog." The answer is, that what is said of a dog accustomed to bite mankind is (except the duty of killing, assigned as a reason) true as to any animal, wild or tame, from which the defendant ought, according to his previous knowledge, to have expected the mischief complained of. Every such animal the owner keeps at his risk, being, without regard to care or negligence, an insurer against all the harm that he might reasonably have expected to ensue. . . .

3. If a dog is likely, as his owner knows, to bite either man or sheep only at particular seasons, or under particular circumstances, then, against those seasons or circumstances, and that kind of mischief to be apprehended in them, the owner insures at his peril. A plaintiff who has suffered such mischief, is, in cases that have been decided, advised to allege a general mischievous disposition, rather than a particular habit. Under such general allegation, his count is, in effect, that the defendant wrongfully kept a dog which he knew to be likely to do a certain harm, and that the dog had done that harm to the plaintiff. . . . A count of this kind puts in issue the existence of a disposition in the dog ferocious and mischievous to such a degree as was likely to produce the injury complained of, such knowledge of that disposition on the part of the defendant as ought to have induced his reasonable apprehension and effectual prevention of such an injury, the subsequent keeping of the dog, and the injury consequent thereon.

. . . Care taken by the defendant, which has failed to prevent what thus he ought to have apprehended and prevented, whilst he kept the animal, could not be a defence in any action of this kind. . . .

In this case before us, the attention of the jury was directed to the question of negligence, perhaps unnecessarily; but negligence has been in fact expressly found. The dog may have been harmless in the defendant's yard, but he knew that it had a habit of following and guarding a horse, and that when thus employed, it was dangerous. He was bound then to insure against this habit, and when he suffered the dog to mount guard at a meeting-house, where many persons unsuspecting of danger may have been expected to pass, he surely was blamably negligent.

The motion is dismissed.

EVANS, FROST, and WITHERS, JJ., concurred.

### 501. KELLY *v.* ALDERSON

SUPREME COURT OF RHODE ISLAND. 1896

19 R. I. 544, 37 Atl. 12

DEFENDANT'S petition for a new trial.

July 11, 1896. STINESS, J. This is an action for damages from a bite by the defendant's dog. The injury took place while the plaintiff was walking on a public highway in Jamestown, in the evening of August 30, 1895. By Pub. Laws R. I. cap. 749, of April 26, 1889, it was provided that the owner or keeper of a dog should be liable to the person injured for the damages sustained, and that it should not be necessary, in order to sustain an action, "to prove that the owner or keeper knew that such dog was accustomed to do such damage." At the trial before the jury, the defendant offered testimony to show that the plaintiff had previously stoned the dog; that the dog was peaceable, and had not been known to attack any person, except the plaintiff, and it is alleged that such testimony was excluded and that exception was taken.

The evident purpose of the statute is to give a remedy to a person who is bitten by a dog upon a highway, without reference to the defendant's knowledge of the viciousness of the dog. In other words, if the dog gets upon the highway the owner is liable for whatever damage he may do. It is the risk which he takes from the fact that the dog is on the highway. The statute plainly extends the liability of an owner beyond his liability at common law, which was only for habits of which he had reason to know. Testimony, therefore, that the dog had not been known to bite before was no defence to the action, and was not admissible upon this ground.

It is argued that no new liability is imposed by the statute, but only a rule of evidence which excuses the plaintiff from proving the scienter.

But if the defendant can set up in defence the fact that he did not know of the bad habits of the dog, the plaintiff must meet the testimony in rebuttal by proving that he did, which is the very thing that the statute says he need not do. The provision is not that he need not prove the fact in the first instance. He need not prove it at all. Clearly, then, testimony relating to the scienter is not admissible as a defence. This is the opinion, under laws of the same purport, in *Woolf v. Chalker*, 31 Conn. 121; *Pressey v. Wirth*, 3 Allen, 191; and *Galvin v. Parker*, 154 Mass. 346. . . .

The exceptions are overruled, and the petition for a new trial denied. *Patrick J. Galvin*, for plaintiff. *Charles Acton Ives* for defendant.

## 502. MOLLOY v. STARIN

COURT OF APPEALS OF NEW YORK. 1908

191 N. Y. 21, 83 N. E. 588

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 27, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. The nature of the action and the facts, so far as material, are stated in the opinion.

*Dickinson W. Richards*, for appellant. The defendant in this case is not liable under the doctrine which holds the owner or keeper of a wild animal to be, under certain circumstances, an insurer against injury by it. . . .

*Jonathan Deyo*, for respondent. Wild beasts having a savage nature are always kept at the absolute risk and peril of those who keep them in their possession. If they do harm to a human being, that fact alone is conclusive evidence that he who keeps them has violated his duty of care. The only defence is that the injured party wilfully and knowingly put his person at the mercy of the beast. . . .

GRAY, J. The defendant is engaged in the business of a common carrier, and, as such, received from their owner four trained bears for transportation on one of his steamboats from New York to New Haven. They were confined in cages; three of the sides of which were wood, while the fourth side, or front, of the cage, consisted of an iron grating, over which a wooden slide was so adjusted as to be moved up and down. Upon arriving at New Haven, at half-past four in the morning, the cages were removed to the defendant's freight house upon the dock, to await their delivery, at a later hour, to the owner. He arranged the cages in the form of a square, somewhat apart, and so that the front of each cage would face within. He then raised the slides somewhat, watered the animals and went off to arrange for taking them away. Some three hours later, the plaintiff, a boy nine years old and apparently quite capable of taking ordinary care of himself, came upon the

dock, though having no business there, entered the freight house, and went between two of the cages. He was bending down to look through the grating of one of them and, in that attitude, putting one foot back of the other, when the bear in the cage behind him seized it and inflicted the injury for which this action was brought. He recovered a judgment against the defendant for damages; which the Appellate Division justices, not all concurring, have affirmed. . . .

I am unable to perceive any legal ground for sustaining the recovery. There was no formal charge, and I find it somewhat difficult to understand, from the various rulings made by the trial Court upon requests for instructions to the jurors, on what theory the case was submitted; unless it be this that the defendant was liable, in all events, if the animal was "not being securely kept." The jurors were instructed that "this case is not considered as an action for damages for negligence" and that "if the boy was a licensee upon the defendant's premises, and if the bear was in the defendant's possession, and, through not being securely kept, injured the boy, the boy is entitled to recover, unless the injury was caused by an act of the boy, done with the knowledge that he was exposing himself to the risk of injury from the animal." It is probably the fact, regarding the various instructions to the jurors, that the trial Court applied the strict rule of liability, adopted in cases where a ferocious animal, whether *ferae naturae* or *domitae*, are kept, with the owner's knowledge of their ferocious propensities. . . . The liability of an owner is absolute and he is bound to keep the animal secure, or he must suffer the penalty for his failure to do so, in making compensation for the mischief done. . . . In this case the owner of the bears might well be under an absolute liability for keeping that dangerous kind of property. . . .

But the defendant was not the owner of the bears; nor was he their keeper within the meaning of the cases. He neither kept nor maintained them, as an owner. As a common carrier he received them as so much freight, as he was warranted in doing; there being nothing in the condition in which they were taken over by him, which constituted a public menace or a nuisance. Indeed, the jurors were expressly instructed that the defendant could not "refuse to take property for transportation, simply because it was of a dangerous character." There is no suggestion that the animals were not securely confined in their cages, and the defendant, in receiving them as a carrier, assumed to their owner the carrier's liability for their safe carriage, and to the general public he owed the duty of adopting reasonable precautions to prevent accidents while the animals were in his possession. The duty, or the responsibility, of the carrier would be proportioned to the nature of the freight carried; for, obviously, a different degree of care would be called for if the item of freight is of a dangerous character, such as would be a wild and ferocious animal, or some highly explosive compound, from what would be required, if some harmless article were in his custody. It does



not appear that the defendant neglected the exercise of a reasonable precaution in carrying these animals, and, when they were taken from his vessel, they were placed within the freight house, with the cages so arranged as to have their fronts face within a square. Thus there was no danger whatever to the passing public. It required unauthorized meddling to create the danger. . . . If the defendant cannot be shown to have been negligent with respect to the public safety, in failing to adopt such a reasonable precaution in carrying his freight of wild animals as the nature of the case called for, he has come under no liability to the plaintiff. . . .

For the reasons given, I advise the reversal of the judgment appealed from and that a new trial be ordered; costs to abide the event.

WILLARD BARTLETT, J. (concurring in result). I find it impossible to concur in the view of the law of this case expressed in the opinion of the Chief Judge, or in the view of the facts expressed in the opinion of Judge GRAY, and, therefore, deem it proper to set forth my reasons for differing from them, in a separate opinion, as briefly as may be consistent with clearness.

It is no doubt the settled law in this State that the owner of a wild animal of a dangerous character, or the owner of domesticated animals known to be of a vicious disposition, is absolutely liable for injuries done by such animal to another, unless the injury was brought upon that other by his own conduct; and this liability exists if injury is done by the animal without fault on the part of the person injured, no matter how much care may have been exercised by the owner for the purpose of preventing the injury (*Muller v. McKesson*, 73 N. Y. 195). A bear is a wild animal of such a character that every one is presumed to have knowledge of its savage nature (*Besozzi v. Harris*, 1 Foster & Finlason, 92). It has further been held that this liability on the part of the owner of an animal known to be a vicious one extends to a person who harbors the animal although not its owner (*Brice v. Bauer*, 108 N. Y. 428). According to the opinion of the Chief Judge, the defendant in this case, who had transported the bear as a common carrier and was detaining the animal on his wharf until the transportation charges should be paid, at the time when the injury was inflicted upon the plaintiff, is to be deemed a person who has harbored the bear within the rule to which I have referred; inasmuch as he was under no obligation to receive and transport such an animal as a common carrier. . . .

But however this may be [as to his obligation to transport], no one will deny that a common carrier may rightfully undertake the transportation of a wild animal. After having entered upon this undertaking as did the defendant here, the question is whether the common carrier is to be held to the strict rule of liability applicable to the person who owns or harbors such an animal, or whether he is liable for an injury which it may inflict upon others only in event of a failure to exercise a proper degree of care in the custody and management of the beast in

transit. So far as I am aware, no case has yet been decided which imposes the stricter liability (amounting practically to that of an insurer) upon the carrier. Taking into consideration the facts to which reference has been made in regard to the establishment and maintenance of zoological collections for the pleasure and instruction of the people, I am of opinion that the rule should not be extended and that the carrier should be held liable only for negligence. . . .

I do not think that the contributory negligence of the plaintiff was so clearly made out as to bar him from a recovery as matter of law. . . . I think that the question of his contributory negligence was proper for the consideration of the jury and should not be determined here as a question of law.

For these reasons I vote for a reversal of the judgment and a new trial.

CULLEN, Ch. J. (dissenting). I dissent from the decision about to be made. No obligation whatever rested upon the defendant as a common carrier to transport wild animals. "A common carrier is not bound to receive dangerous articles, such as nitro-glycerine, dynamite, gunpowder, aqua fortis, oil of vitriol, matches, etc. . . . It was thus optional with the defendant to accept the powder for transportation or not" (*Piedmont Mfg. Co. v. C. & G. R. R. Co.*, 19 S. C. 353). In the Nitro-Glycerine Case (15 Wall. U. S. 524) the defendant, an express company, was held exempt from liability for damage done the property of third parties by the explosion of nitro-glycerine which the defendant had transported, it being shown that the defendant was ignorant of the contents of the package and there being nothing in the appearance of the package to cause suspicion of its dangerous character; otherwise, there is a strong intimation in the opinion that the defendant would have been liable. Of course, the same principle of law controls the transportation of wild animals, snakes, and the like. Here the defendant knew the character of the animal he was transporting, and without any legal obligation resting upon him did so voluntarily, presumably for a sufficient compensation. At the time of the injury to the plaintiff the animal was in the possession, control, and custody of the defendant to the same extent as other property transported by him. Its possession in this case is emphasized by the fact that at the time he was detaining the animal in the wharf as security for the payment of the freight due for its carriage. Under these circumstances he occupied exactly the same position and was under the same liability as any other owner or harborer of a wild animal. The charge of the trial Court that the defendant was bound to transport the animal was erroneous, but this error was in favor of the defendant instead of to his prejudice. It therefore furnished no ground for reversal. . . .

Doubtless the carrier may lawfully carry wild animals or dangerous substances if he so elects, but I am at a loss to see how that fact tends to limit his liability to third persons. Every reason suggested — the

necessity for explosives, the establishment of zoölogical gardens, etc. — is just as strong an argument in favor of limiting the liability of owners and possessors of wild animals or dangerous substances as it is in favor of limiting the liability of carriers; yet it is conceded by my brother Willard Bartlett that the law in this State as to such owner or possessor remains in full force, and in no respect relaxed (*Quilty v. Battie*, 135 N. Y. 201; *Hahnke v. Friederich*, 140 id. 224). In the *Quilty* case, a married woman was held liable for suffering her husband to keep his (not her) vicious dog in her house. Surely, considering the advantage of, if not necessity for, domestic harmony, the woman in the case cited was entitled to at least as charitable a judgment as the defendant in this case.

The judgment of the Appellate Division should be affirmed, with costs.

EDWARD T. BARTLETT, HAIGHT and HISCOCK, JJ., concur with GRAY, J.; WILLARD BARTLETT, J., concurs in result in opinion, with whom WERNER, J., concurs; CULLEN, Ch. J., reads dissenting opinion, Judgment reversed, etc.

503. CHARLES VINER. *A General Abridgement of Law and Equity*. (Trespass, Q. a. 4. 1793, 2d ed., vol. XX, p. 532.) In trespass, if a man breaks my hedge to the damage of 4d. and beasts of the common enter and do much damage, I shall recover damages against him in respect of all the other damages; per JENNY and FINCH. BROOKE makes a quaere if he shall have trespass vi & armis and give all in evidence, or shall have it vi & armis of the breaking and action upon the case for the other damage by the entry of the beasts; and says it seems, that he shall recover all the damages by the general action of trespass vi & armis. Quaere if trespass vi & armis and upon the case may be all in one and the same writ. Brooke, Trespass, pl. 179, cites 9 E. 4. 4.

#### 504. HEALEY v. BALLANTINE

SUPREME COURT OF NEW JERSEY. 1901

66 N. J. L. 339, 49 Atl. 511

ON error to the Essex Circuit.

Before DEPUE, Chief Justice, and Justices DIXON, COLLINS, and HENDRICKSON.

For the plaintiff in error, *C. Lincoln De Witt* and *Grant C. Fox* (of the New York bar).

For the defendants on error, *Benjamin M. Weinberg* and *Samuel Kalisch*.

The opinion of the Court was delivered by

DEPUE, Chief Justice. This was a suit by husband and wife to recover damages for an injury done to the wife, Mary Healey, who, on October 14th, 1898, was walking along the sidewalk on Christie street, a public street in the city of Newark. While she was in the lawful use of the street, a horse of the defendant was being led along the sidewalk by a halter by a servant of the defendant. The horse had no other harness. The plaintiff testified that she came from Ferry street into Christie street, and walked along the sidewalk on Christie street; that on the outer edge of the sidewalk and running parallel with Christie street is a wooden railing separating the sidewalk from the street; that while she was walking along the sidewalk she saw a man leading a horse by a halter coming towards her on the sidewalk; that as the man and the horse approached her she attempted to get out of the way of the horse by going a little further out towards the railing, when the horse kicked her. For the personal injuries she sustained this suit was brought, and resulted in a verdict in favor of the plaintiffs for personal injuries to the wife and for the damages sustained by the husband. There is no controversy as to the manner in which the accident happened.

The plaintiffs neither allege in the declaration nor proved at the trial any mischievous propensity on the part of the defendant's horse. The contention on the part of the defence was that in order to allow the plaintiffs to recover damages for the personal injuries, a vicious or mischievous propensity on the part of the animal must be shown and the scienter established. This question was raised first on motion to nonsuit, which was denied and exception taken. The learned judge, in his charge to the jury, dealt with this subject as follows: "It is said by the defendant that the plaintiffs ought to prove to you that the defendant knew that the horse was a kicker. I charge you that that is not the law, and that it is not necessary, in order for the plaintiffs to recover, for them to show that the defendant corporation knew of this bad propensity. . . . Did the stableman act negligently and carelessly in leading the horse along the sidewalk so near to the plaintiff Mary Healey that the horse could reach her with his hoofs?" To this instruction exception was also taken, and errors have been assigned accordingly.

To sustain the contention of the defendant's counsel, reliance is placed on *Cox v. Burbidge*, 13 C. B. N. S. 430. In that case it appeared that the defendant's horse, being on a highway unattended, kicked the plaintiff, a child who was playing there; there was no evidence to show how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick. It was held that there was no evidence from which a jury would be justified in inferring that the defendant had been guilty of actionable negligence. The familiar doctrine of the common law is that the owner of a domestic animal is not responsible for an injury done by it unless he has knowledge of the propensity or vice which induces the animal to do the injury, or has

been guilty of some actionable negligence. The court, in disposing of the case, dwelt mainly on the fact that there was no evidence of an actionable wrong on the part of the owner of the animal. . . . In *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10, the defendant's horse injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendant's. It was held that the defendant was liable in damages, apart from any question of negligence on its part. The ground of that decision is stated in the opinion of Mr. Justice KEATING to be this: "The horse, it is found, kicked and bit the mare through the fence. I take it that the meaning of that must be that the horse's mouth and feet protruded through the fence over the plaintiff's land, and that would, in my opinion, amount in law to a trespass. . . ." Mr. Beven, commenting on these cases, used this language (Negligence, 97):

"Although when a horse is in a place where it has a right to be, any disposition to kick that it may suddenly manifest does not import a liability on its owner; yet, when the horse is where it should not be, and kicks, the kicking is not so far remote from what is to be expected from the natural disposition of horses that the injury cannot be said to follow in the natural and obvious sequence from the original wrongful act which allowed the horse to get where an opportunity of doing injury is given." . . .

If the owner of a horse suffers it to go at large in the streets of a populous city, he is answerable for a personal injury done by it to an individual, without proof that the owner knew that the horse was vicious. *Goodman v. Gay*, 15 Pa. St. 188; see also *Fallon v. O'Brien*, 12 R. I. 518. . . .

Mr. Wood, commenting on the case of *Cox v. Burbidge*, says:

"The doctrine of this case does not commend itself to the Courts or profession as being consistent with reason or sound policy. The horse was unlawfully in the highway; the child was lawfully there, and there seems to be no good reason why the owner or keeper of the horse should not be responsible for the injuries inflicted upon the child while the horse was so unlawfully at large." Wood, Nuisance, 190.

Judge Redfield, in discussing the case of *Cox v. Burbidge*, says that that case

"has created some discussion in England and provoked some unfriendly criticisms, as it seems to us not altogether without reason. It seems almost incomprehensible that anyone should require proof that the owner of a horse was made aware of its propensity to do damage when running at large in the highway. If the horse was wrongfully in the highway and did damage in consequence to any person or thing rightfully there, the owner or keeper should be responsible, as it seems to us." 4 Am. L. Reg. (N. S.) 140, 141.

It may safely be asserted that the decision of that case was contrary to the great weight of authority of this country, and it seems to us not sustained on principle or by preceding authority in England.

The case of *Cox v. Burbidge* is, however, so clearly distinguishable from this case that, if recognized as authority, it would be inapplicable in this instance. In that case it was assumed by the Court and made the groundwork of decision that there was no evidence of an actionable wrong on the part of the owner of the animal; that it may have been in the street without any negligence of the owner, or might have been put there by a stranger, or might have escaped from some enclosed place without the owner's knowledge. In the present case the defendant's horse was in charge of a servant, for whose acts and negligence the defendant is responsible. . . . The Court instructed the jury that the plaintiffs could only recover by establishing by a preponderance of the testimony that the servant of the defendant was in some way careless and negligent at the time. Riding or leading a horse along the sidewalk, is a nuisance; for such an unlawful use of the sidewalk, an indictment would lie. It was assumed by the English judges, in their opinions in *Hammack v. White*, 11 C. B. N. S. 588, that riding and driving on the sidewalk as a voluntary act was unlawful, and that the defendant would be liable in damages for killing a man on the sidewalk, unless he showed that he was carried on the sidewalk by his horse, which was restive and uncontrollable. The cases from the courts of our sister States that have been cited are also to the same effect. . . .

We think the instruction of the trial Court on this subject was correct. . . .

We find no error on the record, and the judgment should be affirmed.

### SUB-TOPIC C. DAMAGE BY INFECTION

#### 505. ANDERTON *v.* BUCKTON

KING'S BENCH. 1719

1 *Stra.* 192

TRESPASS for the entry of diseased cattle into the plaintiff's close, per quod the plaintiff's cattle were infected. Not guilty pleaded, and a verdict for the plaintiff for 20s.

It was moved to allow the plaintiff his full costs, upon the account of the special damages alleged and put in issue, and which would have subsisted of itself as a distinct cause of action, and the plaintiff ought not to be punished for joining it with the trespass, to avoid vexation. And Cro. Car. 163, 307, 3 Mod. 39, 2 Vent. 48, Cro. Car. 141, Ray. 487, were cited.

On the other side it was insisted that though here is a matter of aggravation laid, yet it is still to be considered as an action of trespass, in which there is a recovery under 40s. And matter alleged only by way of aggravation cannot entitle the plaintiff to full costs. 2 Vent. 48, Salk. 642.



The CHIEF JUSTICE, POWYS, and FORTESCUE, Justices, were for full costs, because the consequential damage is a matter for which the plaintiff might have had a distinct satisfaction. . . . EYRE, J., contra. . . . And the plaintiff had full costs.

506. COOKE *v.* WARING

EXCHEQUER OF PLEAS. 1863

2 H. &amp; C. 332

DECLARATION, for that the defendant wrongfully, negligently, and improperly kept certain sheep diseased with the scab, and dangerous to be suffered to go at large, he the defendant during all that time well knowing the said sheep were so diseased with the scab and dangerous to be at large; whereby and by reason of the wrongful, negligent, and improper conduct of the defendant in that behalf, the said sheep of the defendant intermixed with certain sheep of the plaintiff in a sound and healthy condition of body, and the said healthy sheep of the plaintiff became diseased and infected by the said diseased sheep of the defendant, and many of the sheep of the plaintiff died from the said disease, and were wholly lost to the plaintiff, and the residue of the said sheep became and were diseased and rendered of little value to the plaintiff. Plea: Not guilty.

At the trial, before CHANNELL, B., at the Shropshire Spring Assizes, 1863, the following facts appeared:— In the summer of 1860, the plaintiff, who was a farmer, had some sheep in a field on his farm. Adjoining one corner of this field was a field of a farm occupied by the defendant. A day or two before the alleged injury the defendant had fetched some sheep from a distance and placed them in this field. The plaintiff being about to sell some of his sheep, they were removed to a barn for inspection by the intended purchaser, when it was discovered that they all had the scab. Some sheep of the defendant having that disease had been previously found in the plaintiff's field mixed with his sheep, and the plaintiff's shepherd separated them; information was sent to the defendant, but he took no notice of it; and his sheep, after being kept for some time, were turned out into the road. There was no direct proof of the mode in which the defendant's sheep got into the plaintiff's field. . . . About four days after the defendant's sheep were found in the plaintiff's field, the defendant said to a person who told him that his sheep had the scab, "I could not help it; I had the sheep at tack at Mr. Parson's of Tugford, and they caught it from Mr. Brindley's, at Broomscroft, sheep." . . .

It was submitted on behalf of defendant: first, that there was no evidence that the defendant knew that his sheep had the scab; secondly, that there was no proof of negligence. The learned judge was of that opinion, and nonsuited the plaintiff.

*Huddleston*, in the following term, obtained a rule nisi for a new trial, on the ground that the learned judge wrongly determined that there was no evidence to go to the jury of scienter or negligence, and that negligence was necessary to be proved as well as knowledge; against which

*Piggott*, Serjt., *H. Matthews*, and *Gough* showed cause, before POLLOCK, C. B., BRAMWELL, B., and CHANNELL, B., May 28, June 2, 4. The ruling of the learned judge was correct. In actions of tort it is not sufficient to allege that an injury accrued to the plaintiff from some act of the defendant, but it must be averred and proved that the act was wrongful. Here there was no evidence of negligence. . . . If the allegation of negligence be struck out of the declaration, no wrongful act is shown. In the case of ferocious animals, the keeping them is the wrongful act, and therefore negligence need not be alleged or proved. *Card v. Case*, 5 C. B. 622 (E. C. L. R. vol. 57); *May v. Burdett*, 9 Q. B. 101 (E. C. L. R. vol. 58); *Jackson v. Smithson*, 15 M. & W. 563; *Smith v. Pelah*, 2 Stra. 1264; *Rast. Ent.* 616. But here there is *damnum* without *injuria*. *Vaughan v. Taff Vale Railway Company*, 3 H. & N. 743, in error 5 H. & N. 679. [BRAMWELL, B. There is nothing illegal in keeping a mischievous or a diseased animal, provided it is kept safely. In *May v. Burdett* the Court said: "But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed, without express averment." May it not be said that an animal having an infectious disease is a "mischievous" animal? Perhaps it is not correct to say of a scabby sheep that it has a "propensity" to communicate disease, but it has a tendency to communicate it. Is there any distinction in principle between the liability for acts of a mischievous animal and a diseased animal?] The propensity to which the law attaches a liability so extraordinary, must be innate and habitual. The tendency to communicate disease may be, and here probably is, of a temporary character. At all events unless a scienter be alleged and proved, which is not done here, evidence of negligence is necessary. [CHANNELL, B. Suppose a vicious horse trespassing on the plaintiff's land and eating his grass, kicked him, would it be necessary to allege a scienter?] An action might be maintained in respect of the trespass, and the injury caused by the kick would form the subject of consequential damage. *Cox v. Burbidge*, 13 C. B. N. S. 430. . . . But where there is no trespass as against the party injured by an animal, there must be proof of a scienter or negligence on the part of the owner. It may be admitted that trespass might have been maintained here, but that form of action has not been adopted. *Anderson v. Buckton*, 1 Stra. 192, was an action of trespass for the entry of diseased cattle

into the plaintiff's close, and it was alleged as consequential damage that the plaintiff's cattle were infected. [CHANNELL, B., referred to *Singleton v. Williamson*, 7 H. & N. 410.] As regards the scienter, there was at most a mere scintilla of evidence. The facts proved are equivocal, and do not establish the defendant's knowledge prior to the occurrence of the mischief. . . .

*Huddleston* and *Harrington*, in support of the rule. First, the fair prima facie presumption from the evidence is, that the defendant was cognizant of the condition of his sheep, before the mischief occurred. . . . Secondly, assuming there was evidence of the scienter, it was unnecessary to aver or prove negligence. The case of *Hill v. Balls*, 2 H. & N. 299, has been relied on by the defendant, but there the purchase of the glandered horse by the plaintiff was a voluntary act, and the rule of caveat emptor was applicable. In *Anderson v. Buckton*, 1 Stra. 192, the decision of the Court proceeded upon the ground that what was there laid as consequential damage might have formed the subject of a distinct action on the case. The authorities which have been referred to, and which establish the proposition that in the case of mischievous propensities, negligence will be presumed where a scienter is shown, apply equally to diseased animals. The injury results in each case from physical agency, though with different effects. . . .

POLLOCK, C. B., now said: We are all of opinion that the rule to set aside the nonsuit and for a new trial ought to be discharged. . . . I am of opinion that, a scienter being essential to support the action, and there being no evidence of it, my brother CHANNELL was perfectly right in nonsuiting the plaintiff.

BRAMWELL, B. I am of the same opinion. The ruling was correct, because there was no negligence, if there was no knowledge upon the part of the defendant. It is, no doubt, extremely difficult to separate the two considerations of knowledge and negligence, and to say that either of them would be sufficient without the other. But I think it enough to say there was no evidence that, at the time when the injury occurred, the defendant knew that the sheep were in a diseased condition, so as to constitute negligence in keeping them. . . .

*Rule discharged.*

## 507. GRIMES v. EDDY

SUPREME COURT OF MISSOURI. 1894

126 Mo. 168, 28 S. W. 756

APPEAL from Monroe Circuit Court. Hon. T. H. BACON, Judge. Affirmed as to first count. Reversed as to second count.

Action to recover the value of a cow alleged to have died from Texas fever contracted from cattle shipped over the Missouri,

Kansas, & Texas Railway, while the same was being operated by the defendants as receivers. The suit was commenced before a justice of the peace in Monroe County, and appealed to the Circuit Court. The statement is in two counts. . . .

It was by stipulation admitted that the cattle, which it is claimed caused the injury, were shipped from Sinton, in San Patricio county, Texas, over a line of railroad connecting with that operated by the defendants, at West Point, Texas, and then delivered to the defendants, consigned to Chicago, Illinois. Said cattle were shipped May 16, 1890, and reached Paris, Monroe County, on the morning of May 21, 1890, while en route to Chicago. As the cars going eastward toward the depot passed over the switch, they were wrecked. . . . One of the cattle cars was broken at one end, and some of the cattle escaped in this way. The cars were thrown over to one side, and the cattle all thrown together at one end, and it became necessary to remove them speedily to prevent them smothering. This was done by opening the side doors, pulling them out with ropes, etc. The town of Paris lies nearly wholly south of the railway. . . . As the cattle escaped from or were removed from the wrecked cars, they were scattered along the right of way south of the track and between the wreck and the road crossing west of the wreck about one hundred and fifty feet. Plaintiff's evidence showed no efforts of anyone, save the trainmen and railroad employees, to stop the cattle from wandering off. They did nothing with the cattle that night, as they were wild, vicious, and unmanageable. By daylight the next morning the cattle had wandered out over the streets of Paris, and upon open grounds, some going as far as a mile in the country, and it was 10 o'clock A. M. before they were all driven into the railroad stock pens by horsemen. . . . As soon as they could do so, defendants had the cattle collected and placed in the stock pens of the railroad company.

At the close of the plaintiff's evidence, defendants interposed a demurrer thereto, which was overruled. Under the instructions of the Court, there was a verdict for plaintiff on each count in the complaint. Defendants then filed a motion for new trial and in arrest of the judgment, which being overruled, they appealed to this court.

*Jackson & Montgomery*, for appellants. (1) The Court erred in not sustaining the defendant's demurrer under the first count in the petition, because the evidence wholly failed to sustain the averments of the petition in these three particulars: First. That the cattle transported and alleged to have been permitted to escape, etc., were infected with a deadly disease. Second. That the defendants knew the fact. . . . Third. That they negligently permitted the cattle to escape from their custody or control. . . .

*R. N. Bodine and Stocking & Alexander*, for respondent. (1) Any-

one who allows diseased or infected animals to run at large, knowing them to be diseased or infected, is liable for the damage or loss which such animals may cause by reason of such disease or infection. . . . (2) Much more, if defendants had in their care or control animals known to them to be affected with a contagious disease, and negligently allowed them to wander upon the streets of Paris, by reason of which plaintiff suffered damage, then the defendants are liable therefor. . . .

BURGESS, J. 1. The first contention of defendants is that the demurrer to the evidence under the first count in the statement should have been sustained, for the reason that it failed to support the averments in the statement in that it failed to show that the Texas cattle which were permitted to escape, were infected with a dangerous or deadly disease, and that the defendants knew it, and that they negligently permitted the cattle to escape from their custody or control.

The cause of action stated in the count now under consideration being one at common law, before plaintiff was entitled to recovery thereunder it devolved upon him to show, not only that the Texas cattle were infected with a dangerous and deadly disease, microbe or parasite, and that the disease was communicated to his cow, by reason of which she died; but it devolved upon him to show that the defendants knew, or that it was a notorious fact, that all Texas cattle were so diseased or so infected, and that it was by their negligence, or that of their employees, that they were permitted to escape from their custody or control. While the proof did not show that the cattle were themselves, in fact, diseased, it is of general notoriety that all cattle in that part of Texas from which these cattle were shipped are infected with a microbe or germ of disease which is taken in by Missouri cattle by injection, that is, taken into the system through the stomach by eating grass over which Texas cattle have travelled, or by drinking water from pools or streams through which they have passed and deposited the germ by dropping, or from ticks. Plaintiff undertook to fix notice on defendants of the infection of the cattle by proof of notoriety of the fact that all Texas cattle are affected with what is called Texas fever, and will impart that fever to native cattle under certain conditions.

In respect of animals of a wild nature, such as beasts of prey, or animals by nature vicious, the owner is responsible for any damages occasioned by them, whether or not he knew of their habits or disease. *Canefox v. Crenshaw*, 24 Mo. 199. While at common law it was the duty of every man to restrain his cattle within his own inclosure and for failing to do so he was liable for their trespasses and for injuries resulting from disease communicated by them, whether he voluntarily permitted them to go at large or not (*Cooley on Torts* (2 Ed.), 397), as to domestic animals, the common law

does not fix any liability on the owner for damages done by them when at large on the ground of negligence, unless it be proven that the owner knew that the animals were mischievous or dangerous. *Lyke v. Van Leuven*, 4 Denio, 127; *Cooley on Torts* (2 Ed.), 341, 343; *Dearth v. Baker*, 22 Wis. 73; *Vrooman v. Lawyer*, 13 Johns. 339; *Railroad v. Finley*, 38 Kan. 550; *Patee v. Adams*, 37 Kan. 133. In *Bradford v. Floyd*, 80 Mo. 207, which was an action for damages occasioned to plaintiff's cattle by contact with what were known as Texas cattle, it was held that, while the evidence showed that the defendant could be held liable for damages caused by disease communicated by them to plaintiff's cattle, it must be shown that defendant knew that his cattle were diseased. The same rule was announced in *Railroad v. Finley*, 38 Kan. 550, and *Patee v. Adams*, 37 Kan. 133.

Since those cases were decided, scientific investigation has demonstrated and it is now a matter of general information or knowledge, that Texas cattle are not, in fact, diseased themselves, so as to render them unhealthy for food, but that all Texas cattle are infected in their systems with a parasite or germ, which is harmless to them, but which when taken into the stomach by native cattle produces what is known as Texas fever. . . . This peculiar characteristic, and its notoriety, is recognized by this and many other States, as is shown by the various legislation with respect thereto as well as by regulations in the markets of the country which require this class of cattle to be kept separate from others. From these considerations it would seem that the case of *Bradford v. Floyd*, *supra*, in so far as it holds that Courts will not take judicial notice of the fact that Texas cattle have some contagious or infectious disease communicative to native cattle should be overruled.

Plaintiff was permitted to prove, over the objections of defendants, that it was a matter of universal knowledge that Texas cattle were infected with an infectious disease communicable to native cattle, and while, from what has been said, such proof was entirely unnecessary, it is impossible to see how defendants could have been prejudiced thereby. As the railway company owed no duty to the plaintiff, what produced or caused the wrecking of the train was of no consequence, except for the purpose of showing how the cattle escaped from the custody of defendants or their employees; the inquiry being whether the escape was because of their carelessness or negligence. If so, as it was a notorious fact that the cattle were infected with microbes or parasites which were liable to communicate, to domestic cattle travelling over the ground after them, or eating grass over which they have passed or their droppings had fallen, the Texas fever, and the plaintiff's cow had contracted the disease in that way, from which she died, the plaintiff is entitled to recover.

As to whether or not the cattle were permitted to escape from the



custody of defendants' employees after the wreck, by reason of their carelessness or negligence, the question was one to be passed upon by the jury under proper instructions from the Court, and we are not prepared to say that there was not sufficient evidence upon which to predicate such instructions.

The instructions that were given under this count in the complaint presented the law of the case very fairly to the jury.

2. The second count of the statement is predicated upon sections 953 and 954, Revised Statutes, 1889: . . .

"No railroad companies or owners of a steamboat, or any other company or person, shall bring into or transport through this State, or from one part thereof to another, any Texas, Mexican, Cherokee or Indian cattle affected with what is commonly known as Texas or Spanish fever. . . ."

The effect of the statute is to obstruct interstate commerce, and to discriminate between the property of one State and that of citizens of other States, in so far as it prohibits the transportation of Texas, Mexican, Cherokee, and Indian cattle through the State [and it is to this extent invalid.] . . .

The judgment as to the first count is affirmed. As to the second count, the judgment is reversed. All concur. BARCLAY, J., concurs in the result.<sup>1</sup>

<sup>1</sup> [TOPIC 3. PROBLEMS:

The defendant's dog trespassed on the plaintiff's land, ran after the plaintiff's mare, barking at her. The mare ran away, and in jumping a fence fell and broke her neck. Is the defendant responsible per se? (1880, *Doyle v. Vance*, 6 Vict. L. R. 87.)

The defendant's hogs were running unlawfully in the highway. The plaintiff's horses took fright at the hogs, ran away and were injured. Is the defendant responsible per se? (1904, *Heist v. Jacoby*, 71 Nebr. 395, 98 N. W. 1058; 1899, *Purinton v. Somerset*, 174 Mass. 556, 55 N. E. 461.)

"I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, the man who kept him would not be liable." (Per Bramwell, B., in *Nichols v. Marsland*, 1875, L. R. 10 Exch. 255.) Is this sound?

Defendant owned a greyhound, and allowed it to go with him to a race-track. The plaintiff was a jockey in the races, and just as he was riding on the home-stretch of a race, the dog rushed out at the plaintiff's horse, and caused it to stumble and fall; the following horse struck the falling horse, which fell upon the plaintiff and injured him severely. By rule of the racing association, no dog was to be brought loose on the premises. Is the defendant responsible? (1909, *McClaim v. Lewiston I. F. & R. Ass'n & Vollmer*, 17 Ida. 63, 104 Pac. 1015.)

The defendant knowingly owned sheep which had the scab disease. A statute made the owner of sheep liable for disease communicated, if the owner knew the sheep to be diseased. The sheep escaped into the plaintiff's lot through a defective fence maintainable by the defendant. If the defendant's sheep originally caught the disease from one of the plaintiff's sheep which had strayed in, is the defendant responsible? (1876, *Herrick v. Gary*, 83 Ill. 85.)

Defendant's cow was unlawfully alone in the highway, sitting down. Plaintiff approached, driving. The cow arose, and the plaintiff's horse took fright

**Topic 4. Keeping Dangerous Things on Premises**

509. *FLETCHER v. RYLANDS*. (1865. 3 H. & C. 774, L. R. 1 Ex. 265, at 279, L. R. 3 E. & I. App. (H. L.) 330.) *Blackburn, J.* (in the Exchequer Chamber):

at the sight of the rising cow. The plaintiff and his vehicle were injured. Is the defendant responsible? (1908, *Marsh v. Koons*, 78 Oh. 68, 84 N. E. 599.)

The defendant owned cattle in a district which had been quarantined by the Federal officers on account of the presence of cattle-disease. The defendant did not know that his cattle were diseased. He transported them out of the district, and the plaintiff's cattle caught the disease which the defendant's cattle in fact had. Is the defendant responsible? (1898, *Croff v. Cress*, 7 Okl. 408, 54 Pac. 558.)

The defendant sent an ox from the live-stock market to his own premises, passing through a city street. The ox was not unruly or vicious in any special way. Two men drove it; no halter was used, as oxen would probably not go quietly if led by halters. Opposite the plaintiff's shop, the ox, after having gone a few yards on the sidewalk, entered the open door of the shop. It was impossible to get him out for three quarters of an hour, and he did damage in the shop to the amount of £1. Is the defendant responsible per se? (1882, *Tillett v. Ward*, L. R. 10 Q. B. D. 17.)

The defendant walked down the road, with his dog following loose. The dog jumped into the plaintiff's field. Is the defendant responsible per se? (1823, *Brown v. Giles*, 1 C. & P. 118.)

The plaintiff was driving on the street. The defendant was leading a horse, which kicked at the plaintiff's buggy, and upset the plaintiff. Is the defendant responsible per se? (1903, *Eddy v. Union R. Co.*, 25 R. I. 451, 56 Atl. 677.)

The plaintiff was an employee in the defendant's zoölogical garden, and his duty was to feed and care for the animals, including a certain camel. One day the camel seized, bit, and beat him. Is the defendant responsible per se? (1909, *Gooding v. Chutes Co.*, 155 Cal. 620, 102 Pac. 819.)

The defendant kept a swarm of bees, which attacked and stung the plaintiff while lawfully on the premises. Is the defendant responsible per se? (1903, *Parsons v. Manser*, 119 Ia. 88, 93 N. W. 86.)

The defendant kept a flock of pigeons in the ordinary manner. The pigeons' habit was to roost on the neighbors' premises, making a loud noise and defiling the place. Is the defendant responsible? (1896, *Taylor v. Granger*, 19 R. I. 410, 37 Atl. 13.)

The plaintiff, while lawfully on the defendant's premises, was attacked and injured by an elephant, kept there by the defendant for exhibition. Is the defendant responsible per se? (1890, *Filburn v. People's Palace & A. Co.*, L. R. 25 Q. B. D. 258.)

**NOTES:**

"Negligence per se: horse left untied." (C. L. R., I, 563.)

"Ferae Naturae." (C. L. R., VIII, 147.)

"Ferae naturae, animals." (H. L. R., V, 404; XII, 346.)

"Bees, damage by." (H. L. R., XIX, 615.)

"Trespass upon unfenced land by animals wrongfully on adjoining land." (H. L. R., XX, 569.)

"General discussion of theories on which American courts base liability for injury by animals." (H. L. R., XXII, 527.)

"Bees, liability for injuries by." (M. L. R., IV, 666.)

**ESSAYS AND CHAPTERS:**

*Thomas Beven*, "The Responsibility at Common Law for the Keeping of Animals." (H. L. R., 1908-09, XXII, 465.)

*Henry T. Terry*, "Some Leading Principles of Anglo-American Law," c. VI, § 107, p. 82.]

We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench.

## 510. HAY v. THE COHOES COMPANY

COURT OF APPEALS OF NEW YORK. 1848

2 N. Y. 159

HAY sued the Cohoes Company, a corporation chartered by act of the legislature (Stat. 1826, p. 72), in the Court of Common Pleas of Albany County. The declaration, which was in case, alleged, among other things, that the defendants at &c., by their agents and servants wrongfully and unjustly blasted and threw large quantities of earth, gravel, slate and stones, upon the dwelling house and premises of the plaintiff, and shut and darkened the windows of said house, obstructed the light, and broke the windows, doors, &c. to the damage of the said plaintiff. Plea, not guilty. On the trial the plaintiff gave evidence tending to prove his declaration, and, among other things, that the agents of the defendants, in excavating a canal upon land of which they claimed to be owners, knocked down the stoop to his house and part of his chimney, and, as it appeared, for the purpose of protection, placed boards, or rough window-blinds, on all the front windows of the plaintiff's house, by which the light was obstructed, &c. The defendants moved for a nonsuit, and among other things, insisted that to make them liable it was incumbent on the plaintiff both to aver and prove that there was negligence, unskilfulness, wantonness or delay, and this the plaintiff had failed to do. The Court of Common Pleas non-

suited the plaintiff, to which an exception was taken. On error brought, the Supreme Court reversed the judgment, and granted a new trial, from which decision the defendants appealed to this Court.

*D. Wright*, for appellants.

*E. F. Bullard*, for respondent.

GARDINER, J., delivered the opinion of the Court.

The defendants insist that they had the right to excavate the canal upon their own land, and were not responsible for injuries to third persons, unless they occurred through their negligence and want of skill, or that of their agents and servants.

It is an elementary principle in reference to private rights, that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others — otherwise it might be made destructive of their rights altogether. Hence the maxim "sic utere tuo," &c. The defendants had the right to dig the canal, the plaintiff the right to the undisturbed possession of his property. . . .

No one questions that the improvement contemplated by the defendants upon their own premises were proper and lawful. The means by which it was prosecuted were illegal notwithstanding. For they disturbed the rightful possession of the plaintiff and caused a direct and immediate injury to his property. For the damages thus resulting, the defendants are liable. Without determining the other questions discussed upon the argument, we think, upon the ground above stated, that the judgment of the Supreme Court should be affirmed.

*Judgment affirmed.*

### 511. WILSON v. PHOENIX POWDER MANUFACTURING COMPANY

SUPREME COURT OF APPEALS OF WEST VIRGINIA. 1895

40 W. Va. 413, 21 S. E. 1035

BRANNON, Judge. The Phoenix Powder Manufacturing Company was sued in an action of trespass on the case in the Circuit Court of Wayne County by John G. Wilson, to recover damages to Wilson's dwelling house and other buildings resulting from an explosion of powder stored in buildings of the defendant company. The jury found a verdict for the plaintiff, subject to the defendant's demurrer to the plaintiff's evidence, on which demurrer the Court gave judgment for the plaintiff, and the defendant resorted to the writ of error which we now decide.

There was no evidence to show negligence on the part of the defendant in the operation of its powder mill or in the storage or handling of its powder, and thus the question arises whether the plaintiff can recover by showing only the presence of the mill in the location it occupied,

the storage of powder there, its explosion, and the consequent damage to the plaintiff's property, without proof of negligence.

Was the defendant maintaining a public nuisance? If it was, it was engaged in the commission of a public wrong; and, injury resulting therefrom to the plaintiff, the defendant must repair such injury.

Powder and nitroglycerine are commodities of essential, if not primary, importance from their wide use in war and in the construction of railroads, roads, buildings, and other varied uses, and their manufacture is a business entirely respectable and indispensable. But that consideration is not all-controlling; that consideration is not alone to be regarded. The rights and safety of those not engaged in their manufacture must not be forgotten. They are agents of magical power and wrath. When the spark or touch of ignition meets them, their subtle force is awakened to instantaneous action — an action giving no warning, and so potent that almost in the twinkling of an eye, before thought of self preservation can come, it wastes man and his home and his savings with irrepressible energy. Often the explosion comes from causes not discernible, which reasonable foresight or prudence cannot see. Valuable as are these giants as auxiliaries to man in his great works, they must be limited to places and bounds of safety.

Here is a mill making powder and other explosives, standing right on the bank of the Ohio River, upon which, day and night, boats bear thousands of precious lives and thousands of dollars of property; about two hundred yards from the great Chesapeake & Ohio Railroad and about three hundred yards from the Huntington & Big Sandy Railroad, both great highways of the public, with trains filled with passengers and property passing over them almost hourly; and about seventy-five yards from a country road, also a highway in constant use. Six explosions occurred at this mill within three years, showing that it was a constant menace to life and property for a wide range around it, within which many people lived and worked, as its explosions threw large pieces of iron and large timbers out into the river, and some clear across into the town of Burlington, about one half mile away on the Ohio bank of the river, and into fields in Ohio, a mile distant. The buildings of the plaintiff which were injured in the explosion involved in this suit stood in Burlington. These explosions have injured many houses in Ohio, by shaking and jarring, damaging chimneys, walls, plastering, etc., from the force of concussion. Some of the explosions were terrible in their power and shock. This powder mill, with its great quantity of explosives in its storehouse, was a constant danger impending over those highways and all lawfully using them, and the people living in the neighborhood within the danger limit — an ever present peril, day and night.

The manufacture and keeping of quantities of gunpowder, nitroglycerine and other explosives in or dangerously near public places, such as towns or highways, is a public nuisance and indictable as such.

It makes no difference whether carefully or negligently conducted and managed. Negligence is here no material element. If damage happen to a person from explosion, the injured party is entitled to compensation without proving negligence on the part of the defendant. He is injured by that which breaks the law — the law against public nuisance. He is in no fault, while the other man is, and he has received damage from that other man's wrongful act. He has a right to immunity from this injury, and the other man owed him the duty of securing him immunity. The State is wronged by the maintenance of a nuisance which may at any moment take the lives and destroy the property of its people passing and repassing over its highways, and reposing and working in their accustomed places, and the particular person hurt has special cause of complaint, because he is especially injured. *Talbott v. King*, 32 W. Va. 6 (9 S. E. Rep. 48).

It is true the manufacturer owns his mill, and is engaged in lawful and honorable business; but he has violated that maxim, centuries old in the law, yet vital and indispensable in organized society where everyone must use his property to earn bread. "Sic utere tuo ut alienum non laedas" (So use your own property that you injure not another). This lawful but dangerous business, being carried on where it is, is a public nuisance. No care can exempt it, situated where it is, from the charge of being a nuisance. *Wood*, Nuis. 69; *Wier's Appeal*, 74 Pa. St. 230; *Heeg v. Licht*, 80 N. Y. 579; *Myers v. Malcolm*, 6 Hill, 292; *Powder..Co. v. Tearney*, 131 Ill. 322 (23 N. E. Rep. 389); 19 Am. St. R. 34 and note p. 39; *McAndrews v. Collerd*, 42 N. J. Law, 189. . . .

The reason is the act is wrongful, fraught with danger all the time, and it is illogical to call on one who, free from fault, has been injured to prove that the party who injured him conducted a business confessedly unlawful in a careless manner, and just wherein he was careless. His whole action is negligent from being wrongful, so to speak. The authorities above cited dispense with proof of negligence by the plaintiff. Later New York cases overrule the case of *People v. Sands*, 1 Johns. 78, in this regard.

Now, if this mill were located in a secluded place — one removed from highways — being in itself a lawful business, the case would be different; it would not be a public nuisance, and to recover injury from an explosion I apprehend the plaintiff must show negligence on the defendant's part. But it is contended that as the declaration alleges negligence on the part of the defendant, it must be proven. That allegation was unnecessary, immaterial and surplusage, and the law does not require anything but material allegations to be proven. *State v. Howes*, 26 W. Va. 110; *State v. Hall*, 26 W. Va. 236; 1 Greenl. Ev. 51. . . .

I suppose the injury to the plaintiff's property was so direct and immediate from the explosion as to warrant an action of trespass under the strict principles of the common law. But that is irrelevant, as, the



action here being trespass on the case, we need not consider the nice and finespun distinction as to direct and consequential injury, on which rested the choice between the two forms of action, resulting formerly in so many nonsuits, discussed in *Jordan v. Wyatt*, 4 Gratt. 151 and elsewhere, as the enactment found in section 8, chapter 103, Code, that "in any case in which an action of trespass will lie there may be maintained an action of trespass on the case," does away with it in this case. . . .

We cannot set aside the verdict for excessiveness of damages. Therefore we affirm the judgment.

512. *PAGE v. DEMPSEY*. (1906. 184 N. Y. 245, 77 N. E. 10.) *Edward T. Bartlett, J.*: The law applicable to this situation has been settled by the decisions of this Court. If the premises of the plaintiff were invaded by projectiles of any kind, it would be a trespass, for which damages could be recovered, although there was no proof of negligence or want of skill. *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *St. Peter v. Denison*, 58 N. Y. 416; *Sullivan v. Dunham*, 161 N. Y. 290. Where the injury involves no trespass upon the plaintiff's premises, but is due solely to concussion, causing great disturbance, jarring and vibration of the earth or air, the plaintiff to maintain an action to recover damages must prove that the work was performed in a negligent and improper manner; the law governing this phase of the case was considered in *Booth v. R., W. & O. T. R. R. Co.*, 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552, in an able and elaborate opinion of Andrews, Ch. J.

513. *BRADFORD GLYCERINE COMPANY v. ST. MARY'S WOOLEN MANUFACTURING COMPANY*. (1899. 60 Oh. 560, 54 N. E. 628.) *Bradbury, C. J.* [in an action for injuries caused by the bursting of a steam-boiler]: To my mind, the analogy between the act of storing so highly explosive and dangerous an agency as nitroglycerine on one's premises and that of conducting a business thereon which requires for its successful operation the use of steam, is not complete, although each is an explosive. Doubtless both are dangerous agencies, when control over them is lost. The use of steam has, however, so generally been employed in every productive industry that every owner of real property may reasonably be held to contemplate the contingency of its being employed upon adjacent premises, and to enjoin his property subject to that risk. In a great city like New York or Chicago, where numerous and varied industries are conducted, there are doubtless many thousands of places where steam is employed. The entire population of such a city is interested, and most of them directly or indirectly benefited by these industries. Large numbers of them labor by day in factories where steam furnishes the motive power, and many of them sleep at night in buildings containing engines in active operation. The modern steam boiler and engine cannot be said to be such a menace to property and human life as to constitute a nuisance per se. They cannot, as such, be driven from the centres of population. Not so, however, with gunpowder and nitroglycerine. These latter agencies, on account of their dangerous character, may be, and usually, if not universally, are, driven into the suburbs of towns and cities, remote from human habitations and valuable structures. Under the circumstances that surround the productive arts and industries of to-day, a modification of the strict rule of liability in favor of those who employ steam in such

arts or industries may not be inconsistent with its assertion against those who store gunpowder and nitroglycerine, or blast rocks, adjacent to the property of others. That public policy which seeks to secure the welfare of the many may demand such modification.

Whether upon such grounds, or for any other reasons, such a modification of the rule should obtain in the case for the use of steam is not, of course, before the Court, and the question is only considered in this brief way to show that there may be no irreconcilable conflict between the cases that have absolved the owners of boilers from liability for the consequences of an explosion occurring without their fault, and the conclusions reached by us in the case under consideration. Doubtless, gunpowder, nitroglycerine, and other dangerous explosives are useful agencies in many industries, as well as steam. But conceding that, in the case of steam boilers, the extensive and varied uses to which steam is devoted, and the comparatively slight danger arising from its use, require, on principles of public policy, which regards the interests of the great body of the people, that every owner of real property should be held to possess it subject to the right of his neighbor to erect a manufactory and employ steam on adjacent premises, yet it does not necessarily follow that such owner should possess his property also subject to the right of his neighbor to erect a powder or nitroglycerine magazine in his vicinity. The existence of a manufacturing establishment, although it employ steam as a motive power, may be, and doubtless is, in many instances, a positive benefit to real property in its vicinity, and instead of diminishing may enhance its value; while, on the contrary, the erection and use of a nitroglycerine magazine could have no other than a disastrous effect on the value of all real property in its vicinity. We think, therefore, the right to maintain the former may be placed upon grounds that cannot apply to the latter.

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514. TENANT *v.* GOLDWIN

KING'S BENCH. 1705

1 *Salk.* 360

[Printed *ante*, as No. 268.]

515. TARRY *v.* ASHTON

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1876

*L. R.* 1 *Q. B. D.* 315

[Printed *ante*, as No. 400.]

516. AINSWORTH *v.* LAKIN

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1902

180 *Mass.* 397, 62 *N. E.* 746

EXCEPTIONS from Superior Court, Hampden County; JOHN A. AIKEN, Judge. Action by one Ainsworth against one Lakin for damages to a stock of goods in a building which was crushed by the fall of the walls of an adjoining building, which had been partly destroyed by

fire, and which had been left standing from the time of the fire on March 11th to March 27th, which was the date of the injury. Judgment in favor of the plaintiff brings exceptions. Exceptions overruled.

*J. B. Carroll and W. H. McClintock*, for plaintiff. *R. A. Allyn, S. S. Taft*, and *A. S. Kneil*, for defendant.

KNOWLTON, J. 1. The defendant's intestate was the owner of the land of the first two stories of the building which stood upon it before the fire. The third story had been conveyed by the former owners to Lewis, Noble, and Laffin, trustees, to hold during the life of the building. By the fire the life of the building was destroyed, and the ownership of Lewis and others in the third story was terminated. . . . As owner of the land and the structures upon it, which were subject to the power of gravitation, and likely to do injury to others if they fell, the defendant's intestate owed certain duties to adjacent landowners. His duty immediately after the fire was affected by the fact that until then he had had no ownership or control of the upper part of the wall, and that the condition of the whole had been greatly changed by the effect of the fire and the destruction of the connected parts. For dangers growing out of changes which he could not prevent he was not immediately liable. *Gray v. Gaslight Co.*, 114 Mass. 149, 19 Am. Rep. 324; *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6. The jury were therefore instructed that, before a liability could grow up against the defendant's intestate after the fire, he was entitled to a reasonable investigation and to take such precautions as were required to prevent the wall from doing harm.

2. We come next to the question, What was his duty and what was his liability after the lapse of such a reasonable time? There is a class of cases in which it is held that one who, for his own purposes, brings upon his land noxious substances or other things which have a tendency to escape and do great damage, is bound at his peril to confine them and keep them on his own premises. This rule is rightly applicable only to such unusual and extraordinary uses of property in reference to the benefits to be derived from the use and the dangers or losses to which others are exposed as should not be permitted except at the sole risk of the user. The standard of duty established by the Courts in these cases is that every owner shall refrain from these unwarrantable and extremely dangerous uses of property unless he provides safeguards whose perfection he guarantees. The case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, 1 Exch. 267 *ante*, No. 509], rests upon this principle. In this Commonwealth, the rule has been applied to the keeping of manure in a vault very near the wall and cellar of a dwelling house of an adjacent owner: *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; see, also, *Fitzpatrick v. Welch*, 174 Mass. 486, 55 N. E. 178, 48 L. R. A. 278. That there are uses of property not forbidden by law to which this doctrine properly may be applied is almost universally acknowledged.

This rule is not applicable to the construction and maintenance of the walls of an ordinary building near the land of an adjacent owner. In *Quinn v. Cummings*, 171 Mass. 255-258, 50 N. E. 624, 626, Mr. Justice HOLMES shows that in reference to the danger from the falling of a structure erected on land "the decision as to what precautions are proper naturally may vary with the nature of the particular structure." He says:

"As it is desirable that building and fences should be put up, the law of this Commonwealth does not throw the risk of that act, any more than of other necessary conduct, upon the actor, or make every owner of a structure insure against all that may happen, however little to be foreseen." . . .

The duty which the law imposes upon an owner of real estate in such a case is to make the conditions safe so far as it can be done by the exercise of ordinary care on the part of all those engaged in the work. He is responsible for the negligence of independent contractors as well as for that of his servants. This rule is applicable to every one who builds an ordinary wall which is liable to do serious injury by falling outside of his own premises. . . . The uses of property governed by this rule are those that bring new conditions which involve risks to the persons or property of others, but which are ordinary and usual, and, in a sense, natural, as incident to the ownership of the land.

The rule first referred to applies to unusual and extraordinary uses which are so fraught with peril to others that the owner should not be permitted to adopt them for his own purposes without absolutely protecting his neighbors from injury or loss by reason of the use. In England this rule, which was laid down in *Rylands v. Fletcher*, *supra*, in reference to a reservoir of water, has since been held to be inapplicable where the collection of the water is in the natural and ordinary use of the land: *Fletcher v. Smith*, 2 App. Cas. 781; see *Carstairs v. Taylor*, L. R. 6 Exch. 217. So far as we know, there is no case in which it has been applied to the erection or maintenance of the walls of an ordinary building.

The construction which should be put upon the judge's charge in regard to liability for standing walls is by no means certain. Some broad statements in it might seem to indicate that he was laying down a rule applicable to the construction and maintenance of walls of ordinary buildings so situated that if they fall they will be likely to injure the property of the adjacent owner. If this were the true meaning, the instructions would be wrong. But, taking the charge in its different parts in connection with the facts stated in the bill of exceptions, we think it was intended to state the rule applicable to the kind of wall that the jury were considering, and not to the walls of the buildings generally. . . . Instead of being a part of a building adapted to occupation, it was a part of the ruins of a building. To maintain such a wall after the expiration of a reasonable time for investigation and for its removal would not be a proper and reasonable use of one's property.

It was the duty of the defendant not to suffer such a wall to remain on his land, where its fall would injure his neighbor, without using such care in the maintenance of it as would absolutely prevent injuries, except from causes over which he would have no control, such as vis major, acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably be expected to anticipate and prevent. This was the rule of the law stated by the judge to the jury. With this construction of the charge we think that the jury were rightly directed to a consideration of the evidence on the principal issue of fact. . . .

*Exceptions overruled.*

517. MARTIN *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY

SUPREME COURT OF KANSAS. 1909

81 *Kan.* 344, 105 *Pac.* 451.

[Printed *ante*, as No. 403.]

518. HOGLE *v.* FRANKLIN MANUFACTURING COMPANY

COURT OF APPEALS OF NEW YORK. 1910

199 *N. Y.* 388, 92 *N. E.* 794

APPEAL from Supreme Court, Appellate Division, Fourth Department.

Action by Mary A. Hogle against the H. H. Franklin Manufacturing Company. From a judgment of the Appellate Division (128 App. Div. 403, 112 *N. Y. Supp.* 881) affirming a judgment for plaintiff, defendant appeals. Affirmed.

For several years prior to the 21st of August, 1906, the plaintiff resided with her husband in a house on West Marcellus Street in the city of Syracuse; the lease from James Doheny, the owner, being in the husband's name, as lessee. The lot upon which the house stands is 34 by 100 feet, and the rear thereof adjoins the land of the defendant, upon which there is a large building several hundred feet long used for the manufacture of automobiles. Between the lot on which the defendant's factory stands and the lot occupied by the plaintiff and her husband, which for convenience will be called the "plaintiff's lot," there is a vacant space 10 feet wide which is not used for storage or dumping purposes, or for any purpose except the admission of light and air. At the rear of plaintiff's lot is a tight board fence 6 feet high, and the space between the fence and her house, 20 by 34 feet, is used as a garden. Each floor of the factory has windows overlooking the plaintiff's premises, and on each of said floors are many mechanics and laborers in the employ of the defendant.

For 18 months prior to the 21st of August, 1906, the employees of the defendant had habitually thrown small pieces of iron, such as nuts, the ends of bolts, and the like, from the upper windows of its factory upon the rear of the plaintiff's lot. Mr. Hogle, who was not at home much in the daytime, saw such objects thrown from the third story of the factory at least a dozen times, some of which struck his house and others fell in the yard at the rear. This was after 6 o'clock in the evening, but when the men were still at work in the factory. He took a handful of the nuts and bolts collected from the garden to Mr. Franklin, the president of the defendant, stated the facts to him, and said he wanted the practice stopped, for he was afraid some one would get hurt. Mr. Franklin replied that he was glad to learn what had happened and would see that it was stopped. Mr. Doheny, the lessor of the plaintiff, complained on several occasions to the assistant manager of the defendant, who said he would do all he could to stop the annoyance. The practice, however, continued and increased, although Mr. Franklin and his foreman forbade it and threatened to discharge any one who was seen to throw anything upon the plaintiff's lot. A little son of the plaintiff was hit by a nut when playing in the backyard. On another occasion a pail of dirty water was thrown upon him, and on still another tobacco-spittle hit him on the head. Mrs. Hogle testified that she saw nuts, pieces of bolts, etc., thrown on her lot and at the children playing there on the average once a day from the spring of 1905 until in August, 1906. Once she saw a rattail file thrown from the window on the third floor and saw it pass over her little boy and strike the ground behind him. These objects, which for convenience counsel call "missiles," came from the windows of defendant's factory and mainly from those on the third floor. She saw many of them when they were thrown by defendant's workmen from the windows of its factory.

On the 21st of August, 1906, she went out into her garden and looking up saw men at work and heard them talking by the windows of the third floor, which were open. As she was kneeling on one knee about 10 feet from the rear of her lot to pull some radishes, she caught a side glance of some object coming from the direction of the third floor, and at once was hit by a piece of iron upon her arm just below the shoulder. She produced the iron in court, and the injury inflicted thereby was somewhat severe.

Upon the first trial, when the complaint was based wholly on negligence, she had a verdict, which was set aside by the trial justice upon the ground that, as the acts of the defendant's workmen were not done within the scope of their employment, an action for negligence would not lie; but it was pointedly suggested in the opinion that an action for nuisance was the proper remedy. The complaint was thereupon so amended as to rest both on negligence and nuisance. Upon the second trial, also, the plaintiff had a verdict, and the judgment



entered thereon was affirmed by the Appellate Division; one of the justices dissenting. The defendant now appeals to this court.

*Jerome L. Cheney*, for appellant. *Frank C. Sargent*, for respondent.

VANN, J. (after stating the facts as above). The theory upon which the case was sent to the jury upon the second trial is shown by the following extracts from the charge of the trial justice: "I do not intend to talk to you about negligence, or about a nuisance, or about any other subject with a technical name. I want you to consider simply, in the light of common sense, what is due from one man to another, from one neighbor to another. . . . If my servant repeatedly, with my knowledge, even if he is not engaged in my business, throws stones at you and injures you, I should do what I reasonably can to prevent that act on his part. In the first place, the servant is subject to my control. In the second place he is occupying my land, and from it he is committing a trespass upon yours; he is using my personal property to help along in that trespass, and he is where he is and is able to commit that trespass because of my act in putting him there and keeping him there. . . . If you find that the plaintiff was injured as she claims, and if you find that these trespasses were repeatedly and continuously committed by persons upon the defendant's property, the defendant concededly having notice that these trespasses were being committed, I say it is a question for you to determine whether or not the defendant used such reasonable efforts as it should have used to prevent their recurrence, and so is liable because their recurrence was not prevented and because as a result the plaintiff received this injury of which she complains."

As the Appellate Division held, and as we think, the evidence warranted the jury in finding that the piece of iron which injured the plaintiff was maliciously thrown from a window of the defendant's factory by one of its workmen, and that for more than a year it had been the practice of its workmen, maliciously, or in a spirit of mischief, to throw similar objects from the windows of its factory upon the premises adjoining where plaintiff lived, with the knowledge of the defendant, but without its consent and in violation of its orders. The defendant contends — and its motion for a nonsuit was based on the ground — "that there can be no recovery in this case unless the jury should find that this piece of iron was thrown upon the plaintiff's premises as a necessary consequence of the work being carried on there or as an incident to it." The refusal to so hold is the main assignment of error on this appeal.

While we all think that the recovery should be sustained we differ somewhat as to the exact theory upon which it should be based. No request that the plaintiff should elect between the theory of nuisance and that of negligence was made at the trial, and the complaint was adapted to either. The trial judge did not name the action, but treated it as an action on the case. If the evidence established a cause

of action for negligence in failing to take reasonable precautions to suppress the evil practice, such as closing the windows or screening them with wire netting or setting a watch upon the men or some other of like character, the defendant cannot complain. Such negligence would rest, not on the throwing of the missiles, as they were not thrown in furtherance of the master's business, but on not using reasonable care to prevent them from being thrown. In other words, it would rest on a relative, and not on an absolute, duty. If, on the other hand, the evidence established an action for nuisance, the rulings of the court were more favorable to the defendant than it was entitled to, because the liability for injury from a nuisance is not relative, but absolute, and proof of negligence on the one hand and the absence thereof on the other is not required. The line between protracted and habitual negligence and nuisance is not easily drawn, and facts may exist which call for damages on either theory when the pleadings are appropriate, as in this case, to either kind of relief.

1. High authority is not wanting to sustain the judgment below on the ground of negligence pure and simple. . . . *Fletcher v. Baltimore & Potomac R. R. Co.*, 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411. . . .

The defendant had reason to believe that missiles would be thrown from its premises upon those of the plaintiff in the future, as they had been continuously in the past, and that they might hurt some one. It took some precautions to prevent the evil; but they were not effective, and the defendant knew they were not. It could not remain quiet and let the practice go on. The jury could properly say that in the exercise of reasonable care in the management of its own property, so as to prevent an injury reasonably to be expected to its neighbor's property and person, it should have taken further precautions, and that it was negligent in not having done so. This would lead to an affirmance on the ground of negligence, the real ground upon which the case was sent to the jury.

2. I am personally of the opinion, however, that the practice complained of was a nuisance as matter of fact, if the jury so found. "*Sic utere tuo ut alienum non lædas*," is an old maxim of the law, which applies both to the use made and the use knowingly suffered to be made of one's own property while he is in full control thereof. It is a trespass for the owner of one lot to throw anything upon the adjoining lot of his neighbor. The defendant furnished the place from which and the means with which habitual trespasses, calculated to inflict personal injury, were committed on the adjoining premises of the plaintiff. The defendant knew of the practice and knew that it had existed a long time, and, while some efforts were made to prevent it, the evil continued and even grew worse. An occasional trespass of this kind committed by the defendant's workmen would not warrant a jury in finding it guilty of suffering or maintaining a nuisance; but, when the practice became habitual and the injury was direct, substantial, and

well known, I think the duty of the defendant became absolute, and that it was guilty of suffering a nuisance to continue on its land if it did not prevent the evil. In a recent case, without attempting a general definition of a nuisance, we said that:

“If the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as matter of fact; but if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a nuisance as matter of law.” *Me'ker v. City of New York*, 190 N. Y. 481, 488, 83 N. E. 565, 567, 16 L. R. A. (N. S.) 621. See, also, *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; *McCarthy v. Natural Carbonic Gas Co.*, 189 N. Y. 40, 81 N. E. 549, 13 L. R. A. (N. S.) 465

While that definition implies that the act is that of the defendant, I think the same rule should apply when a series of acts extending over many months is committed by men in the employment of the defendant, to its knowledge, with its personal property and while standing on its premises, even if the acts are without the line of its business. Although the defendant did not commit the injuries nor sanction them, it suffered them to continue for so long a period as to make them its own, or so at least the jury could find. It is a nuisance for one to permit a crowd to habitually gather on his land and by boisterous singing, obscene language, and other disorderly conduct to seriously annoy his next-door neighbor. It is immaterial whether the acts are committed by his own workmen or by strangers, so long as they are committed on his land, constantly and with his knowledge. . . . Although the mere ownership of land may impose no liability for a nuisance thereon, or committed therefrom, still if the owner suffers his premises to become the standpoint for the habitual infliction of injuries upon his neighbor, and such injuries could not be inflicted without standing on such land, he may be held liable by the jury as a principal. He suffers the evil to exist on his land, if, while in the full possession and control thereof, he knows that it exists thereon and he does not abate it within a reasonable time and under reasonable circumstances; both time and circumstances ordinarily being for the jury.

I think that upon the facts as they are presumed to have been found by the jury the defendant was guilty of suffering a nuisance to exist and continue on its premises, and that it is liable for the injury resulting therefrom to the plaintiff without proof of negligence or its incidents.

The judgment should be affirmed with costs.

CULLEN, C. J., and WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. WERNER, J., concurs on first ground stated in opinion.

*Judgment affirmed.*

## 519. MILLER v. VILLAGE OF MULLAN

SUPREME COURT OF IDAHO. 1909

17 *Ida.* 28, 104 *Pac.* 660

APPEAL from District Court, Shoshone County; W. W. Woods, Judge.

Action by Olive D. Miller and another against the Village of Mullan. Judgment for plaintiffs, and defendant appeals. Reversed.

*A. G. Kerns* and *A. T. Ryan*, for appellant.

AILSHIE, J. Respondents recovered judgment in the trial court for \$1,500 damages on account of personal injuries received by Olive D. Miller, wife of respondent George T. Miller, by falling on a defective street crossing. Mrs. Miller, in company with her two grown daughters and her infant daughter, was travelling on the Second Street crossing over Pine Street in the village of Mullan, and stepped on a board which broke, and she fell and broke her leg immediately above the ankle, and sustained other bruises and injuries. On the corner at one end of this crossing stood a candy store, and at the other end of the crossing, and on the opposite side of Pine Street, stood the electric light plant. Mrs. Miller and her daughters had come down Pine Street, and the girls had preceded her several feet and were on the cross-walk, having passed over the place where respondent was injured only a few seconds later. The cross-walk seems to have consisted of three 2 x 12-inch boards, side by side, extending lengthwise across the street. Respondent testifies that she went upon the crossing from the side of the street on which the candy store was located, and that at a distance of about three feet from the sidewalk one of the boards broke, and she fell and sustained the injuries of which she complains. She also says that she did not notice any defect in the walk before receiving the injury, and that she had passed over it several times before during the last preceding 13 days. The girls testified that they did not notice any danger or defect in the walk as they passed over it, and they they had also passed over it several times before that, but had not noticed anything wrong with the walk at that place. This particular cross-walk seems to have been quite old, and had some holes broken in it toward the end next to the electric light building, but no one claims that any holes or breaks were visible at the end, or near where this board broke and Mrs. Miller received her injuries. After the accident it was discovered that the board was well rotted on the under side, and that the sill or crosspiece on which the boards rested at this point was also rotten, and had not been sufficient to support the board with the added weight of Mrs. Miller. No contention is made that there was any patent or visible defect in the crossing at the point where the injury occurred. The cause of action appears to have been prosecuted on the theory that the crossing con-

tained a latent defect, namely, rotten and decayed boards and sills, which an ordinary pedestrian could not, and would not, be expected to discover, but which it was the duty of the village authorities to discover and repair. It is not contended that the authorities had any actual notice of the defect at this place, but it is contended, and there is some evidence to support the contention, that this was an old crossing, and that it was somewhat decayed and out of repair toward the other end from where the accident occurred. Respondents insist that, although this was a latent defect, the village authorities are chargeable with constructive notice of the same, and that their failure to have it repaired before this accident is negligence for which the municipality is liable.

1. It is settled in this state that cities and villages incorporated under the general law of the state "are liable in damages for a negligent discharge of the duty of keeping streets and alleys in a reasonably safe condition for use by travellers in the usual modes." *Carson v. City of Genesee*, 9 Idaho, 244, 74 Pac. 862, 108 Am. St. Rep. 127; *Moreton v. Village of St. Anthony*, 9 Idaho, 532, 75 Pac. 262. Without negligence there can be no recovery. Negligence may arise out of a failure to act on actual and positive knowledge of a defect or danger in a street or sidewalk, or it may equally arise out of constructive knowledge on the part of the proper village or city authorities that a defect or danger exists. 2 Dillon, *Munic. Corp.* § 1024; Elliott on Ev. § 2513.

2. Since it is not contended that the village had actual notice of the decayed and defective condition of the walk at the place where this injury was sustained, the recovery must be had, if at all, on the grounds of constructive notice. The walk was built prior to the incorporation of the village, but no contention is made that the walk was not properly constructed in the first place. In order to hold the village liable, it should be shown that the defect was so obvious, or had existed for such a length of time, as to indicate that the authorities knew of the danger and had known it a sufficient length of time to have repaired it. 2 Dillon, *Munic. Corp.* § 1025; *Hanscom v. Boston*, 141 Mass. 242, 5 N. E. 249; *Jones v. City of Greensborough*, 124 N. C. 310, 32 S. E. 675; *Cook v. City of Momosa*, 66 Iowa, 427, 23 N. W. 907. It is common knowledge that the board sidewalks used in the villages and most of the cities of this state will rot and decay in course of time, but the length of time in which they will become dangerous and unsafe is so indefinite and uncertain, and subject to so many influences, either advancing or retarding the process of decay, that no reasonable estimate can be made as to the specific time at and after which a walk will become unsafe. Climatic conditions are so different at different localities, and also different walks are constructed in different ways. *Miller v. City of North Adams*, 182 Mass. 569, 66 N. E. 197. . . . One walk might be fairly good after 10 years' use, while another might become wholly unsafe in less time.

This kind of a case is clearly distinguishable from cases involving the duty to inspect and keep in safe condition coal holes and trap doors in sidewalks and bridges and culverts within the city limits. In these latter cases the nature of the place demands a higher degree of care and vigilance and more frequent inspection than is required for the ordinary sidewalk or street crossing. In the case at bar many witnesses testified to passing over this crossing daily, and that they had never noticed any defect at or near the place of the accident. Some said the walk as a whole was in fairly good condition, while others said it had holes in it, and was in a decayed condition on the side of Pine Street next to the electric light plant, and the cause for this was given as being on account of wagons crossing, principally on that side. It seems that teams could not cross on the side next to the candy store. The street commissioner testified that he inspected this crossing about one month prior to the accident, and that it was in "very fair condition," and that he discovered no danger or defects. A careful examination of the record fails to disclose any sufficient evidence on which to rest a verdict of negligence on the part of the village in not discovering and repairing this latent defect in the crossing. It may be that the village was in fact negligent in not discovering it, and that the respondents can satisfactorily establish such negligence on a new trial, but we would not be justified by the record before us in affirming the judgment. It would not do to direct a judgment in this case on account of the erroneous theory on which the case was apparently tried in the court below.

If this Court should hold that the municipalities of this State are chargeable with notice of the time when and conditions under which a wooden sidewalk or crosswalk ceased to be safe for pedestrians on account of age and use where no patent or obvious defect is apparent, it would subject them to a hazard, care, and expense that but few of them could afford. *Weisse v. Detroit*, 105 Mich. 482, 63 N. W. 423; *Bucker v. South Bend*, 20 Ind. App. 177, 50 N. E. 412. If, on the contrary, a walk has been used for so long that it is in a general state and condition of decay and disrepair, and is allowed to remain in such condition, notice of such condition will be imputed to the municipality, and if so bad as to be dangerous, such failure to repair or improve it will become negligence. . . .

3. Again, in instruction No. 13, the Court instructed the jury: "That it is as much the duty of the defendant to keep the sidewalks in the suburbs of the defendant in a safe condition for the use of travellers as those in the heart of the city; that while the authorities may have a discretion in the matter of pavements or no pavements, yet they have no discretion in the matter of safety; and it is an absolute duty to keep all the sidewalks in the city in a reasonably safe condition for the use of travellers, whether in the heart of the city or near the limits." This instruction was evidently called forth by the fact that the cross-



ing at which the accident occurred was in the outskirts of the village, and, as the witnesses testified, was the last crossing on Pine Street. Now, while it is true that the duty to keep sidewalks and crossings in a reasonably safe condition is imperative upon the municipal authorities with reference to walks in the outskirts of a town as well as in the busiest portion, still the place where the injury occurs often has an important bearing on the question of implied notice and consequent negligence. What would constitute reasonable care and precaution with reference to the repair and safety of a walk, in a remote part of a town where it is but little used, would not in every case amount to reasonable care and prudence with reference to a walk or crossing in the heart of the town, where the entire population pass over it daily. . . .

In view of the severity of the foregoing instructions, given on the request of the plaintiff, the error of the Court in modifying the defendants' requested instruction No. 2 was the more prejudicial, in that it tended to centre the minds of the jurors on the necessity for the corporation maintaining its walks in a state of absolute safety, rather than in a state of reasonable safety, as we understand the true rule to be. The instruction requested by the defendant was as follows: "The jury is instructed that the village of Mullan cannot be held guilty of negligence for every act or omission which would constitute negligence on the part of an individual. Much discretion is vested in such bodies. For instance: A village is not guilty of negligence for a failure to build sidewalks on all its streets, but when it has constructed a walk, it must be kept in a reasonably safe condition." The Court modified this instruction by inserting after the word "constructed" the words "or maintains" and striking out the word "reasonably," leaving the last clause of the sentence, when given to the jury, reading as follows: "But when it has constructed or maintains a walk it must be kept in a safe condition." The insertion of the words "or maintains" was entirely proper, but the striking out of the word "reasonably" broke the entire force of the instruction so far as the defendant was concerned, and tended to accentuate the necessity for the village maintaining its walks in absolute safety. This is an impossibility, and is not expected of municipalities. . . .

Judgment is reversed, and a new trial ordered; costs awarded to appellant.

SULLIVAN, C. J., and STEWART, J., concur.

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## 520. TUBERVIL *v.* STAMP

KING'S BENCH. 1697

*Comb.* 459, 1 *Salk.* 13, 12 *Mod.* 152

CASE, on the custom of the realm, quare neglegenter custodivit ignem suum in clauso suo, ita quod per flammam blada querentis, in quodam

*clauso ipsius querentis combusta fuerunt.* After verdict *pro querentem*, it was objected, the custom extends only to fire in his house or curtilage, (like goods of guests) which are in his power. *Non allocatur.* For the fire in his field is his fire as well as that in his house; he made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had risen which he could not stop, it was matter of evidence, and he should have shewed it. And so *HOLT, ROKESBY, and EYRE*; against the opinion of *TURTON*, who went upon the difference between fire in a house, which is in a man's custody and power, and fire in a field, which is not properly so; and it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment, according to the opinion of the other three.

521. ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY  
v. MATHEWS

SUPREME COURT OF THE UNITED STATES. 1896

165 *U. S.* 1, 17 *Sup.* 243

THIS was an action brought in an inferior court of the State of Missouri, by an owner of land in St. Louis county, against a railroad corporation organized under the laws of the State, and owning and operating with locomotive engines a line of railway adjoining the plaintiff's land, to recover damages for the destruction of the plaintiff's dwelling-house, barn, out-buildings, shrubbery and personal property upon that land, by fire communicated from one of those engines on August 9, 1887.

The petition contained two counts, the first of which alleged negligence on the part of the defendant; and the second did not, but was founded on the statute of Missouri of March 31, 1887, by which

"each railroad corporation, owning or operating a railroad in this State, shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon the railroad owned or operated by such railroad corporation; and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf, for its protection against such damages." Missouri Laws of 1887, p. 101; Rev. Stat. of 1889, § 2615.

The answer, among other defences, set up that the statute violated the Constitution of the United States, by depriving the defendant of its property without due process of law; and by denying to it the equal protection of the laws. . . .

At the trial the plaintiff introduced evidence tending to support the allegations of the petition; and the Court, at his request, instructed the jury that "if they believed from the evidence that during the month of August, 1887, plaintiff was the owner of the land in the petition de-

scribed, and the defendant was the owner or operating a railroad adjoining said land, having locomotive engines in use upon the said road, and that on August 9, 1887, fire was communicated from a locomotive engine, then in use upon the railroad owned or operated by defendant, to plaintiff's property on his said land, and thereby the buildings and other property in the petition mentioned, or any of it, were destroyed, then the jury will find for the plaintiff." The Court refused to give to the jury the following instructions requested by the defendant: "Though the jury may believe from the evidence that fire was communicated from a locomotive engine on use in defendant's railroad to plaintiff's property, as charged in the second count of plaintiff's petition, yet that fact is only prima facie evidence of negligence on the part of defendant, and unless the jury believe from the whole evidence in the case that said fire was either negligently set out by defendant, or was communicated to plaintiff's property by reason of defendant's negligence, the plaintiff cannot recover." The defendant excepted to the instruction given as well as to the refusal to instruct as requested; and, after verdict and judgment for the plaintiff, appealed to the Supreme Court of the State, which held the statute to be constitutional, and affirmed the judgment. 121 Missouri, 298. The defendant sued out this writ of error.

Mr. *David D. Duncan*, (with whom were Mr. *John F. Dillon* and Mr. *Winslow F. Pierce* on his brief), for plaintiff in error. Mr. *L. F. Parker* filed a brief for plaintiff in error. . . .

Mr. *Percy Werner* and Mr. *Garland Pollard*, for defendant in error, submitted on their brief.

Mr. Justice GRAY, after stating the case, delivered the opinion of the Court. The only question presented by the record, of which this Court has jurisdiction, is whether there is anything inconsistent with the Constitution of the United States in the statute of Missouri of March 31, 1887, by which every railroad corporation owning or operating a railroad in the State is made responsible in damages for property of any person injured or destroyed by fire communicated by its locomotive engines; and is declared to have an insurable interest in property along its route, and authorized to insure such property, for its protection against such damages. . . . The argument that this statute is in excess of the power of the Legislature may be the most satisfactorily met by first tracing the history of the law regarding the liability of persons for fire originating on their own premises and spreading to the property of others.

At common law, every man appears to have been obliged, by the custom of the realm, to keep his fire safe so that it should not injure his neighbor; and to have been liable to an action if a fire, lighted in his own house, or upon his land, by the act of himself, or of his servants or guests, burned the house or property of his neighbor, unless its spreading to his neighbor's property was caused by a violent tempest or other

inevitable accident which he could not have foreseen. *Thirning, C. J.*, and *Markham, J.*, in *Beaulieu v. Finglam*, Yearbook 2 H. IV, 18; *Anon*, Cro. Eliz. 10; 1 Rol. Abr. 1, Action sur Case, B 1; *D'Anvers Abr.*, Actions, B; *Turberville v. Stamp*, (1698) Comyns, 32; S. C., 1 Salk. 13, Holt, 9, 1 Ld. Raym. 264, 12 Mod. 152; Com. Dig., Action upon the Case for Negligence, A, 6; 1 Vin. Abr. 215, 216; 1 Bac. Abr., Action on the Case, F (Amer. ed. 1852), p. 122; *Canterbury v. Attorney General*, 1 Phil. Ch. 306, 316-319; *Filliter v. Phippard*, 11 Q. B. 347, 354; *Furlong v. Carroll*, 7 Ontario App. 145, 159. The common law liability in case of ordinary accident, without proof of negligence, was impliedly recognized in the statute of Anne, passed within ten years after the decision in *Turberville v. Stamp*, above cited, and providing that "no action, suit or process whatsoever shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby; any law or usage or custom to the contrary notwithstanding." Stats. 6 Anne (1707), c. 31 (58), § 7, 8 Statutes of the Realm, 795; 10 Anne (1711), c. 14 (24), § 1, 9 Statutes of the Realm, 684. By the statute of 14 Geo. III (1774), c. 78, § 86, the statute of Anne was extended to "any person in whose house, chamber, stable, barn or other building, or whose estate, any fire shall accidentally begin."

In modern times in England, the strict rule of the common law as to civil liability in damages for fire originating on one's own land, and spreading to property of another, has been recognized as still existing, except so far as clearly altered by statute. . . . In the course of the argument in *Blyth v. Birmingham Waterworks*, (1856) 11 Exch. 781, 783, Baron MARTIN said:

"I held, in a case tried at Liverpool in 1853 that, if locomotives are sent through the country emitting sparks, the persons doing so incur all the responsibilities of insurers; that they were liable for all the consequences."

In *Vaughan v. Taff Vale Railway*, (1858) 3 H. & N. 743, the Court of Exchequer held that a railway company, expressly authorized by its charter to use locomotive engines on its railway, was responsible for damages caused to property by fire communicated from such engines, although it had taken every precaution in its power to prevent the injury. But the judgment was reversed in the Exchequer Chamber; and Lord Chief Justice COCKBURN said:

"Although it may be true, that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby insured independently of any negligence of the mode of dealing with the animal, or using the instrument; yet when the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been used to prevent the injury, the sanction of the Legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible." 5 H. & N. (1860) 679, 685.

The final decision in that case has since been considered in England as establishing that a railway company, which by Act of Parliament has been expressly authorized to use locomotive engines upon its railway, without being declared to be responsible for fires communicated from those engines, is not, in the absence of negligence on its part, liable for damages caused by such fires. *Fremantle v. Northwestern Railway*, (1861) 10 C. B. (N.S.) 89; *Hammersmith, &c. Railway v. Brand*, (1869) L. R. 4 H. L. 171; *Smith v. London & Southwestern Railway*, (1870) L. R. 6 C. P. 14, 21, 22; *London, Brighton & Southcoast Railway v. Truman*, (1885) 11 App. Cas. 45. . . .

In this country, the strict rule of the common law of England as to liability for accidental fires has not been generally adopted; but the matter has been regulated, in many States, by statute. *Clark v. Foot*, 8 Johns. 329; *Bachelor v. Heagan*, 18 Maine, 32; *Tourtellot v. Rosebrook*, 11 Met. 460; *Finley v. Langston*, 12 Missouri, 120; *Miller v. Martin*, 16 Missouri, 508; *Catron v. Nichols*, 81 Missouri, 80; *Cooley on Torts*, 14, 590-592; 1 *Thompson on Negligence*, 148-150. In the Colony of Massachusetts, from the first settlement, it was an object of legislation, "for the preservation of houses, hay, boards, timber, &c." 1 Mass. Col. Rec. (1631) 90, (1639) 281; 3 Mass. Col. Rec. (1646) 102. In 1660, or earlier, it was enacted that,

"whoever shall kindle any fires in the woods, or grounds lying common, or enclosed, so as the same shall run into corn grounds or enclosures," at certain seasons, should "pay all damages, and half so much for a fine"; "provided that any man may kindle fire in his own ground so as no damage come thereby either to the country or to any particular person." Mass. Col. Laws of 1660, p. 31; of 1672, p. 51.

Soon after the introduction of railroads into the United States, the legislature of the State of Massachusetts, by the statute of 1837, c. 226, provided that a railroad corporation should be held responsible in damages for any injury done to the buildings or other property of others by fire communicated from its locomotive engines, "unless the said corporation shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury"; and that any railroad corporation should have an insurable interest in property along its route for which it might be so held responsible in damages, and might procure insurance thereon in its own behalf. Three years later, that statute was repealed, and was re-enacted with the omission of the clause above quoted, thus making the liability of the railroad corporation absolute, and not dependent upon negligence on its part. And the statute in this form, with merely verbal changes, has been continued in force by successive re-enactments. Mass. Stat. 1840, c. 85; Gen. Stat. of 1860, c. 63, § 101; Stat. 1874, c. 372, § 106; Pub. Stat. of 1882, c. 112, § 214. . . . In Maine and in New Hampshire, statutes substantially like the statute of Massachusetts of 1840, making railroad corporations absolutely liable, without regard to negligence, for

injuries to property by fire communicated from their locomotive engines, were enacted in 1842, and have been since continued in force, and their validity upheld by the highest Courts of those States, as applied to corporations created either before or after their passage. Maine Stat. 1842, c. 9, § 5; Rev. Stat. of 1883, c. 51, § 64. . . . In Connecticut, before any legislation towards holding railroad corporations liable for property burned by sparks from their locomotive engines, they were held not to be so liable, if their use of such engines was with due care and skill, and in conformity with their charters. *Burroughs v. Housatonic Railroad*, 15 Conn. 124. The subsequent legislation upon the subject, and the reasons for it as stated by the Supreme Court of the State, were as follows: Experience demonstrated that in all cases of fire set by the operation of railroads it was extremely difficult, and in some cases impossible, to prove negligence even when it existed. This led to the passage in 1840, and to the re-enactment in 1875, of a statute providing that, in all actions for any injury occasioned by fire communicated by a railway locomotive engine in the State, proof that such fire was so communicated should be prima facie evidence of negligence. Conn. Stat. 1840, c. 26; Gen. Stat. of 1875, tit. 19, 11, § 29. Even then, the difficulty was but partially removed, for in most cases the defendant could easily produce evidence of due care, and the plaintiff would be ill prepared to meet it. Therefore, in 1881, the Legislature took the broad, equitable ground that upon proof of the fact that the locomotive engine communicated fire to and destroyed property the company should be liable, independently of the question of negligence; and accordingly enacted another statute, in the words of the Massachusetts statute of 1840, before mentioned, imposing an absolute liability, qualified only by the insertion of the words, "without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured." Conn. Stat. 1881, c. 92. . . .

The learning and diligence of counsel have failed to discover an instance in which a statute, making railroad companies absolutely liable for damages by fire communicated from their locomotive engines to the property of others, has been adjudged to be unconstitutional, as to companies incorporated before or since its enactment.

This review of the authorities leads to the following conclusions:

First. The law of England, from the earliest times, held any one lighting a fire upon his own premises to the strictest accountability for damages caused by its spreading to the property of others.

Second. The earliest statute which declared railroad corporations to be absolutely responsible, independently of negligence, for damages by fire communicated from their locomotive engines to property of others, was passed in Massachusetts in 1840, soon after such engines had become common.

Third. In England, at the time of the passage of that statute, it was undetermined whether a railroad corporation, without negligence,



was liable to a civil action, as at common law, for damages to property of others by fire from its locomotive engines; and the result that it was not so liable was subsequently reached after some conflict of judicial opinion, and only when the acts of Parliament had expressly authorized the corporation to use locomotive engines upon its railroad, and had not declared it to be responsible for such damages.

Fourth. From the time of the passage of the Massachusetts statute of 1840 to the present time, a period of more than half a century, the validity of that and similar statutes has been constantly upheld in the courts of every State of the Union in which the question has arisen.

The motives which have induced, and the reasons which justify, the legislation now in question, may be summed up thus: Fire, while necessary for many uses of civilized man, is a dangerous, volatile and destructive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall; and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the Legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizens not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the Legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments. The very statute now in question, which makes the railroad company liable to damages for property so destroyed, gives it, for its protection against such damages, an insurable interest in the property in danger of destruction, and the right to obtain insurance thereon in its own behalf; and it may obtain insurance upon all such property generally, without specifying any particular property. *Eastern Railroad v. Relief Ins. Co.*, 98 Mass. 420. The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered. *Grand Trunk Railway v. Richardson*, 91 U. S. 454, 472; *Huntington v. Attrill*, 146 U. S. 657.

The statute is a constitutional and valid exercise of the legislative power of the State, and applies to all railroad corporations alike. Consequently, it neither violates any contract between the State and the railroad company, nor deprives the company of its property without due process of law, nor yet denies to it the equal protection of the laws.

*Judgment affirmed.*

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522. BERTHOLF v. O'REILLY

COURT OF APPEALS OF NEW YORK. 1878

74 N. Y. 509

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 8 Hun, 16.) The nature of the action and the facts are set forth sufficiently in the opinion.

*Lewis E. Carr*, for appellant. The Civil Damage Act so far as it assumes to give a right of action against the owner of the building in which the intoxicating liquors were sold for damages is unconstitutional. . . . It was unconstitutional because it deprived the owner of the building wherein intoxicating liquors may be sold of the freedom from liability for the tenant's acts which belongs to other landlords. . . .

*W. J. Groo*, for respondent. The Legislature had authority to pass the Civil Damage Act and it did not contravene the provisions of article 1, sections 1 and 6 of the Constitution. . . .

ANDREWS, J. This and other cases which have been argued and are awaiting decision raise the question of the constitutionality of the "Act to suppress intemperance, pauperism and crime," passed April 29, 1873, commonly known as the Civil Damage Act. Some of the cases are actions against the vendors of liquors sold to be drunk by the purchasers, and causing intoxication and consequential injury to the plaintiffs. This action is brought by the plaintiff against the defendant, as the landlord of hotel premises, let with knowledge that intoxicating liquors were to be sold therein by the lessee, to recover the value of a horse owned by the plaintiff, which died in consequence of having been overdriven by the plaintiff's son while in the state of intoxication, produced in part by liquor sold him by the lessee at his bar on the leased premises. The essential facts, as established by the verdict of the jury, may be briefly stated.

The defendant, when the Act in question was passed, was the owner of a hotel building and premises. In June, 1875, he leased them to one Firnhaber, knowing that the lessee intended to occupy the building for a hotel and boarding-house, and sell intoxicating liquors therein. The lessee entered into possession and opened a

bar in the hotel, and with the defendant's knowledge commenced selling liquors therefrom. On Sunday, July 18, 1875, the plaintiff's son, who was residing with his father, informed him that he had some business with a person residing about four miles from the father's residence, and thereupon, with the plaintiff's knowledge, took his horse and buggy and drove away. He did not go to the place where he informed the plaintiff he intended to go, but went to the village, where Firnhaber's hotel was located, and to the hotel, and there purchased and drank whiskey several times at the bar, and then drove to a neighboring village and drank again, and returned to Firnhaber's, drinking again on his return. He became, in consequence of these repeated potations, intoxicated, was arrested for disorderly conduct in the streets, and after being detained in custody for a time was discharged, and in the evening started for home, and the horse soon after it reached the plaintiff's house died. The jury have found, and the evidence fully justifies the finding, that it died from the overdriving by the plaintiff's son, and that his treatment of the horse was caused by his intoxication. Firnhaber had no license to sell intoxicating liquors. It was understood between him and the defendant, when the lease was made, that a license was to be procured, and the defendant informed him that he would see that he had one. The plaintiff's son was of intemperate habits, and at one time had been an inmate of an inebriate asylum. The plaintiff recovered a verdict for the value of the horse.

It cannot be disputed that the facts found bring the case within the terms of the statute and authorize the recovery, if the law itself is valid. The Act gives to every husband, wife, parent, guardian, employer or other person, "who shall be injured in person or property or means of support by any intoxicated person or in consequence of the intoxication" of any person, a right of action against any person who shall by selling or giving intoxicating liquors have caused the intoxication, in whole or in part, and declares that "any person or persons, owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold thereon, shall be liable, severally and jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained and for exemplary damages."<sup>1</sup> All the elements of the landlord's liability under the Act exist in this case, viz.: the leasing of premises with knowledge that intoxicating liquors were to be sold thereon; the sale by the tenant, producing intoxication; and the act of the intoxicated person, causing injury to the property of the plaintiff.

The question we are now to determine is whether the Legislature has the power to create a cause of action for damages, in favor of a person injured in person or property by the act of an intoxicated

<sup>1</sup> [The terms of another such statute are given in *ante*, No. 89.]

person, against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon. . . .

The element of care or diligence on the part of the seller or landlord does not enter into the question of liability. The statute imposes upon the dealer and the landlord the risk of any injury which may be caused by the traffic. It cannot be denied that the liability sought to be imposed by the Act is of a very sweeping character. . . . His only absolute protection against the liability imposed by the Act is to be found in not using or permitting the premises to be used for the sale of intoxicating liquors.

The question whether the Act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. . . .

Our conclusion is that the Act of 1873 is a constitutional enactment. It is doubtless an extreme exercise of legislative power, but we cannot say that it violates any express or implied prohibition of the Constitution.

The judgment must be affirmed, with costs.

All concur.

*Judgment affirmed.*

523. ERNST FREUND. *The Police Power*. (1904. §.634, p. 657.) Constitutionality of Absolute Liability. If the rule of absolute liability is held to be unconstitutional, it must be on the ground that justice and equality forbid that a person be required to make good the loss of another unless some fault, or culpability, can be imputed to him. This is the position taken by the Courts of Alabama, Montana, Wyoming, and Utah (§ 629, *supra*). But while the common law does require fault of some kind as a general principle, it has always recognized some exceptions (trespass of cattle, fire, etc.), and it cannot be said that the rules of the common law represent the only and final conclusions of justice. The principle that inevitable loss should be borne not by the person on whom it may happen to fall, but by the person who profits by the dangerous business to which the loss is incident, embodies a very intelligible idea of justice, and which seems to be in accord with modern social sentiment. Moreover, the rule of absolute liability is established in our law in the case of fires caused by locomotives and has been sanctioned by the United States Supreme Court. It also underlies the rule of respondeat superior, since the employer cannot relieve himself from liability for acts done by the servant within the scope of his employment, by proof of the greatest possible care in the selection of the servant. Logic and consistency, therefore, demand that liability irrespective of negligence should not be denounced as unconstitutional. The required element of causation may readily be found in the voluntary employment of dangerous instruments or agencies. Some preceding voluntary act, it seems, ought to exist, in order to justify liability. . . .<sup>1</sup>

<sup>1</sup> [TOPIC 4. PROBLEMS:

The defendant built a dam. The water confined by the dam percolated

## Topic 5. Publishing a Defamation.

## 524. RUMNEY v. WORTHLEY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1904

186 *Mass.* 144, 71 *N. E.* 316

TORT for alleged libel contained in two letters mailed by the defendant in January, 1901, and addressed to the plaintiff. Writ dated May 18, 1901.

through, and injured the plaintiff's premises. Is the defendant responsible per se? (1899, *Texas & P. R. Co. v. O'Mahoney*, — *Tex. Civ. App.* —, 50 *S. W.* 1049.)

The defendant pulls down his own building on his own premises. Is he responsible per se for damage done to adjoining property? (1898, *Ulshowski v. Hill*, 61 *N. J. L.* 375, 39 *Atl.* 904.)

The defendant stored crude oil in tanks; it escaped and caught fire, damaging the plaintiff's property. Is the defendant responsible per se? (1903, *Longabaugh v. Anderson*, 68 *Ohio* 131, 67 *N. E.* 286.)

The defendant erected a high chimney, which was blown down by an extraordinary gale, damaging the plaintiff's property. Was the defendant responsible per se? (1894, *Cork v. Blossom*, 162 *Mass.* 330, 38 *N. E.* 495.)

The defendant stored powder on his premises. A storm of lightning caused it to explode, damaging the plaintiff's property. Was the defendant responsible per se? (1888, *Laffin & R. Powder Co. v. Rand*, 30 *Ill. App.* 321.)

The defendant had a mine under the plaintiff's land, and lawfully ran up a shaft to the surface. For lack of a fence around the shaft, the plaintiff's horse fell in and was killed. Is the defendant responsible per se? (1863, *Williams v. Grancott*, 4 *B. & S.* 148.)

The defendant had nitroglycerine in storage. It exploded, breaking windows a mile away. Is the defendant responsible per se? (1899, *Bradford Glycerine Co. v. Mfg. Co.*, 60 *Oh.* 560, 54 *N. E.* 528.)

The defendant was blasting out a tree; part of the stump was thrown 400 feet into the highway, killing the plaintiff's intestate. Is the defendant responsible per se? (1900, *Sullivan v. Dunham*, 161 *N. Y.* 290, 55 *N. E.* 923.)

The defendant was blasting rock within the city limits. A blast injured the plaintiff's building. Is the defendant responsible per se? (1902, *Fitzsimmons & C. Co. v. Braun*, 199 *Ill.* 390, 65 *N. E.* 249; 1898, *Simon v. Henry*, 62 *N. J. L.* 486, 41 *Atl.* 692.)

The defendant built and maintained a standpipe, for obtaining water-pressure in its service of water to the city. The standpipe burst, and the plaintiff, who was in a house close to it, was injured. Is the defendant responsible per se? (1896, *Defiance Water Co. v. Olinger*, 54 *Oh.* 532, 44 *N. E.* 238.)

The defendant surrounded its land with a barbed wire fence, and the plaintiff's horse was injured thereby. Is the defendant responsible at peril? (1900, *Winkler v. R. Co.*, 126 *N. C.* 370, 35 *S. E.* 621.)

The defendant erected poles for electric lighting, one of which fell, being rotten, and injured the plaintiff. Is the defendant responsible per se? (1898, *Denver v. Sherret*, *C. C. A.*, 88 *Fed.* 226.)

The defendant erected electric-light poles and strung high-voltage wires. By contact at a certain point where the insulation was not perfect, the current escaped and injured the plaintiff. Is the defendant responsible per se? (1898, *Overall v. El. Light Co.*, — *Ky.* —, 47 *S. W.* 442.)

The defendant owned a powder factory, which exploded and injured the plaintiff. The only supposable cause of the explosion was the malicious act

At the trial in the Superior Court before GASKILL, J., it was admitted that the defendant wrote and mailed the letters and that they were libellous. It appeared that the letters were opened and read by the plaintiff's daughter. The evidence in regard to publication is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant on the ground that there was no publication of the letters by the defendant, and reported the case for determination by this court. If the ruling of the judge was correct, judgment was to be entered on the verdict; if not correct, the verdict was to be set aside and a new trial granted.

*J. H. Morrison*, for the plaintiff. *J. J. Kerwin*, for the defendant.

KNOWLTON, C. J. The only question reserved in this report is whether there was any evidence of publication of the libels, or either of them, contained in the two letters addressed by the defendant to the plaintiff. These letters were sent by mail in the ordinary way, addressed to the plaintiff at No. 12 Burt Street, Lowell, which was his place of residence. His wife conducted a grocery store which was attached to the dwelling-house at No. 14 Burt Street, she having filed a certificate, under the provisions of the Pub. Sts. c. 147, § 11, that she was doing business as a married woman. The plaintiff acted as her agent in conducting the business, and his daughter, twenty-three years of age, was a clerk in the store.

Sending a libellous letter through the mail to the person libelled, with no reason to suppose that it will be opened and read by any one else before he has received and read it, is not a publication which will support a civil action for libel. *Clutterbuck v. Chaffers*, 1 Stark. 471; *Delacroix v. Thevenot*, 2 Stark. 63. . . . In criminal prosecutions for libel, the rule is generally held differently.

The question in this case is whether there was any evidence which would have warranted the jury in finding that the defendant believed, or had good reason to believe, that the letters might be opened and read by the plaintiff's daughter in his absence, and that she was authorized to open her father's letters. The question of difficulty is whether there was evidence that the defendant was aware that she was accustomed or authorized to read such letters, addressed to

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of a discharged employee. Is the defendant responsible per se? (1902, *Kleebauer v. Western F. & E. Co.*, 138 Cal. 497, 69 Pac. 246.)

NOTES:

"Liability for use of dynamite." (A. L. Reg., 51 O. S., 570.)

"Liability for injury by contact with live wire." (A. L. Reg., 57 O. S., 639.)

"Negligence; electric companies: degree of care required." (C. L. R., V, 169, 330.)

"Workmen's Compensation Act; liability of employer without fault — constitutionality." (C. L. R., X, 751.)

"Adjoining landowners; duty to restrain employees." (C. L. R., X, 783.)

"Employer's Liability Acts — Constitutionality of clause making employer's negligence immaterial" (H. L. R., XXIV, 243).]



her father. On this point the testimony is very unsatisfactory. . . . If he sends the letters, having good reason to believe that they were likely to be opened by an authorized person other than the plaintiff, his sending them by mail was a publication.

*Verdict set aside.*

# 525. VIZETELLY v. MUDIE'S SELECT LIBRARY LIMITED

COURT OF APPEAL, QUEEN'S BENCH DIVISION. 1900

*L. R. 2 Q. B.* [1900] 170

APPLICATION for judgment or a new trial in an action tried before GRANTHAM, J., with a jury.

The action was for a libel contained in a book, copies of which had been circulated and sold by the defendants, who were the proprietors of a circulating library with a very extensive business. The defendants in their defence stated that if they sold or lent the book in question they did so without negligence, and in the ordinary course of their business as a large circulating library; that they did not know, nor ought they to have known, that it contained the libel complained of; that they did not know and had no ground for supposing that it was likely to contain libellous matter; and that under the circumstances so stated they contended that they did not publish the libel.

The plaintiff had been employed by Mr. Gordon Bennett of the New York Herald to proceed as the head of an expedition to Africa to search for Sir H. Stanley, who was then engaged in an expedition for the rescue of Emin Pasha, and to furnish news to the New York Herald on the subject. He met Stanley and Emin Pasha in Africa on their way down to the coast at a place called Msura; and subsequently sent off letters to Mr. Gordon Bennett. Messrs. Archibald Constable & Co., a well-known firm of publishers in October, 1898, published in this country a book called "Emin Pasha: his Life and Work," which was a slightly abridged English version of a work published in Germany that purported to be compiled from the journals, letters, and scientific notes of Emin Pasha and from official documents. It contained the following passage purporting to be an extract from Emin Pasha's diary:

"Vizetelly sent off three messengers to-day to the coast, each with a bulky letter. However, as he is not yet sober, he cannot surely have written them himself, and the solution of the problem is, as Dr. Parke tells us, simply that Stanley had the correspondence ready, and knocked it down to the highest bidder, Vizetelly, that is, Gordon Bennett, and quite right too."

This was the libel complained of. . . . Mr. A. O. Mudie, one of the defendant's two managing directors, who was called as a witness

for the defendants, gave evidence to the effect that the defendants did not know when they circulated and sold the book in question that it contained the passage complained of. He stated that the books which they circulated were so numerous that it was impossible in the ordinary course of business to have them all read, and that they were guided in their selection of books by the reputation of the publishers and the demand for the books. He said in cross-examination that there was no one else in the establishment besides himself and his co-director who exercised any kind of supervision over the books; that they did not keep a reader or anything of that sort; that they had had books on one or two occasions which contained libels; that that would occur from time to time; that they had had no action brought against them for libel before the present action; and that it was cheaper for them to run an occasional risk of an action than to have a reader. The learned judge, in summing up, in substance directed the jury to consider whether, having regard to the above-mentioned evidence the defendants had used due care in the management of their business. The jury found a verdict for the plaintiff, damages £100.

The defendants applied for judgment or a new trial on the ground that there was no evidence on which a verdict could be found or judgment entered for the plaintiff, and also on the grounds that the judge insufficiently directed the jury on the question what amounted in law to the publication of a libel, and on the question of the burden of proof as to publication and of the duty of the defendants and their alleged negligence, and that the verdict was against the weight of the evidence.

*Asquith*, Q. C., and *Scrutton* (*McCall*, Q. C., with them) for the defendants. . . . The question, therefore, is whether the proprietors of a library, such as the defendants', who in the ordinary course of business lend or sell a book which contains a libel, in ignorance that it contains a libel, can be said to publish the libel. The merely accidental circulation of a libel by the innocent transmission of a document containing it, as, for instance, by a carrier or messenger, does not amount to a publication of it. At any rate, it does not amount to publication, unless it can reasonably be said that the person so transmitting the document ought to have known or suspected that it contained a libel. . . .

*Cyril Dodd*, Q. C., and *Bassett Hopkins*, for the plaintiff. The case of *Emmons v. Pottle*, 16 Q. B. D. 354, introduced an exception from the general law on the subject which is not applicable to the present case. It is submitted that the result of the authorities prior to that case clearly is to show that the sale of a book containing a libel in the ordinary course of business would be a publication of the libel, although the vendor did not know that the book contained the libel. . . .

ROMER, L. J. The law of libel is in some respects a very hard one. In the remarks which I am about to make I propose to deal only with communications which are not privileged. For many years it has been well settled law that a man who publishes a libel is liable to an action, although he is really innocent in the matter, and guilty of no negligence. That rule has been so long established as to be incapable of being altered or modified, and the Courts, in endeavouring to mitigate the hardship resulting from many cases, have only been able to do so by holding that, under the circumstances of cases before them, there had been no publication of the libel by the defendant. The result, in my opinion, has been that the decisions on the subject have not been altogether logical or satisfactory on principle. The decisions in some of the earlier cases with which the Courts had to deal are easy to understand. Those were cases in which mere carriers of documents containing libels, who had nothing to do with and were ignorant of the contents of what they carried, have been held not to have published libels. Then we have the case of *Emmons v. Pottle*, in which vendors of newspapers in the ordinary course of their business sold a newspaper which contained a libel. It was clear that selling a document which contained a libel was *prima facie* a publication of it, but the Court there held that there was no publication of the libel under the circumstances which appeared from the special findings of the jury, those findings being (1) that the defendants did not know that the newspapers at the time they sold them contained libels on the plaintiff; (2) that it was not negligence on the defendants' part that they did not know that there was any libel in the newspapers; and (3) that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so. Lord ESHER, M. R., in this Court, was of opinion that, though the vendors of the newspapers, when they sold them, were *prima facie* publishers of the libel, yet, when the special findings of the jury were looked at, the result was that there was no publication of the libel by the defendants. BOWEN, L. J., put his judgment on the ground that the vendors of the newspapers in that case were really only in the same position as an ordinary carrier of a work containing a libel. The decision in that case, in my opinion, worked substantial justice; but, speaking for myself, I cannot say that the way in which the result was arrived at appears to me altogether satisfactory; I do not think that the judgments very clearly indicate on what principle Courts ought to act in dealing with similar cases in future. That case was followed by others, more or less similar to it, namely, *Ridgway v. Smith & Son*,<sup>1</sup> *Mallon v. W. H. Smith & Son*,<sup>2</sup> and *Martin v. Trustees of the British Museum*.<sup>3</sup>

<sup>1</sup> 1890, 6 Times L. R. 275.<sup>2</sup> 9 Id. 621.<sup>3</sup> 1894, 10 Id. 338.

The result of the cases is, I think, that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing, (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him; (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by negligence on his part that he did not know it contained the libel, then, although the dissemination of the work by him was *prima facie* publication of it, he may nevertheless, on proof of the before-mentioned facts, be held to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury. Applying this view of the law to the present case, it appears to me that the jury, looking at all the circumstances of the case, have in effect found that the defendants published the libel complained of, and therefore the defendants are liable, unless that verdict is disturbed. Looking at the special circumstances of the case which were brought to the attention of the jury, I cannot say that they could not reasonably find as they did. . . . For these reasons I think the application must be dismissed.

*Application dismissed.*

## 526. HANSON v. GLOBE NEWSPAPER COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893

159 Mass. 293, 34 N. E. 462

KNOWLTON, J. The defendant published in its newspaper an article describing the conduct of a prisoner brought before the Municipal Court of Boston, and the proceedings of the court in the case, designating him as "H. P. Hanson, a real estate and insurance broker of South Boston." He was, in fact, a real estate and insurance broker of South Boston, and the article was substantially true, except that he should have been called A. P. H. Hanson instead of H. P. Hanson. The plaintiff, H. P. Hanson, is also a real estate and insurance broker in South Boston, and in writing the article the reporter used his name by mistake. The article was as follows:

"He waxed eloquent. H. P. Hanson fined ten dollars for refusing payment of car fare. . . . H. P. Hanson, a real estate and insurance broker of South

Boston, emerged from the seething mass of humanity that filled the dock and indulged in a wordy bout with policeman Hogan, who claimed to have arrested Hanson on the charge of evading car fare and being drunk at the same time. The judge agreed that the prisoner was sober, but on the charge of evasion of car fare the evidence warranted the fining of the eloquent occupant of the dock ten dollars without costs, which he paid." . . .

The justice of the Superior Court, before whom the case was tried, without a jury, "found as a fact that the alleged libel declared on by the plaintiff was not published by the defendant of or concerning the plaintiff," and the only question in the case is whether this finding was erroneous as matter of law.

In a suit for libel or slander, it is always necessary for the plaintiff to allege and prove that the words were spoken or written of and concerning the plaintiff. . . . In every action of this kind the fundamental question is, What is the meaning of the author of the alleged libel or slander, conveyed by the words used interpreted in the light of all the circumstances? The reason of this is obvious. Defamatory language is harmful only as it purports to be the expression of the thought of him who uses it. . . . In the present suit, the Court had no occasion to rely on the testimony of the writer as to the person to whom the language was intended to apply. The language itself, in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name H. P. Hanson was used by mistake. As the evidence showed that the words were published of and concerning A. P. H. Hanson, the finding that they were not published of the plaintiff followed of necessity. . . .

Whether there should be a liability founded on negligence in any case when the truth is published of one to whom the words, interpreted in the light of accompanying circumstances easily ascertainable by those who read them, plainly apply; and where, by reason of identity of names, or similarity of names and description, a part of the public might think them applicable to another person of whom they would be libellous, is a question which does not arise on the pleadings in this case. So far as we are aware, no action for such a cause has ever been maintained. . . . We are of opinion that the finding was well warranted, and there must be,

*Judgment on the finding.*

HOLMES, J. I am unable to agree with the decision of the majority of the Court, and as the question is of some importance in its bearing on legal principles, and as I am not alone in my views, I think it proper to state the considerations which have occurred to me. . . .

The article described the subject of it as a prisoner in the criminal dock, and states that he was fined. . . . The statement is, "H. P. Hanson, a real estate and insurance broker of South Boston, emerged from the seething mass of humanity that filled the dock," etc. . . . The very substance of the libel complained of is the statement that the plaintiff

was a prisoner in the criminal dock, and was fined. The object of the article, which is a newspaper criminal report, is to make that statement. . . . The public, or all except the few who may have been in court on the day in question, or who consult the criminal records, have no way of telling who was the prisoner except by what is stated in the article, and the article states that it was "H. P. Hanson, a real estate and insurance broker of South Boston." If I am right so far, the words last quoted, and those words alone, describe the subject of the allegation, in substance as well as in form. Those words also describe the plaintiff, and no one else. The only ground, then, on which the matters alleged of and concerning that subject can be found not to be alleged of and concerning the plaintiff, is that the defendant did not intend them to apply to him, and the question is narrowed to whether such a want of intention is enough to warrant the finding, or to constitute a defence, when the inevitable consequence of the defendants' acts is that the public, or that part of it which knows the plaintiff, will suppose that the defendant did use its language about him.

On general principles of tort, the private intent of the defendant would not exonerate it. It knew that it was publishing statements purporting to be serious, which would be hurtful to a man if applied to him. It knew that it was using as the subject of those statements words which purported to designate a particular man, and would be understood by its readers to designate one. In fact, the words purported to designate, and would be understood by its readers to designate, the plaintiff. If the defendant had supposed that there was no such person, and had intended simply to write an amusing fiction, that would not be a defence, at least unless its belief was justifiable. Without special reason, it would have no right to assume that there was no one within the sphere of its influence to whom the description answered. The case would be very like firing a gun into a street, and, when a man falls, setting up that no one was known to be there. *Commonwealth v. Pierce*, 138 Mass. 165, 178; *Hull's Case*, Kelyng, 40; *Rex v. Burton*, 1 Strange, 481; *Rigmaidon's Case*, 1 Lewin, 180; *Regina v. Desmond*, Steph. Cr. Law, 146. So, when the description which points out the plaintiff is supposed by the defendant to point out another man whom in fact it does not describe, the defendant is equally liable as when the description is supposed to point out nobody. On the general principles of tort, the publication is so manifestly detrimental that the defendant publishes it at the peril of being able to justify it in the sense in which the public will understand it.

But in view of the unfortunate use of the word "malice" in connection with libel and slander, a doubt may be felt whether actions for these causes are governed by general principles. The earliest forms of the common law known to me treat slander like any other tort, and say nothing about malice. 4 Seld. Soc. Pub. 40, 48, 61. Probably the word was borrowed at a later, but still early date, from the malitia of



the canon law. By the canon law, one who maliciously charged another with a grave sin incurred excommunication, *ipso facto*. Lyndwood, *Provinciale*, lib. 5, tit. 17 (*De Sent. Excomm. c. 1, Auctoritate Dei*); Oughton, *Ordo Judiciorum*, tit. 261. Naturally *malitia* was defined as *cogitatio malae mentis*, coming near to conscious malevolence. Lyndwood, *ubi supra*, note f. Naturally also for a time the common law followed its leader. Three centuries ago it seems to have regarded the malice in slander and libel as meaning the malice of ethics and the spiritual law. In a famous case where the parson repeated, out of Fox's Book of Martyrs, the story "that one Greenwood, being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God, whereas in truth he never was so plagued, and was himself present at that sermon," and afterwards sued the parson for the slander, Chief Justice WRAY instructed the jury "that, it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously; and so was found not guilty." *Greenwood v. Prick*, stated in *Brook v. Montague*, Cro. Jac. 90, 91; see also *Crawford v. Middleton*, 1 Lev. 82, ad fin. But that case is no longer law. *Hearne v. Stowell*, 12 A. & E. 719, 726. The law constantly is tending towards consistency of theory. For a long time it has been held that the malice alleged in an action of libel means no more than it does in other actions of tort. . . . Accordingly, it recently was laid down by this Court that the liability was the usual liability in tort for the natural consequences of a manifestly injurious act. *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 245. A man may be liable civilly, and formerly, at least by the common law of England, even criminally, for publishing a libel without knowing it. *Curtis v. Mussey*, 6 Gray, 261. . . . And it seems he might be liable civilly for publishing it by mistake, intending to publish another paper. *Mayne v. Fletcher*, 4 Man. & Ry. 311, 312, note. . . . So a man will be liable for a slander spoken in jest, if the bystanders reasonably understand it to be a serious charge. *Donoghue v. Hayes*, Hayes, 265. Of course it does not matter that the defendant did not intend to injure the plaintiff, if that was the manifest tendency of his words. *Curtis v. Mussey*, 6 Gray, 261, 273; *Haire v. Wilson*, 9 B. & C. 643. And to prove a publication concerning the plaintiff, it lies upon him "only to show that this construction, which they've put upon the paper, is such as the generality of readers must take in, according to the obvious and natural sense of it." *The King v. Clerk*, 1 Barnard. 304, 305. . . . Under the circumstances of the case, "believed" meant reasonably believed. . . .

The foregoing decisions show that slander and libel now, as in the beginning, are governed by the general principles of the law of tort, and, if that be so, the defendant's ignorance that the words which it published identified the plaintiff is no more an excuse than ignorance of any other fact about which the defendant has been put on inquiry.

To hold that a man publishes such words at his peril, when they are supposed to describe a different man, is hardly a severer application of the law, than when they are uttered about a man believed on the strongest grounds to be dead, and thus not capable of being the subject of a tort; it has been seen that by the common law of England such a belief would not be an excuse. *Hearne v. Stowell*, 12 A. & E. 719, 726, denying Parson Prick's case.

I only will add on this point, that I do not know what the "publicly known circumstances" are, [as alluded to in the opinion of the majority]. I think it is a mistake of fact to suppose that the public generally know who was before the Municipal Court on a given day. I think it is a mistake of law to say that, because a small part of the public have that knowledge, the plaintiff cannot recover for the harm done him in the eyes of the greater part of the public, probably including all his acquaintances who are ignorant about the matter, and I also think it no sufficient answer to say that they might consult the criminal records, and find out that probably there was some error. *Blake v. Stevens*, 4 F. & F. 232, 240. . . .

Mr. Justice MORTON and Mr. Justice BARKER agree with this opinion.  
*E. D. Loring*, for the plaintiff. *G. M. Palmer*, for the defendant.

### 527. PECK *v.* TRIBUNE COMPANY

SUPREME COURT OF THE UNITED STATES 1909

214 U. S. 185, 29 Sup. 554

[Printed *ante*, Book I, as No. 156.]

### 528. JONES *v.* HULTON

SUPREME COURT OF JUDICATURE OF ENGLAND. 1909

L. R. [1909] 2 K. B. 444

APPLICATION by the defendants for judgment or a new trial in an action tried by CHANNELL, J., with a special jury.

The plaintiff, Mr. Thomas Artemus Jones, a barrister practising on the North Wales Circuit, brought the action to recover damages for the publication of an alleged libel concerning him contained in an article in the Sunday Chronicle, a newspaper of which the defendants were printers, proprietors, and publishers. The article, which was written by the Paris correspondent of the paper, purported to describe a motor festival at Dieppe, and the parts chiefly complained of ran thus:

"Upon the terrace marches the world, attracted by the other motor races — a world immensely pleased with itself, and minded to draw a wealth of inspiration — and, incidentally, of golden cocktails — from any scheme to spend the passing hour. . . . 'Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know — the other thing!' whispers a fair neighbour of mine excitedly into her bosom friend's car. Really, it is not surprising how

certain of our fellow-countrymen behave when they come abroad? Who would suppose, by his goings on, that he was a churchwarden at Peckham? No one, indeed, would assume that Jones in the atmosphere of London would take on so austere a job as the duties of a churchwarden. Here, in the atmosphere of Dioppe, on the French side of the Channel, he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies."

The plaintiff had in fact received the baptismal name of Thomas only, but in his boyhood he had taken, or had been given, the additional name of Artemus, and from that time he had always used, and had been universally known by, the name of Thomas Artemus Jones or Artemus Jones. He had, up to the year 1901, contributed signed articles to the defendant's newspaper. The plaintiff was not a churchwarden, nor did he reside at Peckham.

Upon complaint being made by the plaintiff of the publication of the defamatory statements in the article, the defendants published the following in the next issue of their paper: "It seems hardly necessary for us to state that the imaginary Mr. Artemus Jones referred to in our article was not Mr. Thomas Artemus Jones, barrister, but, as he has complained to us, we gladly publish this paragraph in order to remove any possible misunderstanding and to satisfy Mr. Thomas Artemus Jones we had no intention whatsoever of referring to him." The defendants alleged that the name chosen for the purpose of the article was a fictitious one, having no reference to the plaintiff, and chosen as unlikely to be the name of a real person, and they denied that any officer or member of their staff who wrote or printed or published or said before publication the words complained of knew the plaintiff or his name or his profession, or his association with the journal or with the defendants, or that there was any existing person bearing the name of or known as Artemus Jones. They admitted publication, but denied that the words were published of or concerning the plaintiff. On the part of the plaintiff the evidence of the writer of the article and of the editor of the paper that they knew nothing of the plaintiff, and that the article was not intended by them to refer to him, was accepted as true. At the trial witnesses were called for the plaintiff, who said that they had read the article and thought that it referred to the plaintiff. The jury returned a verdict for the plaintiff with £1750 damages, and the learned judge gave judgment for the plaintiff. The defendants appealed.

*Rufus Isaacs*, K. C., and *Norman Craig*, for the defendants. . . . It was not suggested for the plaintiff that either the writer of the alleged libel or the editor who passed it for publication knew of the plaintiff's existence, or that there was any intention to refer to him. It was an unlucky accident that the writer, in selecting a name for his imaginary personage, happened to hit upon one which might be supposed to denote the plaintiff. Upon the admitted facts the defendants are entitled to judgment. . . .

*Montague Lush*, K. C., and *Gordon Hewart*, for the plaintiff. The general principle applies that a man must be taken to have intended that which is the natural result and meaning of what he does or says, and cannot be heard to say that in his own mind he had not that intention. It was for the jury in such a case to say whether, having regard to the terms of the libel, it would be reasonably understood by readers to apply to the plaintiff. . . .

May 24. Lord ALVERSTONE, C. J., read the following judgment. . . . It is, in my opinion, clearly established by authorities, to some of which I will refer, that the question, if it is disputed, whether the article is a libel upon the plaintiff, is a question of fact for the jury; and in my judgment this question of fact involves not only whether the language used of a person in its fair and ordinary meaning is libellous or defamatory, but whether the person referred to in the libel would be understood by persons who knew him to refer to the plaintiff. This proposition is so well established that, but for the grave and strenuous argument addressed to us on behalf of the defendants, I should not have thought it necessary to refer at any length to the authorities which support the proposition.

It was, however, contended that there was a distinction between the identity of the person supposed to be referred to in the article and the defamatory language used about the person. I know of no case in which this distinction has been drawn, but it seems to me, both upon authority and principle, that both on the question of whether the alleged libel refers to the plaintiff and as to the meaning of the language used, the question is for the jury upon the evidence before them. . . . If, in the opinion of the jury, a substantial number of persons who knew the plaintiff, reading the article, would believe that it refers to him, in my opinion an action (assuming the language to be defamatory) can be maintained; and it makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. . . .

From this point of view I have most carefully considered the learned judge's summing up. In the first place, in my opinion his ruling at the conclusion of the plaintiff's case was quite right. . . . In my opinion this appeal fails and must be dismissed with costs.

FLETCHER MOULTON, L. J., read the following judgment: The ruling of the learned judge in this case is of such wide application, and strikes so directly at what I believe to be the foundations of the English law of libel, that, before dealing with the facts, which to my mind make it an ordinary case of no special difficulty, I propose to examine generally the law relating to libel so far as it deals with the necessity of the plaintiff's proving that the defendant intended the defamatory matter to apply to him.

The action of libel is a very ancient action for a tort at common law.

The essentials of such a cause of action appear from the well-known form of the declaration, a form which itself must have been in use for centuries. It ran thus: "That the defendant falsely and maliciously wrote and published of and concerning the plaintiff the words following, that is to say, 'he (meaning the plaintiff) is,'" &c. . . . It is therefore, to my mind, settled law that a defendant is not guilty of libel unless he wrote and published the defamatory words "of and concerning the plaintiff" — in other words, unless he intended them to refer to the plaintiff. The ruling of the learned judge in the present case is directly contrary to this. He says "It does not matter what he intended" and has directed the jury that they may find the defendant guilty of libelling the plaintiff, although he did not know of his existence and had never written a word "of and concerning him" in his life. He has substituted for the plain issue which the common law has alone known, throughout three centuries at least, an issue which is in substance expressed thus: "Is there a class of persons who *might* reasonably *suppose* the words to be written of and concerning the plaintiff?" That this can be the meaning of the old common law averment is to my mind impossible. . . .

The limitation of the action of defamation to cases where the defendant has spoken or written words "of and concerning the plaintiff" is not an example of the weakness of common law remedies, but of their wisdom. It constitutes the protection of the innocent individual from being held guilty of defaming others of whom he has never intended to speak, and also from being himself defamed. On the one hand, to hold a person responsible for every application that his words may bear in the minds of persons who either possess knowledge that he does not possess or are ignorant of that which he knows, would be to put on him a burden too heavy to be borne. But on the other hand, it constitutes the protection of the individual from being defamed, because it nullifies all attempts to libel by language which as a matter of construction cannot refer to the plaintiff, but which persons reading between the lines would understand to refer to him by reason of the surrounding circumstances. This is one of the most common forms of libel. No name is mentioned, or some name other than that of the person really meant is substituted. The reader, in order to discover the person referred to, must reject or alter part of that which is written. But all these devices are in vain to shelter a libeller, because the issue is not whether the language is, as a matter of construction, applicable to the plaintiff, but whether the writer intended it to refer to the plaintiff, and if he did so he is responsible if any one can discover his intention, however much in words he may have striven to conceal it. This great and beneficial amplitude of the remedy is, however, only possible because the law makes the intention to refer to the plaintiff the critical issue. . . .

The plaintiff at the trial called his father, a doctor at Denbigh, and some other persons from North Wales, who knew him personally, to

say that they thought the article referred to him. . . . But the learned judge put a stop to calling further evidence by the following most remarkable ruling: "The question for the jury is whether people who happened to know Mr. Artemus Jones and who happened to read the article would as reasonable men think it meant him." He thus takes the interpretation, not of the world at large, but of the comparatively small class who knew of the plaintiff. . . . If I am right in my view, the direction of the learned judge to the jury was so materially erroneous that the verdict cannot stand. . . . The defendants are, in my opinion, entitled to a new trial.

FARWELL, L. J. The appellants contend that the verdict and judgment in this case cannot stand, because it was proved that neither the writer of the libellous article, not any person in the defendants' employment under whose notice it came before it was published, knew or had even heard of the existence of the plaintiff, and that it therefore necessarily follows that the defendants cannot have intended the libellous words to apply to the plaintiff. The question for us is whether this contention is right. . . .

To prove the libellous nature of the words, that is, the innuendo . . . the first step is to prove that the words published, whether by name, nickname, or description, are such as reasonably to lead persons acquainted with the plaintiff to believe that he is the person to whom the libel refers; the next step is to prove that that is the true intent and meaning of the words used. This is what I understand to be meant by Lord COTTENHAM in *LeFanu v. Malcomson*:<sup>1</sup>

'If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express of words, but still so describing them it is known who they were, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. . . .'

It is, however, argued that when Lord COTTENHAM says "the writer of the libel *intended* to mean these individuals," he was referring to the intention expressed in the words that he has used, as explained by the relevant surrounding circumstances. In my opinion this is not so. . . . An action for defamation differs from other actions, such for instance as trespass, in that it is of the essence of the defamation that the plaintiff should be aimed at or intended by the defendant. The man who throws a squib into a crowd not intending to hit anyone is liable for the consequences of his act, whatever his intentions may have been, because the two necessary constituents of tort, namely, a wrongful act by the defendant and

<sup>1</sup> 1 H. L. C. 637, 644.



actual damage to the plaintiff, are both present. But it is not enough for a plaintiff in libel to shew that the defendant has made a libellous statement, and that the plaintiff's friends and acquaintances understand it to be written of him: he must also shew that the defendant printed and published it of him: for if the defendant can prove that it was written truly of another person the plaintiff would fail. To this extent I agree with FLETCHER MOULTON, L. J. But we differ as to the meaning of the word "intended." In my opinion the defendant intended the natural meaning of his own words in describing the plaintiff as much as in the innuendo. The inquiry is not what did the defendant mean in his own breast, but what did the words mean having regard to the relevant surrounding circumstances. . . . The squib-thrower is liable for the injury done by his squib to the plaintiff, whether he aimed at or intended to hit him or not; the libeller is not liable to the plaintiff unless it is proved that the libel was aimed at or intended to hit him; the manner of proof being such as I have already stated. If the libel was true of another person and honestly aimed at and intended for him, and not for the plaintiff, the latter has no cause of action, although all his friends and acquaintances may fit the cap on him. If this were not so, no newspaper could ever venture to publish a true statement of A., lest some other person answering the description should suffer thereby. . . .

I am therefore of opinion that the defendant cannot complain of CHANNELL, J.'s summing up. I do not think that he intended to rule anything more than that the alleged actual, as distinguished from the expressed, intention of the defendant was under the circumstances of this particular case immaterial. . . .

*Appeal dismissed.*<sup>1</sup>

<sup>1</sup> [TOPIC 5. PROBLEMS:

The defendant telegraph company transmitted the following message: "V. told me that Nye was bought off by P. in 1896." The message, though not on its face libellous, was libellous as understood by the addressee. Is the defendant responsible per se? (1900, *Nye v. Telegraph Co.*, 104 Fed. 628.)

The defendant wrote to the president of a corporation a letter libellous per se, complaining of the plaintiff's conduct as manager of a corporation; the defendant being a director, this letter would have been privileged. But by mistake the defendant mailed it in an envelope addressed to the plaintiff's brother, who received and opened it and handed it to the plaintiff. Is the defendant responsible per se? (1883, *Tompson v. Dashwood*, L. R. 11 Q. B. D. 43.)

The plaintiff got up a public petition on some cause of local interest. The press correspondent telegraphed an item about it, referring to the plaintiff as "a cultured gentleman." The telegraph operator made this "a colored gentleman," and the editor of the defendant newspaper turned this into "a negro." Is the defendant responsible per se? (1900, *Upton v. Publishing Co.*, 104 La. 141, 28 So. 970.)

The defendant published an account of a disappearance or murder of "Pearl M. Ball," and the account attributed to the woman illicit relations with the guilty man. To get a photograph of the girl, defendant went to a photographer

The result of the cases is, I think, that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing, (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him; (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by negligence on his part that he did not know it contained the libel, then, although the dissemination of the work by him was *prima facie* publication of it, he may nevertheless, on proof of the before-mentioned facts, be held to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury. Applying this view of the law to the present case, it appears to me that the jury, looking at all the circumstances of the case, have in effect found that the defendants published the libel complained of, and therefore the defendants are liable, unless that verdict is disturbed. Looking at the special circumstances of the case which were brought to the attention of the jury, I cannot say that they could not reasonably find as they did. . . . For these reasons I think the application must be dismissed.

*Application dismissed.*

## 526. HANSON v. GLOBE NEWSPAPER COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893

159 Mass. 293, 34 N. E. 462

KNOWLTON, J. The defendant published in its newspaper an article describing the conduct of a prisoner brought before the Municipal Court of Boston, and the proceedings of the court in the case, designating him as "H. P. Hanson, a real estate and insurance broker of South Boston." He was, in fact, a real estate and insurance broker of South Boston, and the article was substantially true, except that he should have been called A. P. H. Hanson instead of H. P. Hanson. The plaintiff, H. P. Hanson, is also a real estate and insurance broker in South Boston, and in writing the article the reporter used his name by mistake. The article was as follows:

"He waxed eloquent. H. P. Hanson fined ten dollars for refusing payment of car fare. . . . H. P. Hanson, a real estate and insurance broker of South

Boston, emerged from the seething mass of humanity that filled the dock and indulged in a wordy bout with policeman Hogan, who claimed to have arrested Hanson on the charge of evading car fare and being drunk at the same time. The judge agreed that the prisoner was sober, but on the charge of evasion of car fare the evidence warranted the fining of the eloquent occupant of the dock ten dollars without costs, which he paid." . . .

The justice of the Superior Court, before whom the case was tried, without a jury, "found as a fact that the alleged libel declared on by the plaintiff was not published by the defendant of or concerning the plaintiff," and the only question in the case is whether this finding was erroneous as matter of law.

In a suit for libel or slander, it is always necessary for the plaintiff to allege and prove that the words were spoken or written of and concerning the plaintiff. . . . In every action of this kind the fundamental question is, What is the meaning of the author of the alleged libel or slander, conveyed by the words used interpreted in the light of all the circumstances? The reason of this is obvious. Defamatory language is harmful only as it purports to be the expression of the thought of him who uses it. . . . In the present suit, the Court had no occasion to rely on the testimony of the writer as to the person to whom the language was intended to apply. The language itself, in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name H. P. Hanson was used by mistake. As the evidence showed that the words were published of and concerning A. P. H. Hanson, the finding that they were not published of the plaintiff followed of necessity. . . .

Whether there should be a liability founded on negligence in any case when the truth is published of one to whom the words, interpreted in the light of accompanying circumstances easily ascertainable by those who read them, plainly apply; and where, by reason of identity of names, or similarity of names and description, a part of the public might think them applicable to another person of whom they would be libellous, is a question which does not arise on the pleadings in this case. So far as we are aware, no action for such a cause has ever been maintained. . . . We are of opinion that the finding was well warranted, and there must be,

*Judgment on the finding.*

HOLMES, J. I am unable to agree with the decision of the majority of the Court, and as the question is of some importance in its bearing on legal principles, and as I am not alone in my views, I think it proper to state the considerations which have occurred to me. . . .

The article described the subject of it as a prisoner in the criminal dock, and states that he was fined. . . . The statement is, "H. P. Hanson, a real estate and insurance broker of South Boston, emerged from the seething mass of humanity that filled the dock," etc. . . . The very substance of the libel complained of is the statement that the plaintiff

was a prisoner in the criminal dock, and was fined. The object of the article, which is a newspaper criminal report, is to make that statement. . . . The public, or all except the few who may have been in court on the day in question, or who consult the criminal records, have no way of telling who was the prisoner except by what is stated in the article, and the article states that it was "H. P. Hanson, a real estate and insurance broker of South Boston." If I am right so far, the words last quoted, and those words alone, describe the subject of the allegation, in substance as well as in form. Those words also describe the plaintiff, and no one else. The only ground, then, on which the matters alleged of and concerning that subject can be found not to be alleged of and concerning the plaintiff, is that the defendant did not intend them to apply to him, and the question is narrowed to whether such a want of intention is enough to warrant the finding, or to constitute a defence, when the inevitable consequence of the defendants' acts is that the public, or that part of it which knows the plaintiff, will suppose that the defendant did use its language about him.

On general principles of tort, the private intent of the defendant would not exonerate it. It knew that it was publishing statements purporting to be serious, which would be hurtful to a man if applied to him. It knew that it was using as the subject of those statements words which purported to designate a particular man, and would be understood by its readers to designate one. In fact, the words purported to designate, and would be understood by its readers to designate, the plaintiff. If the defendant had supposed that there was no such person, and had intended simply to write an amusing fiction, that would not be a defence, at least unless its belief was justifiable. Without special reason, it would have no right to assume that there was no one within the sphere of its influence to whom the description answered. The case would be very like firing a gun into a street, and, when a man falls, setting up that no one was known to be there. *Commonwealth v. Pierce*, 138 Mass. 165, 178; *Hull's Case*, Kelyng, 40; *Rex v. Burton*, 1 Strange, 481; *Rigmaidon's Case*, 1 Lewin, 180; *Regina v. Desmond*, Steph. Cr. Law, 146. So, when the description which points out the plaintiff is supposed by the defendant to point out another man whom in fact it does not describe, the defendant is equally liable as when the description is supposed to point out nobody. On the general principles of tort, the publication is so manifestly detrimental that the defendant publishes it at the peril of being able to justify it in the sense in which the public will understand it.

But in view of the unfortunate use of the word "malice" in connection with libel and slander, a doubt may be felt whether actions for these causes are governed by general principles. The earliest forms of the common law known to me treat slander like any other tort, and say nothing about malice. 4 Seld. Soc. Pub. 40, 48, 61. Probably the word was borrowed at a later, but still early date, from the malitia of

the canon law. By the canon law, one who maliciously charged another with a grave sin incurred excommunication, *ipso facto*. Lyndwood, *Provinciale*, lib. 5, tit. 17 (*De Sent. Excomm. c. 1, Auctoritate Dei*); Oughton, *Ordo Judiciorum*, tit. 261. Naturally *malitia* was defined as *cogitatio malae mentis*, coming near to conscious malevolence. Lyndwood, *ubi supra*, note f. Naturally also for a time the common law followed its leader. Three centuries ago it seems to have regarded the malice in slander and libel as meaning the malice of ethics and the spiritual law. In a famous case where the parson repeated, out of Fox's Book of Martyrs, the story "that one Greenwood, being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God, whereas in truth he never was so plagued, and was himself present at that sermon," and afterwards sued the parson for the slander, Chief Justice WRAY instructed the jury "that, it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously; and so was found not guilty." *Greenwood v. Prick*, stated in *Brook v. Montague*, Cro. Jac. 90, 91; see also *Crawford v. Middleton*, 1 Lev. 82, ad fin. But that case is no longer law. *Hearne v. Stowell*, 12 A. & E. 719, 726. The law constantly is tending towards consistency of theory. For a long time it has been held that the malice alleged in an action of libel means no more than it does in other actions of tort. . . . Accordingly, it recently was laid down by this Court that the liability was the usual liability in tort for the natural consequences of a manifestly injurious act. *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 245. A man may be liable civilly, and formerly, at least by the common law of England, even criminally, for publishing a libel without knowing it. *Curtis v. Mussey*, 6 Gray, 261. . . . And it seems he might be liable civilly for publishing it by mistake, intending to publish another paper. *Mayne v. Fletcher*, 4 Man. & Ry. 311, 312, note. . . . So a man will be liable for a slander spoken in jest, if the bystanders reasonably understand it to be a serious charge. *Donoghue v. Hayes*, Hayes, 265. Of course it does not matter that the defendant did not intend to injure the plaintiff, if that was the manifest tendency of his words. *Curtis v. Mussey*, 6 Gray, 261, 273; *Haire v. Wilson*, 9 B. & C. 643. And to prove a publication concerning the plaintiff, it lies upon him "only to show that this construction, which they've put upon the paper, is such as the generality of readers must take in, according to the obvious and natural sense of it." *The King v. Clerk*, 1 Barnard. 304, 305. . . . Under the circumstances of the case, "believed" meant reasonably believed. . . .

The foregoing decisions show that slander and libel now, as in the beginning, are governed by the general principles of the law of tort, and, if that be so, the defendant's ignorance that the words which it published identified the plaintiff is no more an excuse than ignorance of any other fact about which the defendant has been put on inquiry.

NOTE: *Menut v. Boston & M.R. Co.* (1910, 207 Mass. 12, 92 N. E. 1032). (Plaintiff alleged that, while at work on premises adjoining defendant's railway, he was thrown from a pile of lumber and over a wall onto the right of way of defendant. Plaintiff contended that, had defendant fenced its right of way at that point, the fence would have prevented his fall and injury.) *Braley, J.* It is not sufficient for the plaintiff to prove that the defendant failed to fence, and if this had been done he would not have been injured, but he must go further and show that the requirement of the statute was enacted for his benefit. . . . The "security and benefit" of the landowner, and "of travellers upon such railroad," having been the words of the statute of 1841, there would seem to be no reasonable ground to question that, under the original act and subsequent statutes which indicate no change of purpose, a fence sufficient to turn the cattle of those whose lands adjoined the road was all that the Legislature intended. . . . The plaintiff, however, urges that the demurrer should be overruled and the judgment reversed, because in a few jurisdictions statutes primarily enacted for purposes similar to our own, even if in some instances varying in terms, have been judicially defined as including protection from personal injuries which might be caused to children of tender years who wandered upon the track through the neglect of the corporation to fence. *Hayes v. Mich. C. R. Co.*, 111 U. S. 228 [No. 530 above.] . . . But even in this distinction the decisions are not harmonious. . . . A child 6 years old went upon the unfenced track of the defendant, in *Bischof v. Illinois Southern R. R.*, 232 Ill. 446, 83 N. E. 948, 13 Ann. Cas. 185, and was killed, but after a review by Cartwright, J., of many of the cases upon which the plaintiff at bar relies, the Court held that, under a statute requiring the corporation to erect and maintain a fence sufficient to prevent cattle, horses, sheep, hogs and other stock from getting on the railroad, the company was not responsible for the death of the plaintiff. It also has been decided in other jurisdictions that statutes requiring the corporation to fence against live stock should not be construed as requiring it to fence for the protection of persons whether infants or adults. And where fencing is held as designed for the benefit of the general public, it would seem there is no obligation to provide for the safety of those capable of taking care of themselves, and of realizing the peril of being on a railroad track.

### 531. *RENNER v. CANFIELD*

SUPREME COURT OF MINNESOTA. 1886

36 *Minn.* 90, 30 *N. W.* 435

APPEAL by defendant from an order of the District Court for Douglas county, COLLINS, J., presiding, refusing a new trial after a verdict for plaintiff for \$200.

*H. Jenkins*, for appellant. . . .

*Clapp, Woodard & Cowie*, for respondent. . . .

MITCHELL, J. As the defendant and one Ward were driving along the highway in front of plaintiff's premises, a dog belonging to plaintiff's father (and which happened to be at that time on plaintiff's premises) rushed out upon the highway, and attacked Ward's dog. Defendant jumped out of his wagon with his gun, whereupon the dog of Renner, Sr., retreated towards or upon plaintiff's premises. While it was thus retreating, defendant fired at and killed it. This dog was accustomed to attack and worry the dogs of passing travellers on the highway, but there is no evidence that it ever attacked persons. When



defendant shot the dog, he stood in the highway, about 175 feet from the plaintiff's house, which was situated on elevated ground some distance back from the road. The dog, when shot, was some 150 feet from the house. Plaintiff's wife was standing at the pump, at or near the side of the house, and saw the defendant shoot, but defendant did not see her, and was not aware of her presence; the view from the highway to the house being more or less intercepted by intervening trees. Mrs. Renner, being owing to her pregnancy in a delicate state of health, and her nerves very sensitive, was so startled and frightened as to seriously affect her health. Her fright seems to have been largely caused, or at least greatly aggravated, by the mistaken impression that defendant aimed his gun towards her, when in fact it was aimed at right angles to the direction where she was standing. For the damages resulting from this injury to his wife's health plaintiff brings this action.

It is very difficult to determine, either from the complaint, or the evidence introduced, or from the charge of the Court, the exact theory upon which this action was brought, tried, or submitted to the jury, — whether the gravamen of defendant's alleged tort was the killing of the dog, or negligence in firing off the gun in dangerous proximity to a human residence. The Court did, however, expressly instruct the jury that the shooting of this dog by defendant was unlawful. He also instructed them that a person is liable for all the consequences "which flow naturally and directly from his acts," and then left it to them to decide, as a question of fact, whether the injuries to plaintiff's wife were the "natural result of defendant's acts."

From this the jury could and naturally would understand that defendant might be liable in this action from the mere fact that the killing of the dog was unlawful. We think a verdict for plaintiff could not be sustained on any such theory of the case. It is elementary that a man is liable only for the proximate or immediate and direct results of his acts. In strict logic it may be said that he who is the cause of loss should be responsible for all the losses whether proximate or remote, which flow from his acts. But in the practical workings of society any such rule would be both impracticable and unjust, and therefore the law looks only to direct and proximate results, or, as the rule is sometimes stated, "whoever does a wrongful act is answerable for the consequences that may ensue in the ordinary and natural course of events." There can be no fixed rule upon the subject that can be applied to all cases. Much must depend upon the circumstances of each particular case. But in this case it is very clear to us that the killing of this dog was in no sense the proximate cause of the injury to the plaintiff's wife. The act, in itself, was not a tort of any kind against plaintiff, as the dog was not his property. The injury to the woman would have been presumably the same whether the killing of the dog was lawful or unlawful, and whether the defend-

ant had fired at the dog, or at a bird in the air. If the acts of defendant amounted to any tort which, in any possible view of the case, could be held to be the proximate cause of the injuries complained of, the gist of it must be negligence in shooting in such proximity to a human residence as might naturally and reasonably be anticipated to be liable to injure the inmates by fright or otherwise. We are by no means prepared to say that, upon the evidence, a verdict for plaintiff could be sustained even upon that ground. But it is enough here to say that the case was not submitted to the jury on any such theory.

Order reversed, and new trial ordered.

532. *STONE v. BOSTON & ALBANY RAILROAD*

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1897

171 *Mass.* 536, 51 *N. E.* 1

[Printed *ante*, as No. 461; Point 3 of the opinion.]

533. *OSBORN v. VAN DYKE*

SUPREME COURT OF IOWA. 1901

113 *Ia.* 557, 85 *N. W.* 784

APPEAL from District Court, Lucas county; T. M. FEE, Judge.

Action to recover damages for personal injuries inflicted through the negligence of defendant. There was a jury trial, which resulted in a verdict in defendant's favor. From a judgment rendered thereon assessing the costs of the action to plaintiff, he appeals. Reversed.

*Dungan & Bartholomew*, for appellant; *Stuart & Stuart*, for appellee.

WATERMAN, J. Plaintiff was in the employ of defendant, and, among other duties, had the care of several horses. On the occasion in question, as plaintiff was leading into a shed with a halter one of the horses, defendant stopped him, and undertook to apply a wash to a galled place on the animal's neck. The horse was nervous and restless, and would not stand, so a twitch was put on him, and plaintiff held this with the halter while the wash was applied. After the twitch was removed, defendant noticed another bruised spot on the animal's shoulder, and he attempted, without replacing the twitch, to wash this. The horse jumped aside, and struck defendant, throwing upon his clothes the medicine, which he had in a tin can in his hand. This angered defendant, who seized the twitch, the handle of which was a heavy stick with a nail in the end, and began violently and brutally beating the horse, which struggled to escape. Plaintiff tried, without avail, to induce defendant to desist. Finally, a blow aimed missed the horse because of a slip by defendant, and plaintiff was struck in the face, breaking the bones of his nose and otherwise injuring him. There was no evidence tending to show that the blow so struck was intentional.

1. The Court submitted the case to the jury on the theory of defendant's negligence, instructing them that the defendant would not be liable if in beating the horse he exercised reasonable care to avoid striking plaintiff, and the blow which inflicted the injury was caused by an accidental slip, for which defendant was not to blame.

2. The jury was further told, in effect, this would be so even if defendant, in beating the horse, was guilty of an unlawful act. . . .

In the ninth paragraph of the Court's charge, the jury were told: "It is not material or necessary for you to find whether or not the act of defendant in whipping or striking his horse was unlawful." It was claimed on behalf of appellant that, if defendant was engaged in the doing of an unlawful act which resulted in injury to plaintiff, such conduct would be negligence as matter of law. There was evidence going to show that defendant was guilty of a violation of § 4969 of the Code, which imposes a penalty for cruelty to animals. "The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events." 1 Addison Torts, 7. In *Messenger v. Plate*, 42 Iowa, 443, defendant was sued for an injury caused by the unboxed tumbling-rod of a threshing machine; the statute made it a misdemeanor to operate a machine with such rods unboxed; this Court announced the following rule of law in that case:

"We concur in the general proposition that whenever an act is enjoined or prohibited by law, and the violation of the statute is made a misdemeanor, any injury to the person of another, caused by such violation, is the subject of an action; and it is sufficient to allege the violation of the law as the basis of the right to recover, and as constituting the negligence complained of."

So, likewise, it is held that, where one is unlawfully carrying a loaded revolver, he is liable for injuries done another by its discharge, although the person injured assented to the revolver being carried. *Evans v. Waite* (Wis.), 53 N. W. 445; see also *Weick v. Lander*, 75 Ill. 93; *Salisbury v. Herchenroder*, 106 Mass. 459; *Conn v. May*, 36 Iowa, 244. If the defendant was doing an unlawful act in beating the horse, he is liable for damages caused thereby, and the subsequent accidental slip would not shield him, for the reasons already stated. The well-known "Squib Case" is a leading authority illustrative of the principle that one who wrongfully sets in motion a force by which another is injured is liable, although an intervening agency, not in itself wrongful, aided in producing the result. *Scott v. Shepherd*, 2 W. Bl. 892; 1 Smith, Leading Cases, 797. We do not regard the case of *Tingle v. Railroad Co.*, 60 Iowa, 333, 14 N. W. 320, cited by appellee, as in conflict with the views here expressed. In that case the unlawful act (operating a train on Sunday) was a condition, but not a cause, of the injury done. For the reason given, the case must go back for a trial. Reversed.

534. UNITED STATES BREWING CO. v. STOLTENBERG,  
ADM'R

SUPREME COURT OF ILLINOIS. 1904

211 *ILL.* 531, 71 *N. E.* 1081

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. P. VAIL, Judge, presiding. This is an action on the case, brought on January 6, 1902, in the Circuit Court of Cook county by appellee, as administrator of John F. McHale, deceased, and against appellant to recover damages for injuries to the deceased, resulting in his death, alleged to have been caused by the negligence of the appellant. The plea of the general issue was filed. The jury returned a verdict in favor of the appellee for \$5,000.00, and judgment was entered for that amount upon the verdict. Upon appeal to the Appellate Court the judgment has been affirmed, and the present appeal is prosecuted from such judgment of affirmance.

The facts are substantially as follows: John F. McHale, at the time of his death was a little boy about four years old, and was killed on August 27, 1901, by being run over by one of appellant's wagons. The accident happened on Leavitt street in Chicago from twenty-five to seventy-five feet north of Huron street, Leavitt street running north and south, and being crossed by Huron street, which runs east and west. A driver, named Fred Fischer, a servant of the appellant, was driving a wagon, which inflicted the injury, north upon Leavitt street; and the boy was struck by the wagon after it had crossed Huron street. . . . Some of the testimony of the appellee tended to show that the appellant's wagon was going at the rate of from ten to fifteen miles an hour, and others from eight to ten miles per hour. The evidence of the appellant tended to show that the appellant's wagon was proceeding north on an ordinary trot, and at a speed not to exceed four or five miles an hour.

*F. J. Canty* and *F. E. Gray* (*J. C. M. Clow* of counsel), for appellant.

*Alexander Sullivan* (*Francis J. Woolley* of counsel), for appellee.

Mr. Justice MAGRUDER delivered the opinion of the Court: . . .

Second. It is claimed, on the part of the appellant, that the trial Court erred in permitting the appellee to introduce in evidence an ordinance of the city of Chicago, forbidding the driving of horses in the city at a greater rate of speed than six miles an hour. The ordinance, so objected to, is as follows:

"SEC. 1259. No person shall ride or drive any horse or horses or other animal in the city of Chicago with greater speed than at the rate of six miles an hour, under a penalty of not more than ten dollars for each offence, to be recovered from the owner or driver thereof, severally and respectively." . . .

The contention of the appellant upon this subject is that, while the violation of a statute may be *prima facie* evidence of negligence, yet that a city council cannot make an act negligence which in the absence of an ordinance would not be negligence; in other words, that a city council cannot by ordinance create civil liabilities between citizens. In support of this contention the case of *Rockford City Railway Co. v. Blake*, 173 Ill. 354, is referred to. It does not appear, however, that in the *Blake* case the ordinance was pleaded in the declaration. . . .

The violation of a statute is *prima facie* evidence of negligence. This is also true as to the violation of a city ordinance, where the ordinance is such a one as the city is authorized by its charter, or by statute, to make. The ordinance, when passed in pursuance of a power conferred by statute, has the force and effect of the statute. . . . Clause 21 of section 63 and article 5 of the City and Village Act, which act is the charter of the city of Chicago, confers the power upon the city council "to regulate the speed of horses and other animals, vehicles, cars and locomotives within the limits of the corporation." (1 Starr & Curtis, Annot. Stat., 2d ed., p. 696.) Inasmuch, therefore, as the city council of Chicago had the power to pass the ordinance, set up in the additional count and introduced in evidence in the case at bar, such ordinance has the force and effect of a statute. Its violation constitutes a *prima facie* case of negligence, if such violation caused the injury, which resulted in the death of the deceased. Consequently, its admission was not error.

In *Channon Co. v. Hahn*, 189 Ill. 28, it was held that, in an action by an employee for injuries received from falling down an open elevator shaft, proof of the defendant's violation of a city ordinance, requiring all persons controlling passenger or freight elevators in buildings to employ some person to take charge of and operate the same, constituted a *prima facie* case of negligence, if such violation caused or contributed to the injury; and we there said (p. 32):

"The breach of this ordinance was alleged in different counts of the declaration, was clearly established by the proof, and this constituted a *prima facie* case of negligence, if the violation of the municipal law caused or contributed to the personal injury received by the appellee."

In *True & True Co. v. Woda*, 201 Ill. 315, where a city ordinance prohibited the placing of any article or thing on a sidewalk in front of any store, shop or other place so as to occupy more than three feet next to the building, and imposed a fine thereof, it was held that the violation of such ordinance made a *prima facie* case against the appellant, it appearing that the ordinance or ordinances were pleaded and proven by the appellee. It has been held that "the fact that the rate of speed, at which the defendants were driving, was prohibited by the ordinance, would of itself be proof of negligence." (1 Thompson on Negligence, § 1307; *Pittsburg*, *Cincinnati*, *Chicago* and *St. Louis*

Railway Co. *v.* Robson, 204 Ill. 254; City of Pekin *v.* McMahon, 154 id. 141; Barrett *v.* Smith, 128 N. Y. 607.) . . .

We have thus noticed all the objections, made by counsel for the appellant, and find no good reason for reversing the judgments of the lower courts. Accordingly, the judgment of the Appellate Court, affirming the judgment of the Circuit Court, is affirmed.

*Judgment affirmed.*

### 535. GRISWOLD *v.* BREGA

APPELLATE COURT OF ILLINOIS. 1895

57 Ill. App. 554

[Printed *post*, as No. 536.]<sup>1</sup>

#### <sup>1</sup> [TOPIC VI. PROBLEMS:

The defendant was driving on the wrong side of the street. The plaintiff was approaching on a bicycle from the other direction. The defendant did not see the plaintiff, owing to the darkness. They collided, and the plaintiff was hurt. Is the defendant responsible? (1897, Cook *v.* Fogarty, 103 Ia. 500, 72 N. W. 677.)

The defendant backed a railroad train over a crossing without a lookout-man at the rear, contrary to statute. Is the defendant responsible *per se*? (1897, Iron Mountain R. Co. *v.* Dies, 98 Tenn. 655, 41 S. W. 860.)

The defendant suspended across the street a banner-sign on a wire rope fastened to iron bolts in the buildings. A high wind blew it down, jerking out one of the iron bolts, which smashed a window in the plaintiff's building. A city ordinance forbade such signs. Is the defendant responsible *per se*? (1871, Salisbury *v.* Herchenroder, 106 Mass. 458.)

The defendant operated a coal mine, and dumped the slack on an open lot. The slack was permanently in a state of combustion. The plaintiff, a boy, stepped into it and was badly burned. A statute imposed a penalty on persons having such a slack-pile who did not "fence in such manner as to prevent loose cattle or horses from having access." Is the defendant responsible *per se*? (1894, Union Pacific R. Co. *v.* McDonald, 152 U. S. 262.)

A peanut-roaster, on wheels, and operated by steam, was kept on the street in front of the owner's store, thus obstructing traffic. The obstruction was an unlawful one, the roaster not being a vehicle. The roaster's boiler exploded, destroying both eyes of the plaintiff, a traveller. The roaster is a machine likely to explode if not carefully made and operated. The city authorities knew this, and knew that the roaster was there. Are they liable? (1910, Frank *v.* Warsaw, 198 N. Y. 463, 92 N. E. 17.)

#### NOTES:

"Negligence: violation of speed ordinance as evidence." (C. L. R., VII, 369).]



**EXCURSUS ON BOOKS I AND II TURAL ELEMENTS  
OF A TORT**

(Relation between the Right, the Tortious Act, and the  
Cause of Action.)

**536. GRISWOLD & DAY v. BREGA & ROSTER**

APPELLATE COURT OF ILLINOIS. 1895

57 Ill. App. 554

Mr. Justice GARY delivered the opinion of the Court:

The case shows that the appellants proposed to remove the New Jersey State Building, erected in Jackson Park at the time of the World's Fair, to a block where Roster has a fine brick and stone apartment house, and nearly opposite on the street to the property of Brega; that the building is a large cheap two story frame structure; that when it was erected, Jackson Park was not within the fire limits of Chicago and the place to which the appellants propose to remove the building, as well as the premises of the appellees were within such fire limits; that an Ordinance of the City requires "Any person desiring to remove a wooden building shall first obtain the written assent to such removal, from persons owning a majority of feet front of the lots in the same block in which it is proposed to locate such removed building and also a majority of persons owning front feet opposite the proposed location and within 150 feet of the same." The decree recites that the Court heard the evidence and proofs offered in open court, but there is no certificate of evidence and the general recital in the decree that all the material allegations of the bill are true, is therefore to be taken literally. *Frink v. Neal*, 37 Ill. App. 621.

The bill charges and the decree finds that such assent, though once obtained, was so obtained by misrepresentation and was, in part, revoked. It is not necessary to go into particulars as to such assent, the brief of the appellants not relying upon it.

The bill charges and the decree finds that the building if so removed would expose Roster's house to more danger from fire and make the property of both the appellees less marketable and saleable. There is much more in the bill and in the decree, but these are matters special to the appellees. The Court awarded a perpetual injunction against the removal. *First Nat. Bank v. Sarlls*, 129 Ind. 201, and *Kaufman v. Stein*, 37 N. E. Rep. 333, are authorities for such injunction,—not simply because an Ordinance is violated, but because of endangering the house of Roster and impairing the value of the property of both the appellees, by an act which is unlawful by ordinance. The fact that it is unlawful changes into a nuisance what otherwise would not be a nuisance, and this is in accord with the rationale of the decision in *King v. Davenport*, 98 Ill. 305.

*The decree is affirmed.*

WATERMAN, J., dissents.

537. FETTER *v.* BEAL

KING'S BENCH. 1697

1 *Ld. Raym.* 339

SPECIAL action of trespass and battery for a battery committed by the defendant upon the plaintiff, and breaking his skull. The plaintiff declares of the battery, &c., and that he brought an action for it against the defendant and recovered 11 *l.* and no more; and that after that recovery part of his skull by reason of the said battery came out of his head, *per quod*, &c. The defendant pleaded the said recovery in bar. Upon which the plaintiff demurred. And *Shower* for the plaintiff argued, that this action differed from the nature of the former, and therefore would well lie, notwithstanding the recovery in the other; because the recovery in the former action was only for the bruise and battery, but here there is a *maihem* by the loss of the skull. As if a man brings an action against another for taking and detaining of goods for two months, and afterwards he brings another action for taking and detaining for two years, the recovery in the former action is not pleadable in bar of the second. If death ensues upon the battery of a servant, this will take away the action *per quod servitium amisit*. And then if a consequence will take away an action, for the same reason it will give an action. If a man brings an action for uncovering his house, by which his goods were spoiled, and afterwards by reason of the said uncovering new goods are spoiled, he shall have a new action. *Quod Holt negavit*. And *per totam curiam*, the jury in the former action considered the nature of the wound, and gave damages for all the damages that it had done to the plaintiff; and therefore a recovery in the said action is good here. And it is the plaintiff's fault, for if he had not been so hasty, he might have been satisfied for this loss of the skull also. Judgment for the defendant, nisi, &c. *Post*, 692.

538. ROSWELL *v.* PRIOR

KING'S BENCH. 1701

12 *Mod.* 635

IN Case, for the continuance of a nuisance by lessee for years against defendant, who had been also a lessee for years of the place where the nuisance stood. Upon a special verdict the case was: The defend-

ant, being possessed for years of a piece of ground adjoining to an antient messuage, with antient lights, whereof the plaintiff was possessed for years, did erect a house thereupon, whereby the plaintiff's said lights were stopped, for which the plaintiff brought a former action, and recovered damages; after which the defendant grants over the ground with the nuisance to another; and after, the plaintiff brings this action against the defendant for the continuance of that nuisance; and whether it lay was the question, Which was often argued, 1st. by *Northley* for the plaintiff, and *Brotherick* for the defendant, 2dly. by *Darnel*, serjeant for the plaintiff, and Sir *B. Shower* for the defendant, and lastly, by *Williams* for the plaintiff, and *Wells* for the defendant. . . .

For the plaintiff, it was said, The plaintiff has a wrong done him, and ought to have some remedy, and that only can be by action upon this case, and against whom shall he have it? Sure here it is material who erected the nuisance, for that is the original tort and ground of the action, for "*causa est causa causati*"; and by the erection he is become liable to the plaintiff for all the consequential damages happening to him by means of such tortious erection; and his granting it over to another is so far from excusing him, that it seems to aggravate against him, for thereby he seems to perpetuate the wrong; for he puts it out of his own power to abate it. . . .

On the other side, it was said that this action either lay against the assignee alone, or at least it ought to be brought against him and the assignor jointly; for it being for the continuance only, and that after assignment over; and to make the assignor answer damages in such case, were to charge him for a nuisance in a place which is not his. And as the assignee has the sole advantage of the continuing, so he ought to be charged with the disadvantages likewise. . . .

The reason of a remedy for a nuisance, is because of the maxim "*sic utere tuo, ut alteri non noceas*," and here the thing which occasions the wrong is not the defendant's; all that the defendant did was to erect, and for that damages have already been recovered against him, and since then he has done no nuisance. For the erection cannot be said to be a continuance, no more than the continuance to-day can be a continuance to-morrow. . . .

Erecting and continuance are several offences, and every day's continuance of the nuisance is a new nuisance; for it is the possession and usage of this nuisance, to the damage of another, is the cause of the action, and that is done by the assignee. . . .

There is diversity between an act that is in itself a direct wrong to another, and an act in itself law but consequentially injurious to another. . . .

*Per Curiam.* A quod permittat must be brought against the alienee, because in its nature it must be brought against him that is tenant of the freehold. An assize of nuisance must be against the alienor and

alienee; but if the alienee dies, the party must have a writ of entry in the per, and not an assize. And sure this action is well brought against the erector, for before his assignment over he was liable for all consequential damages; and it shall not be in his power to discharge himself by granting it over; and more especially here, where he grants over; reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompence, viz. the rent for the same; for sure when one erects a nuisance, and grants it over in that manner, he is a continuor with a witness. And suppose in this case the lessor or assignor had been seised in fee, and had erected this nuisance, and then infeoffed another over, he had conveyed this as a nuisance, and '*causa causae est causa causati*.' And if a wrongdoer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it. And where it is objected, that the tort of erecting is purged by the recovery for the erecting, that is not so, for then the erector might lawfully continue the nuisance; but if the nuisance continue after recovery for the erection, such continuance will be such a nuisance as a new action will lie for. And the putting it out of one's power to abate a nuisance, is as great a tort as not to abate it when it is in your power to do it. And it is a fundamental principal in law and reason, that he that does the first wrong shall answer for all consequential damages; and here the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection, till it be abated. . . .

And the distinction, that the building merely is not a nuisance, is very metaphysical: It is true, if you abstract the building from the hurt that it occasions to the neighbour, it is no nuisance; but sure the building a house which is a nuisance, is a *malum in se*.

It was farther said by the Court, that if one takes another prisoner by wrong, and then turns him over to another officer, who detains him, the first taker will answer for all the consequential damages. But if this action here were brought by an alienee of the land to which the nuisance was, against the erector, and erection had been before any estate in the alienee, the question would be greater; because the erector never did any wrong to the alienee. But here they agreed to give judgment for the plaintiff.

### 539. BRUNSDEN v. HUMPHREY

QUEEN'S BENCH DIVISION, SUPREME COURT OF JUDICATURE  
OF ENGLAND. 1884

*L. R. 14 Q. B. D. 141*

APPEAL of the plaintiff against an order of the Queen's Bench Division making absolute a rule to enter judgment for the defendant. The

facts are set out in the report of the proceedings before the Queen's Bench Division <sup>1</sup> and also are briefly noticed in the judgments of BRETT, M. R., and BOWEN, L. J., and it will be here sufficient to state that the plaintiff, whilst he was driving his cab, came into a collision with a van of the defendant through the negligence of the defendant's servant, whereby he sustained bodily injury and his cab was damaged, and that the plaintiff, before the present action, sued the defendant for damage to his cab in a county court, and the defendant paid into court a small sum which was accepted, and thereupon the action in the county court was discontinued. Upon these facts the Queen's Bench Division entered judgment for the defendant.

Feb. 12. *Waddy*, Q. C., and *Crispe*, for the plaintiff. The question is whether the payment into court in the action brought in the county court can be treated as an accord and satisfaction of the bodily injury sustained by the plaintiff. . . . [*Per Curiam*. The question is not as to whether there has been an accord and satisfaction; but whether the proceedings in the county court as to the damage to the cab are a bar to the present action for the plaintiff's bodily injury.] . . . No evidence could in the county court be lawfully given as to the plaintiff's bodily injuries; for he merely sued for the damage done to his cab and for no other ground of complaint; and this is a decisive test to show that the present action is maintainable: *Hitchin v. Campbell*.<sup>2</sup>

*Murphy*, Q. C., and *J. C. Hannon*, for the defendant. The present action will not lie. The cause is the same as that litigated in the county court, and the plaintiff has the opportunity of recovering by the action in that court the damages which he now claims; and therefore the recovery of damages in the county court is a bar to the present action: *Nelson v. Couch*.<sup>3</sup> The negligence of the defendant's servant is the gist of the action, and the plaintiff is endeavoring to turn one cause of action into two. . . .

July 12. The following judgments were delivered:

BRETT, M. R. This case was heard before POLLOCK, B., and LOPES, J. The plaintiff was a cabman driving in his vehicle, when he was run into by the defendant's vehicle. The collision was caused by the negligence of the defendant's servant. In the case in which the present appeal is brought, the plaintiff has sued the defendant for injury done to his person. The jury have found a verdict for £350, showing clearly that the personal injuries were serious. Before this the plaintiff had brought an action in the county court for damage to his cab, by which he recovered a certain amount. In this second action it was urged that the plaintiff could not succeed, because no person can sue twice for one and the same cause of action. On the other side, it was contended that there were two distinct causes of action, and that there was no law to prevent two actions: that it might be sometimes oppressive to bring

<sup>1</sup> 11 Q. B. D. 712.

<sup>2</sup> 2 W. Bl. 827 at p. 108.

<sup>3</sup> 15 C. B. (N. S.) 99, at pp. 108.

two actions, but that in that event the Court might summarily stay one of them and that in the present case the two actions were not oppressive. The question is whether there are two causes of action, or whether there is only one; and if there is but one cause of action, the present suit is not maintainable.

For the defendant, reliance has in effect been placed upon the maxim, *Interest reipublicae ut sit finis litium*; and it has been contended that it enunciates an admirable rule of law. When that rule is applied to damages which are patent, it is a good rule; but where damages are afterwards developed, it is not a rule to be commended. It is a rule which sometimes produces a harsh result, and if it were now for the first time put forward, I could not assent to its being pushed to the length to which it has sometimes been carried: in fact it is never wanted except when injury, undeveloped at the time of action brought, is afterwards developed. However, the maxim exists, and it must receive a proper application. But, in order to apply it, we must often suppose what is not the case. It is to be assumed that the subsequent damage was in the contemplation of the person injured.

The question, however, remains, whether the cause of action is the same. In this case the injury was occasioned by the negligent driving of the defendant's servant. Suppose that by the negligent driving of the defendant's servant the van had run against the plaintiff's cab, and had injured him without any damage to the cab; an action would have lain, and any apparent bodily injury which the plaintiff might have sustained would be a cause of action. Suppose that the defendant's servant by his negligent driving had damaged the plaintiff's cab without injuring him personally: under circumstances of that kind the cause of action would be a damage to the plaintiff's property. The owner of property has a right to have it kept free from damage. The plaintiff has brought the present action on the ground that he has been injured in his person. He has the right to be unmolested in all his bodily powers. The collision with the defendant's van did not give rise to only one cause of action: the plaintiff sustained bodily injuries, he was injured in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods: therefore the plaintiff is at liberty to maintain the present action.

Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it; but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case. In the action brought in the county court, in order to support the plaintiff's case it would be necessary to give evidence of the damage done to the plaintiff's vehicle. In the present action it would be necessary to



give evidence of the bodily injury occasioned to the plaintiff, and of the sufferings he has undergone, and for this purpose to call medical witnesses. This one test shows that the causes of action as to the damage done to the plaintiff's person are distinct. Therefore we are not now called upon to apply a legal maxim, the application of which ought not to be stretched. The plaintiff is entitled to recover the sum of £350, awarded by the jury. Two actions may be brought in respect of the same facts, where those facts give rise to two distinct causes of action. . . .

BOWEN, L. J. . . . The question to be decided is whether the damage done by the negligent driving of the defendant's servant to the plaintiff's cab is in substance the same cause of action as the damage caused by such negligence to the plaintiff's person. . . . In order clearly to elucidate this question, let me assume for the sake of argument that that damage had been caused by some act of the defendant himself and not merely an act of his servant. . . . Injury would have been done to the plaintiff in respect of two absolute and independent rights, the distinction between which is inveterate both in the English and the Roman law. Everyone in this country has an absolute right to security for his person. Everybody has further an absolute right to have his enjoyment of his goods and chattels unmeddled with by others. In the hypothetical case I am assuming, both these rights would have been injured, and though the two injuries might have been combined in one suit, could it have been said that the subject matter of each grievance was the same? . . .

Now what is the gist of such an action on the case for negligence? If the whole of the plaintiff's case were to be stated and the entire story told, it seems to me that it would have comprised two separate or distinct grievances; narrated, it is true, in one statement or case. Actions for the negligent management of any animal, or any personal or movable chattel, such as a ship or machine, or instrument, all are based upon the same principle, viz., that a person, who, contrary to his duty, conducts himself negligently in the management of that which contains in itself an element of danger to others, is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve and have been accompanied by specific damage. Without remounting to the Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made, either by judges or judicial writers, of the terms "injuria" and "damnum," it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. . . .

According to the popular use of language, the defendant's servant has done one act and one only, the driving of the one vehicle negligently against the other. But the rule of law, which I am discussing, is not

framed with reference to some popular expressions of the sort, but for the sake of preventing an abuse of substantial justice. Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant; but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which (if no damage has ensued) would have been legally unimportant. It certainly would appear unsatisfactory to hold that damage done in a carriage accident to a man's portmanteau was the same injury as the damage done to his spine, or that an action under Lord Campbell's Act by the widow and children of a person who has been killed in a railway collision, is barred by proof that the deceased recovered in his lifetime for the damage done to his luggage.

It may be said that it would be convenient to force persons to sue for all their grievances at once, and not to split their demands; but there is no positive law (except so far as the County Court Acts have from a very early date dealt with the matter,) against splitting demands which are essentially separable (see *Seddon v. Tutop*<sup>1</sup>), although the High Court has inherent power to prevent vexation or oppression, and by staying proceedings or by apportioning the costs, would have always ample means of preventing any injustice arising out of the reckless use of legal procedure. . . . The judgment of the Queen's Bench Division ought to be reversed, and the judgment entered at the trial for the plaintiff be restored with costs to the plaintiff, including the costs below and of this appeal.

LORD COLERIDGE, C. J. In this case I am with much regret unable to concur in the judgment of my brother BOWEN, to which I understand the Master of the Rolls to assent. I should have been glad, in the face of this difference of opinion, to have given reasons at length for my inability to agree in the judgment. But the plaintiff very naturally presses for judgment, and I am unable to do more than shortly to express my dissent. It appears to me that whether the negligence of the servant or the impact of the vehicle which the servant drove, be the technical cause of the action, equally the cause is one and the same. That the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different rights, i. e. his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two,

<sup>1</sup> 6 T. R. 607.

if, besides his arm and leg being injured, his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it. I think that the Court below was right, and that this appeal should be dismissed.

*Judgment reversed.*

540. **REILLY v. SICILIAN ASPHALT PAVING COMPANY.** (1902. 170 N. Y. 40; 62 N. E. 772.) *Cullen, J.*: The appellant claimed that while driving in Central Park, in the city of New York, both his person and his vehicle were injured in consequence of collision with a gravel heap placed on the road through the negligence of the defendant. Thereupon he brought an action against the defendant in the Court of Common Pleas to recover damages for the injury to his person. Subsequently he brought another action in one of the District Courts in the city of New York to recover for the injury to his vehicle. In his last action he obtained judgment, which was paid by the defendant. Thereafter the defendant set up by supplemental answer the judgment in the District Court suit and its satisfaction, as a bar to the further maintenance of the action in the Common Pleas. . . . The question now before us has been the subject of conflicting decisions in different jurisdictions. In England it has been held by the Court of Appeal, Lord Coleridge, Chief Justice, dissenting, that damages to the person and to property, though occasioned by the same wrongful act, give rise to different causes of action (*Brunsdon v. Humphrey*, L. R. 14 Q. B. D. 141); while in Massachusetts, Minnesota, and Missouri the contrary doctrine has been declared. (*Doran v. Cohen*, 147 Mass. 342; *King v. Chicago, M. & St. P. Ry. Co.*, 82 N. W. Rep. 1113; *Von Fragstein v. Windler*, 2 Mo. App. 598.) The argument of those Courts which maintain that an injury to person and property creates but a single cause of action is that as the defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong; while that of the English Court is that the negligent act of the defendant in itself constitutes no cause of action, and becomes an actionable wrong only out of the damage which it causes. "One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person." (*Brunsdon v. Humphrey*, *supra*.) I doubt whether either argument is conclusive. If, where one person was driving the vehicle of another, both the driver and the vehicle were injured, there can be no doubt that two causes of action would arise, one in favor of the person injured and the other in favor of the owner of the injured property. On the other hand, if both the horse and the vehicle, being the property of the same person, were injured, there would be but a single cause of action for the damage of both. If, while injury to the horse and vehicle of a person gives rise to but a single cause of action, injury to the vehicle and its owner gives rise to two causes of action, it must be because there is an essential difference between an injury to the person and an injury to property that makes it impracticable or, at least, very inconvenient in the administration of justice to blend the two. We think there is such a distinction. Different periods of limitation apply. The plaintiff's action for personal injuries is barred by the lapse of three years; that for injury to the property not till the lapse of six

years. The plaintiff cannot assign his right of action for the injury to his person, and it would abate and be lost by his death before a recovery of a verdict, and if the defendant were a natural person, also by his death before that time. On the other hand, the right of action for injury to property is assignable and would survive the death of either party. . . . Therefore, for reason of the great difference between the rules of law applicable to injuries of the person and those relating to injuries to property, we conclude that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action.

541. NATIONAL COPPER COMPANY v. MINNESOTA MINING COMPANY

SUPREME COURT OF MICHIGAN. 1885

57 Mich. 83

ERROR to Ontonagon. (*Williams*, J.) April 28–9. June 3.

Trespass. Defendant brings error. Reversed.

*T. L. Chadbourne*, for appellant. In trespass the unlawful invasion is the injury and cause of action; its consequences are merely elements of damage. . . . A nuisance as distinguished from a trespass is something not per se harmful which does injury: *Wood on Nuisances* 1, 20; but there can be only one recovery for continuing nuisances, where the continuance itself is an injury. . . .

*Chandler, Grant & Gray* and *G. V. N. Lothrop*, for appellee, as to what are successive trespasses constituting fresh causes of action. . . .

COOLEY, C. J. This is an action of trespass. The following is a statement of the case, as made for the plaintiff, for the argument in this Court: "The plaintiff and defendant are corporations, which for twenty-five years and more have been engaged in copper mining in Ontonagon county. Their mines adjoin each other. Each owns the land in fee on which its mine is situated. The plaintiff, in carrying on its mining operation, left a wall of rock, from fifteen to eighteen feet thick, next to the boundary line of defendant's mine. This was left as a barrier and protection to its mine against water or other encroachments from the Minnesota. The Minnesota, [the defendant mine,] left no such barrier; it not only worked up to the boundary line, but broke through into defendant's mine. About the year 1866, the plaintiff, at about forty feet above its fourth level, and from twenty-five feet from the boundary line, drilled a hole, of the ordinary size, about one and one-half inches in diameter, and when the blast was fired it blew through into the opening which had been previously made by the defendant into the plaintiff's territory. The drill-hole was left through from two to two and one-half feet of solid rock. Capt. Chynoweth, then the agent of plaintiff, examined this hole and the surroundings, and immediately gave orders to cease work there. This was done

as a further protection against the defendant. No work was done [by the plaintiff] at this point after that until the winter of 1883-4. The plaintiff had no knowledge of any further trespass at this point until February, 1884, under the circumstances related hereafter.<sup>1</sup>

About 1870 the defendant concluded to abandon regular mining, stopped its pumps, . . . took out the supports of the roof of the mine, and allowed it to settle or cave in. . . . The result was that the surface of the ground became depressed, and openings were made in it. . . . Into these openings the water from rains and melting snow ran into the defendant's mine, and from thence flowed into the plaintiff's mine through the opening at its fourth level. But for these openings the water would have run down the hill-side. As one of defendant's own witnesses expressed it, 'There has been a general falling away of the bluff.' There were no such openings on the surface of the National. In fact, we everywhere find the plaintiff conducting its mining operations with due regard to the rights of adjoining owners; while we find the defendant conducting its operations in the most reckless disregard of such rights. . . . We do not think that the history of mining upon Lake Superior will disclose another instance of such reckless disregard of the rights of an adjoining mine-owner. . . .

In May, 1880, the plaintiff resumed mining operations and commenced to pump the water from its mine. The six inch pump, formerly used by the mine, and which had always been adequate to keep the mine unwatered, proved wholly inadequate, and it was compelled to get a twelve inch pump, and even this was not sufficient in the spring; and in 1882 the water gained on them one hundred and twenty feet, and in 1883, two hundred and twenty-two feet, with the pump working night and day. Capt. Parnell, the agent of the plaintiff's mine, was thoroughly acquainted with it, having worked in the mine years before; he soon became convinced that the bulk of the water came from the defendant's mine. He found that the water came from the fourth level. He cleaned out the level, [in 1884], and, on reaching the point where the drill-hole had been made years before, he found that the rock had all been blasted away from the Minnesota side, and that the water was rushing through an opening from twenty to twenty-five feet high and twelve feet wide. When discovered there was a volume of water seven feet wide flowing from the Minnesota into the National. When the defendant made its second encroachment at this point does not clearly appear; according to the defendant's witness Spargo it was in 1871 or 1872. . . .

It was not denied in the Court below, and we presume will not be in this Court, that the defendant committed these several acts of trespass. . . . Furthermore, it is beyond dispute that the defendant knowingly and wilfully committed these acts of trespass, and broke down the

<sup>1</sup> [The following paragraphs are slightly transposed from the original report, for clearness' sake.]

barrier which the plaintiff had so carefully left to protect its mine for all future time, and against all possible dangers."

The above is a sufficient statement of the facts for a discussion of the principal question in the case, viz.: Is the plaintiff's right of action barred by the statute of limitations?

The count in the declaration on which the parties went to trial alleged that the defendant, on March 15, 1882, and on divers days and times between that day and the commencement of suit, with force and arms broke down the partition wall between the mine of the plaintiff and the mine of the defendant, and let the water from its said mine into the mine of the plaintiff, and then and there filled the mine of the plaintiff with water, greatly damaging its timbering, workings, walls, and machinery, hindered and prevented the plaintiff from carrying on and transacting its lawful and necessary affairs and business, caused the plaintiff great damage and expense in removing water from its mine, etc. The defendant pleaded the general issue, with notice that the statute of limitations would be relied upon. The plaintiff recovered a large judgment.

I. The time limited for the commencement of suit for trespass upon lands in this State is two years from the time the right of action accrues. This action was commenced in May, 1884, and it is not claimed that damages for the original trespass can be recovered in it. The contention of the plaintiff may be succinctly stated as follows:

1. Had the plaintiff instituted suit within two years from the original trespass, the recovery would have been limited to such damages as were the direct and immediate result of the trespass. The subsequent flowage of water through the opening was not the direct, immediate, or necessary result of breaking down the barriers; therefore no damages could have been recovered therefor in an action so brought.

2. Two trespasses may be the result of one act. In other words, one trespass may cause another, and he who commits the wrongful act in such a case will be responsible for both trespasses.

3. In this case no action accrued for the flowage of water into the plaintiff's mine until the flowage actually took place; but when the flowage occurred as a result of defendant's wrongful act it was a trespass, and if it continued from day to day there was continuous trespass for which repeated actions might be maintained.

Upon these positions the plaintiff plants its case, and unless they are sound in law the recovery cannot be supported. All right of recovery for the original trespass, which consisted in breaking through into the plaintiff's mine, was long since barred, and it is not claimed that there was, from the time of the first wrong, a continuous trespass which can give a right of action now. The merely leaving an opening between the two mines is not the wrong for which suit is brought, but it is the flowing of water through the opening which is complained of as a new trespass; the original wrongful act of the defendant in break-



ing through being the cause, and the injurious consequence when it happened, connecting itself with the cause to complete the right of action.

In support of its contention that the case before us may be regarded as one of continuous trespass from the first, several authorities are cited for the plaintiff, which may be briefly noticed. Among them is *Holmes v. Wilson*, 10 Ad. & El. 503. It appeared in that case that a turnpike company had built buttresses on the plaintiff's land for the support of its road. The act was a trespass, and the plaintiff recovered damages therefor; but this, it was held, did not preclude its maintaining a subsequent action for the continuance of the buttresses where they had been wrongfully placed. The ground of the decision was that in the first suit damages could be recovered only for the continuance of the trespass to the time of its institution. There could be no legal presumption that the turnpike company would persist in its wrongful conduct, and, consequently, prospective damages, which would only be recoverable on the ground of such persistent wrong-doing, would not have been within the compass of the first recovery. The cases of *Bowyer v. Cook*, 4 C. B. 236; *Thompson v. Gibson*, 7 M. & W. 456; *Russel v. Brown*, 63 Me. 203; and *Powers v. Council Bluffs*, 45 Ia. 652, are all decided upon the same principle. . . . The principle of decision in all these cases is clear and not open to question. In each of them there was an original wrong, but there was also a persistency in the wrong from day to day; the plaintiff's possession was continually invaded, and his right to the exclusive occupation and enjoyment of his freehold continually encroached upon and limited. Each day, therefore, the plaintiff suffered a new wrong, but no single suit could be made to embrace prospective damages, for the reason that future persistency in the wrong could not legally be assumed.

To make these cases applicable, it is necessary that it should appear that the action of the defendant has been continuously wrongful from the first. Whether it can be so regarded will be considered further on. The plaintiff, however, does not, as we have seen, rely exclusively upon this view. Its case is likened by counsel to that of a farmer, whose fences are thrown down by a trespasser; the cattle of the trespasser on a subsequent day entering through the opening. In such a case it is said there are two trespasses; the one consisting in throwing down the fences, and the other in the entry of the cattle; and the right of action for the latter would accrue at the time the entry was actually made. The plaintiff also cites and relies upon a number of cases in which the act of the party which furnishes the ground of complaint antedates the injurious consequence, as the original trespass in this case antedated the flowing from which the plaintiff has suffered damage. . . .

The plaintiff also, in this connection, likens its case to that of one who, in consequence of a ditch dug upon his neighbor's land, has water

collected and thrown upon his premises to his injury. It is not the act of digging the ditch that sets the time of limitation to running in such a case, but it is the happening of the injurious consequence. The case supposed, however, is not a case of trespass. The act of digging the ditch was not in itself a wrongful act. The owner of land is at liberty to dig as many ditches as he pleases on his own land, and he becomes a wrong-doer only when, by means of them, he causes injury to another. If he floods his neighbor's land the case is one of nuisance, and every successive instance of flooding is a new injury. But here, as in the case of a continuous trespass, prospective damages cannot be taken into account, because it must be presumed that wrongful conduct will be abandoned rather than persisted in, and that the party will either fill up his ditches or in some proper way guard against the recurrence of injury. *Battishill v. Reed*, 18 C. B. 696. Cases of flooding lands by dams or other obstructions to running water are cases of this description. *Baldwin v. Calkins*, 10 Wend. 169; *Mersereau v. Pearsall*, 19 N. Y. 108; *Plate v. Railroad Co.*, 37 N. Y. 472. So are cases of diverting water, to the flow of which upon his premises the plaintiff is entitled. *Langford v. Owsley*, 2 Bibb, 215. So are the cases of the wrongful occupation of a public street, whereby the access of the plaintiff to his premises is obstructed. *Carl v. Railroad Co.*, 46 Wis. 625. . . .

The case before us was one of admitted trespass, from which immediate damage resulted. Had suit been brought at that time, all the natural and probable damage to result from the wrongful act would have been taken into account, and the plaintiff would have recovered for it. But there was no continuous trespass from that time on. The defendant had built no structure on the plaintiff's premises, was occupying no part of them with anything it had placed there, and was in no way interrupting the plaintiff's occupation or enjoyment. All it had left there was a hole in the wall. But there is no analogy between leaving a hole in a wall on another's premises and leaving houses or other obstructions there to encumber or hinder his occupation; the physical hindrances are a continuance of the original wrongful force, but the hole is only the consequence of a wrongful force which ceased to operate the moment it was made. If, therefore, the plaintiff had brought suit more than two years after the original trespass, and before the flooding of its mine by water flowing through the opening had begun, and if the statute of limitations had been pleaded, there could have been no recovery. The action for the original wrong would then have been barred, and there had been no repetition of the injury in the mean time to give a new cause of action. The mere continuance of the opening in the wall could not be a continuous damage. *Lloyd v. Wigney*, 6 Bing. 489.

The right or action, if any, for which the plaintiff can complain, must therefore arise from the flowing itself as a wrongful act; there being no longer any action for the original breaking, and no continuous acts

of wrong from that time until the flowing began. The flowage caused a damage to the plaintiff; but damage alone does not give a right of action; there must be a concurrence of wrong and damage. The wrong, then, must be found in leaving the opening unclosed and permitting the water to flow through. It must therefore rest upon an obligation on the part of the defendant either to close the opening, because persons for whose acts it was responsible had made it, or to restrain water which had collected on its own premises from flowing upon the premises of the plaintiff to its injury. The latter seems to be the ground upon which the plaintiff chiefly relies for a recovery. . . . The plaintiff must fix some distinct wrong upon the defendant within the period of statutory limitation, or the action must fail; and there is no such wrong in this case unless the *failure to prevent* the flowing constitutes one. The original act of wrong is no more in question now, after having been barred by the statute, that it would have been if damages had been recovered or settled for amicably; nor do we see that it can be important in a case like the present, where the wrong must be found in the injurious flowing, whether there was or was not a wrong originally. If there was, it stands altogether apart from the wrong now sued for, with an interval between them when no legal wrong could have been complained of. . . .

The case of *Clegg v. Bearden*, 12 Q. B. 576, is not unlike in its facts the case before us. In that case, also, there had been a wrongful breaking through from one mine to another, and an injurious flowage of water through the opening. The facts were found by special verdict, and Lord Denman, in pronouncing judgment, said,

“The gist of the action, as stated in the declaration, is the keeping open and unfilled an aperture and excavation made by the defendant into the plaintiffs’ mine. . . . The defendant having made an excavation and aperture in the plaintiffs’ land was liable to an action of trespass: but no cause of action arises from his omitting to re-enter the plaintiffs’ land and fill up the excavation: such an omission is neither a continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty. It was, however, contended on the part of the plaintiffs, that, admitting this to be so, there nevertheless was a legal obligation or duty upon the defendant to take means to prevent the water from flowing from his mine into that of the plaintiffs through the aperture he had made;” but “the plaintiffs have not alleged any such duty or obligation in their declaration, nor is their action founded upon a breach of any such duty, if it exists, but upon the omission to fill up the aperture made by them in the plaintiffs’ mine. It appears to us that the defendant, upon the facts found by the jury, is entitled to have the verdict entered for him upon the plea of not guilty.”

If this case was rightly decided, it should rule the one before us. It has been followed by the Supreme Court of Ohio in *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583, in a case which also closely resembles this upon its facts, and is not distinguishable in principle.

It seems to us that these cases are sound in law as well as conclusive.

The only wrongful act with which the defendant is chargeable, was committed so long before the bringing of suit that action for it was barred. . . . There could be no flowing from one mine into the other while both were worked; and had the plaintiff ceased operations and the defendant continued to work, the defendant would have suffered the damage instead of the plaintiff. But neither party was under obligation to keep its mine pumped out for the benefit of its neighbor. Either was at liberty to discontinue its operations and abandon its mine whenever its interest should seem to require it. . . . But a jury could not have awarded damages for any exercise of a right, and they could not, therefore, have given damages for a possible injury to flow from such an abandonment. This is on the plain principle that the mere exercise of a right cannot be a legal wrong to another, and if damage shall happen, it is *damnum absque injuria*.

This view of the case is conclusive; but there is another that is equally so. The wrong to the plaintiff consisted in breaking down the wall which had been left by it in its operations. If any damage might possibly result from this which was not then so far probable that a jury could have taken it into account in awarding damages, the plaintiff was not without redress. It would have been entitled in a suit then brought to recover the cost of restoring the barrier which had been taken away; and if it had done so, and made the restoration, the damage now complained of could not have happened. It thus appears that complete redress could have been had in a suit brought at that time; and, that being the case, the plaintiff is not entitled to recover now for an injury for which an award of means of prevention was within the right of action which was suffered to become barred. The right which then existed, being a right to recover for all the injury which had then been suffered, including the loss of the dividing barrier, it would not have been competent for the plaintiff, had suit then been brought, to leave the loss of the barrier out of account, awaiting possible special damages to flow therefrom as a ground for a new suit. The wrong which had then been committed was indivisible; and the bar of the statute must be as broad as the remedy was which it extinguishes.

The judgment must be set aside and a new trial ordered.

The other Justices concurred.<sup>1</sup>

<sup>1</sup> [NOTES:

"A single action or successive actions for a nuisance." (M. L. R., VIII, 227.)

"Removal of support: accrual of action." (H. L. R., XIII, 665; XIV, 303; XV, 574.)

CHAPTERS ON THE JURAL NATURE OF THIS WRONG:

Henry T. Terry, "Some Leading Principles of Anglo-American Law," §§ 565-576, *The Identity of Wrongs*.]







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